



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

Via FOIAonline

August 8, 2017

Belinda Brannon
8099 N. Mc Kee Rd.
Irvington, AL 36544

Re: FOIA Request DOC-NOAA-2017-000204

Dear Mr. Brannon:

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on November 21, 2016, in which you requested:

Fishing Trawler Lady Julie Documentation No. : 1089342 Incident: Did this vessel sink?

In response to your request NOAA conducted a search of NMFS and NOS, and did not locate any records responsive to your request.

You have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:

Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, by facsimile (fax) to [202-482-2552](tel:202-482-2552), or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

For your appeal to be complete, it must include the following items:

- a copy of the original request,

- our response to your request,
- a statement explaining why the production of the records was in error.
- “Freedom of Information Act Appeal” must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

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FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

Email: ogis@nara.gov
Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence please contact Mark Graff at mark.graff@noaa.gov, or by phone at (301) 427-8285, or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

GRAFF.MARK.HYRUM.1514447892
Digitally signed by
GRAFF.MARK.HYRUM.1514447892
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI,
ou=OTHER, cn=GRAFF.MARK.HYRUM.1514447892
Date: 2017.08.08 11:20:03 -04'00'

Mark H. Graff
FOIA Officer/Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, August 8, 2017 12:00 PM
To: Lola Stith - NOAA Affiliate
Subject: DOC-NOAA-2017-000794
Attachments: FAL no records response mhg.pdf

Hey Lola,

This one is ready for closeout (b)(5)

[REDACTED]

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

Via FOIAonline

August 8, 2017

Jared E. Knicley
NRDC
1152 15th St. NW
Washington DC, 20005

Re: FOIA Request DOC-NOAA-2017-000794

Dear Mr. Knicley:

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on March 14, 2017, in which you requested:

Please produce records of the following types in NOAA's possession, custody or control: 1. All records setting forth general policy or guidance for NOAA staff to apply when determining whether to remove information, documents, or webpages from a NOAA website. 2. All records from January 20, 2017 through the present instructing NOAA staff within the Office of Communications to remove specific information, documents, or webpages from any NOAA website. In this request, the term "records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, memoranda, notes, emails, text messages, notices, facsimiles, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of NOAA Headquarters.

As you and I discussed over the phone, record retention policies would fall under the purview of NARA, and can be located here: <https://www.archives.gov/records-mgmt>. As to the second portion of your request, NOAA conducted a search of the Office of Communications and did not locate any responsive records.

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FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:

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Sincerely,

**GRAFF.MARK.HY
RUM.1514447892**

Digitally signed by
GRAFF.MARK.HYRUM.1514447892
DN: c=US, o=U.S. Government, ou=DoD,
ou=PKI, ou=OTHER,
cn=GRAFF.MARK.HYRUM.1514447892
Date: 2017.08.08 11:57:14 -04'00'

Mark H. Graff
FOIA Officer/Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration

Deanna Harwood - NOAA Federal

From: Deanna Harwood - NOAA Federal
Sent: Tuesday, August 8, 2017 5:37 PM
To: Mark Graff - NOAA Federal; Kathryn Kempton
Subject: Fwd: OCE I and OCE II Appeal
Attachments: appeal memo -- draft.docx

I thought you might like to see this.

Deanna Harwood
Deputy Chief, Southwest Section
NOAA, Office of General Counsel
U.S. Department of Commerce
501 W. Ocean Blvd., Suite 4470
Long Beach, CA 90802
(562) 980-4068

----- Forwarded message -----

From: Wall, Robin (USACAN) <Robin.Wall@usdoj.gov>
Date: Mon, Aug 7, 2017 at 2:01 PM
Subject: OCE I and OCE II Appeal
To: Deanna Harwood - NOAA Federal <deanna.harwood@noaa.gov>, "Lee, Helen" <HLee@doc.gov>

Deanna and Helen,

(b)(5) [Redacted]

[Redacted]

[Redacted]

(b)(5) [Redacted]

[Redacted]

(b)(5) [Redacted]

When the final decision come down, I will let you know.

Hope all is well,
Robin

Robin M. Wall
Assistant United States Attorney
United States Attorney's Office, Northern District of California
450 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
[415.436.7071](tel:415.436.7071)
robin.wall@usdoj.gov

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(b)(5)

(b)(5)

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, August 9, 2017 8:06 AM
To: Dennis Morgan - NOAA Federal; Robert Swisher - NOAA Federal
Cc: Robert Hogan
Subject: Fwd: OCE I and OCE II Appeal
Attachments: appeal memo -- draft.docx

FYI, (b)(5) [REDACTED]

[REDACTED]

Bob--any other impact you see that I'm missing?

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) [REDACTED] (C)

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Date: Tue, Aug 8, 2017 at 5:37 PM
Subject: Fwd: OCE I and OCE II Appeal
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>, Kathryn Kempton <Kathryn.Kempton@noaa.gov>

I thought you might like to see this.

Deanna Harwood
Deputy Chief, Southwest Section
NOAA, Office of General Counsel

U.S. Department of Commerce
501 W. Ocean Blvd., Suite 4470
Long Beach, CA 90802
[\(562\) 980-4068](tel:(562)980-4068)

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To: Deanna Harwood - NOAA Federal <deanna.harwood@noaa.gov>, "Lee, Helen" <HLee@doc.gov>

Deanna and Helen,

(b) (5)

(b)(5)

When the final decision come down, I will let you know.

Hope all is well,
Robin

Robin M. Wall

Assistant United States Attorney

United States Attorney's Office, Northern District of California

450 Golden Gate Avenue, 9th Floor

San Francisco, CA 94102

[415.436.7071](tel:415.436.7071)

robin.wall@usdoj.gov

(b)(5)

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(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, August 9, 2017 8:16 AM
To: Kathryn Kempton - NOAA Federal
Subject: Fwd: OCE I and OCE II Appeal
Attachments: appeal memo -- draft.docx

Hi Kathryn--

I forwarded this to Bob Hogan this morning (below), along with a brief overview. Bob's the new FOIA POC for GC.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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----- Forwarded message -----

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Wed, Aug 9, 2017 at 8:06 AM
Subject: Fwd: OCE I and OCE II Appeal
To: Dennis Morgan - NOAA Federal <dennis.morgan@noaa.gov>, Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>
Cc: Robert Hogan <robert.j.hogan@noaa.gov>

FYI, (b)(5)

[Redacted content]

Bob--any other impact you see that I'm missing?

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) (C)

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From: **Deanna Harwood - NOAA Federal** <deanna.harwood@noaa.gov>
Date: Tue, Aug 8, 2017 at 5:37 PM
Subject: Fwd: OCE I and OCE II Appeal
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>, Kathryn Kempton <Kathryn.Kempton@noaa.gov>

I thought you might like to see this.

Deanna Harwood
Deputy Chief, Southwest Section
NOAA, Office of General Counsel
U.S. Department of Commerce
501 W. Ocean Blvd., Suite 4470
Long Beach, CA 90802
[\(562\) 980-4068](tel:5629804068)

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Date: Mon, Aug 7, 2017 at 2:01 PM
Subject: OCE I and OCE II Appeal
To: Deanna Harwood - NOAA Federal <deanna.harwood@noaa.gov>, "Lee, Helen" <HLee@doc.gov>

Deanna and Helen,

(b)(5)
[Redacted text block]

[Redacted text block]

(b)(5) [Redacted]

[Redacted]

[Redacted]

When the final decision come down, I will let you know.

Hope all is well,
Robin

Robin M. Wall
Assistant United States Attorney
United States Attorney's Office, Northern District of California
450 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
[415.436.7071](tel:415.436.7071)
robin.wall@usdoj.gov

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(b)(5)

(b)(5)

Lola Stith - NOAA Affiliate

From: Lola Stith - NOAA Affiliate
Sent: Wednesday, August 9, 2017 10:36 AM
To: Mark Graff - NOAA Affiliate
Subject: ACTION REQUIRED: FOIA DOC-NOAA-2017-000204 (REVIEW/SIGN)
Attachments: DOC-NOAA-2017-000204 FAL.docx

Hi Mark - A copy of the draft FAL for the subject FOIA is attached for signature. Please sign/return to me. I will complete the closeout of the FOIA request.

Lola

On Wed, Aug 9, 2017 at 10:25 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Mark - This request is on us to process the closeout. I will prepare the No Records FAL for your signature.

Lola

On Tue, Aug 8, 2017 at 10:48 AM, Nkolika Ndubisi - NOAA Federal <nkolika.ndubisi@noaa.gov> wrote:

Hi Mark,

(b)(5)

Thanks,

Nkolika Ndubisi (Nikki)
Administration Division
Management and Budget
National Ocean Service
[\(240\) 533-0937](tel:(240)533-0937)

----- Forwarded message -----

From: Nkolika Ndubisi - NOAA Federal <nkolika.ndubisi@noaa.gov>
Date: Thu, Dec 15, 2016 at 7:00 PM
Subject: Re: FOIA Reassignment - FOIA DOC-NOAA-2017-000204
To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Hi Lola,

I uploaded the Signed Tasker and Doc. of Search.

Nkolika Ndubisi (Nikki)
Administration Division

Management and Budget

National Ocean Service

[\(240\) 533-0937](tel:(240)533-0937)

On Thu, Dec 15, 2016 at 11:03 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Nikki (b)(5)

Thanks!

Lola

----- Forwarded message -----

From: **Mark Graff - NOAA Federal** <mark.graff@noaa.gov>

Date: Thu, Dec 15, 2016 at 10:59 AM

Subject: Re: FOIA Reassignment - FOIA DOC-NOAA-2017-000204

To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

As long as the search logs are in the correspondence yes.

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:(301)628-5658) (O)

(b)(6) (C)

On Thu, Dec 15, 2016 at 10:13 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Good morning Mark (b)(5)

Lola

----- Forwarded message -----

From: **Nkolika Ndubisi - NOAA Federal** <nkolika.ndubisi@noaa.gov>

Date: Wed, Dec 14, 2016 at 2:57 PM

Subject: Fwd: FOIA Reassignment - FOIA DOC-NOAA-2017-000204

To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Cc: FOIA Office <foia@noaa.gov>

Hi Lola

(b)(5)

Nikki

----- Forwarded message -----

From: **Jeri Dockett - NOAA Affiliate** <jeri.dockett@noaa.gov>

Date: Wednesday, December 14, 2016
Subject: FOIA Reassignment - FOIA DOC-NOAA-2017-000204
To: Nkolika Ndubisi - NOAA Federal <nkolika.ndubisi@noaa.gov>

Nikki,

(b)(5)

~Jeri

On Thu, Dec 8, 2016 at 2:48 PM, Nkolika Ndubisi - NOAA Federal <nkolika.ndubisi@noaa.gov> wrote:
Jeri

(b)(5)

Nkolika Ndubisi (Nikki)
Administration Division
Management and Budget
National Ocean Service
[\(240\) 533-0937](tel:(240)533-0937)

----- Forwarded message -----

From: **Lola Stith - NOAA Affiliate** <lola.m.stith@noaa.gov>
Date: Thu, Dec 8, 2016 at 12:56 PM
Subject: FOIA Reassignment - FOIA DOC-NOAA-2017-000204
To: Zachary Cress - NOAA Federal <zachary.cress@noaa.gov>, Nkolika Ndubisi <nkolika.ndubisi@noaa.gov>

Good afternoon all (b)(5)

Thanks,

Lola

----- Forwarded message -----

From: **foia@regulations.gov** <foia@regulations.gov>
Date: Thu, Dec 1, 2016 at 4:17 PM
Subject: FOIA Assignment for DOC-NOAA-2017-000204
To: "nmfs.sero.foia1@noaa.gov" <nmfs.sero.foia1@noaa.gov>

You have been assigned to the FOIA request DOC-NOAA-2017-000204. Additional details for this request are as follows:

- Assigned By: Samuel B. Dixon
- Request Tracking Number: DOC-NOAA-2017-000204
- Due Date: 12/30/2016
- Requester: Belinda Brannon
- Request Track: Simple

- Short Description: N/A
- Long Description: Fishing Trawler Lady Julie Documentation No. : 1089342 Incident: All documentation related to this incident report and documentation to confirm whether or if this vessel sank.
-

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

lola.m.stith@noaa.gov

--

Very respectfully,

Jeri Dockett

FOIA/Records Manager

National Oceanic Atmospheric Administration

Office of Response and Restoration

1305 East West Highway

SSMC4 RM 10124

Silver Spring, MD 20910

(O)240.533.0395

--

Nkolika Ndubisi (Nikki)

Administration Division

Management and Budget

National Ocean Service

[\(240\) 533-0937](tel:(240)533-0937)

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

lola.m.stith@noaa.gov

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

lola.m.stith@noaa.gov

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

lola.m.stith@noaa.gov

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

((b)(6) [REDACTED])

lola.m.stith@noaa.gov



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

December 8, 2020

Belinda Brannon
8099 N. Mc Kee Rd
Irvington, AL 36544-3296

Re: FOIA Request DOC-NOAA-2017-000204

Dear Ms. Brannon,

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on 12/01/2016, in which you requested:

Fishing Trawler Lady Julie Documentation No. : 1089342 Incident: All documentation related to this incident report and documentation to confirm whether or if this vessel sank.

After searching our files we were unable to locate any records that are responsive to your request.

Although no records were located during our search, you have the right to appeal a “no document found” response. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:

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- our response to your request,
- a statement explaining why the withheld records should be made available, and why the denial of the records was in error.
- “Freedom of Information Act Appeal” must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

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Sincerely,



Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
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To: Lola Stith - NOAA Affiliate
Subject: Fwd: FOIA Reassignment - FOIA DOC-NOAA-2017-000204
Attachments: FAL no records response.pdf

This is the one I prepared and signed for you yesterday. Want to just use this one? :)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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Date: Tue, Aug 8, 2017 at 11:21 AM
Subject: Re: FOIA Reassignment - FOIA DOC-NOAA-2017-000204
To: Nkolika Ndubisi - NOAA Federal <nkolika.ndubisi@noaa.gov>

Got it--thanks Nikki (b)(5)

[REDACTED]

[REDACTED]

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
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(b)(5)

Thanks,

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Administration Division
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National Ocean Service
[\(240\) 533-0937](tel:(240)533-0937)

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From: **Nkolika Ndubisi - NOAA Federal** <nkolika.ndubisi@noaa.gov>
Date: Thu, Dec 15, 2016 at 7:00 PM
Subject: Re: FOIA Reassignment - FOIA DOC-NOAA-2017-000204
To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Hi Lola,

I uploaded the Signed Tasker and Doc. of Search.

Nkolika Ndubisi (Nikki)
Administration Division
Management and Budget
National Ocean Service
[\(240\) 533-0937](tel:(240)533-0937)

On Thu, Dec 15, 2016 at 11:03 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Nikki (b)(5)

Thanks!

Lola

----- Forwarded message -----

From: **Mark Graff - NOAA Federal** <mark.graff@noaa.gov>
Date: Thu, Dec 15, 2016 at 10:59 AM
Subject: Re: FOIA Reassignment - FOIA DOC-NOAA-2017-000204
To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration

(301) 628-5658 (O)

(b)(6) (C)

On Thu, Dec 15, 2016 at 10:13 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Good morning Mark (b)(5)

[Redacted]

[Redacted] ?

Lola

----- Forwarded message -----

From: **Nkolika Ndubisi - NOAA Federal** <nkolika.ndubisi@noaa.gov>

Date: Wed, Dec 14, 2016 at 2:57 PM

Subject: Fwd: FOIA Reassignment - FOIA DOC-NOAA-2017-000204

To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Cc: FOIA Office <foia@noaa.gov>

Hi Lola

(b)(5)

Nikki

----- Forwarded message -----

From: **Jeri Dockett - NOAA Affiliate** <jeri.dockett@noaa.gov>

Date: Wednesday, December 14, 2016

Subject: FOIA Reassignment - FOIA DOC-NOAA-2017-000204

To: Nkolika Ndubisi - NOAA Federal <nkolika.ndubisi@noaa.gov>

Nikki,

(b)(5)

[Redacted]

~Jeri

On Thu, Dec 8, 2016 at 2:48 PM, Nkolika Ndubisi - NOAA Federal <nkolika.ndubisi@noaa.gov> wrote:

Jeri

(b)(5)

[Redacted] ?

Nkolika Ndubisi (Nikki)
Administration Division
Management and Budget
National Ocean Service
[\(240\) 533-0937](tel:2405330937)

----- Forwarded message -----

From: **Lola Stith - NOAA Affiliate** <lola.m.stith@noaa.gov>

Date: Thu, Dec 8, 2016 at 12:56 PM

Subject: FOIA Reassignment - FOIA DOC-NOAA-2017-000204

To: Zachary Cress - NOAA Federal <zachary.cress@noaa.gov>, Nkolika Ndubisi <nkolika.ndubisi@noaa.gov>

Good afternoon all (b)(5)

?

Thanks,

Lola

----- Forwarded message -----

From: **foia@regulations.gov** <foia@regulations.gov>

Date: Thu, Dec 1, 2016 at 4:17 PM

Subject: FOIA Assignment for DOC-NOAA-2017-000204

To: "nmfs.sero.foia1@noaa.gov" <nmfs.sero.foia1@noaa.gov>

You have been assigned to the FOIA request DOC-NOAA-2017-000204. Additional details for this request are as follows:

- Assigned By: Samuel B. Dixon
- Request Tracking Number: DOC-NOAA-2017-000204
- Due Date: 12/30/2016
- Requester: Belinda Brannon
- Request Track: Simple
- Short Description: N/A
- Long Description: Fishing Trawler Lady Julie Documentation No. : 1089342 Incident: All documentation related to this incident report and documentation to confirm whether or if this vessel sank.
-

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6)

lola.m.stith@noaa.gov

--

Very respectfully,

Jeri Dockett

FOIA/Records Manager

National Oceanic Atmospheric Administration

Office of Response and Restoration

1305 East West Highway

SSMC4 RM 10124

Silver Spring, MD 20910

[\(O\)240.533.0395](tel:(240)533.0395)

--

Nkolika Ndubisi (Nikki)
Administration Division
Management and Budget
National Ocean Service
[\(240\) 533-0937](tel:(240)533-0937)

--

[Lola Stith](mailto:lola.m.stith@noaa.gov)
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c (b)(6) [REDACTED])
lola.m.stith@noaa.gov

--

[Lola Stith](mailto:lola.m.stith@noaa.gov)
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c (b)(6) [REDACTED])
lola.m.stith@noaa.gov



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

Via FOIAonline

August 8, 2017

Belinda Brannon
8099 N. Mc Kee Rd.
Irvington, AL 36544

Re: FOIA Request DOC-NOAA-2017-000204

Dear Mr. Brannon:

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on November 21, 2016, in which you requested:

Fishing Trawler Lady Julie Documentation No. : 1089342 Incident: Did this vessel sink?

In response to your request NOAA conducted a search of NMFS and NOS, and did not locate any records responsive to your request.

You have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:

Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, by facsimile (fax) to [202-482-2552](tel:202-482-2552), or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

For your appeal to be complete, it must include the following items:

- a copy of the original request,

- our response to your request,
- a statement explaining why the production of the records was in error.
- “Freedom of Information Act Appeal” must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

Email: ogis@nara.gov
Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence please contact Mark Graff at mark.graff@noaa.gov, or by phone at (301) 427-8285, or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

GRAFF.MARK.HYRUM.1514447892
Digitally signed by
GRAFF.MARK.HYRUM.1514447892
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI,
ou=OTHER, cn=GRAFF.MARK.HYRUM.1514447892
Date: 2017.08.08 11:20:03 -04'00'

Mark H. Graff
FOIA Officer/Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, August 9, 2017 11:32 AM
To: Lola Stith - NOAA Affiliate
Subject: Re: ACTION REQUIRED: Task for DOC-OS-2017-001469 (REVIEW/SIGN)
Attachments: NOAA RESPONSE_Glawe_DOC-OS-2017-001469 Fee Estimate Tasker mhg.pdf

Perfect--here you go.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Wed, Aug 9, 2017 at 11:06 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Mark - AGO has completed their fee estimate. I have attached a NOAA copy of the completed tasker for your review/approval/signature.

R/

----- Forwarded message -----

From: foia@regulations.gov <foia@regulations.gov>

Date: Wed, Aug 9, 2017 at 10:25 AM

Subject: FOIA Task Completed for DOC-OS-2017-001469

To: "acrawford@doc.gov" <acrawford@doc.gov>, "lola.m.stith@noaa.gov" <lola.m.stith@noaa.gov>

The FOIA Task for DOC-OS-2017-001469 was completed. Additional details for this task are as follows:

Task Details:

- Tracking Number: DOC-OS-2017-001469
- Task Type: Request Detail
- Outcome: Other
- Task Description: See attached fee estimate tasker in correspondence and submission details.
- Task Comments: Fee estimate attached.
- Assigned To: Shem Yusuf
- Assigned By: Shem Yusuf
- Date Sent: 07/19/2017
- Due Date: 07/26/2017

- Closed Date: 08/09/2017

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6)

lola.m.stith@noaa.gov

Total estimated dollar amount for electronic search. 0

Total estimated hours for review. 0

Total estimated dollar amount for review. 0

Manual Search (Complete if necessary.)

Total estimated number of pages of documents. 25

Total estimated dollar amount for duplication. 0

Total estimated hours for search. 0

Total estimated dollar amount for search. 72.12

Total estimated hours for review. 1

Total estimated dollar amount for review. 72.12

This information is needed to compute a total "OS" fee estimate for the requester.

No records. _____

GRAFF.MARK.HYR
UM.1514447892

Digitally signed by
GRAFF.MARK.HYRUM.1514447892
DN: c=US, o=U.S. Government,
ou=DoD, ou=PKI, ou=OTHER,
cn=GRAFF.MARK.HYRUM.1514447892
Date: 2017.08.09 11:30:16 -04'00'

NOAA

Signature (Senior Official)

Bureau

Date

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, August 9, 2017 5:33 PM
To: Stephen Lipps - NOAA Federal; Holmes, Colin; Robert Moller - NOAA Federal; Scott Smullen - NOAA Federal; Jeff Dillen - NOAA Federal; Kristen Gustafson - NOAA Federal; Robert Hogan
Cc: Tom Taylor; Kimberly Katzenbarger - NOAA FEDERAL; Charles; Dennis Morgan - NOAA Federal; Stacey Nathanson - NOAA Federal; Robert Swisher - NOAA Federal; Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate; Lola Stith - NOAA Affiliate; Zachary Goldstein - NOAA Federal; Douglas Perry - NOAA Federal; Nkolika Ndubisi - NOAA Federal; Jeri Dockett - NOAA Affiliate; Cc: OCIO/OPPA; Troy Wilds - NOAA Federal; Lawrence Charters - NOAA Federal; Allison Soussi-Tanani - NOAA Federal; Bogomolny, Michael (Federal); Roxie Allison-Holman - NOAA Federal; John Almeida - NOAA Federal
Subject: Weekly FOIA Incoming and High Visibility Requests
Attachments: Re-Filed JW v. DOC Complaint.pdf; Weekly FOIA Incoming and High Visibility Requests 08.02.17 - 08.08.17.xls

Good Afternoon,

Attached is this week's report.

American Bridge 21st Century submitted a request seeking communications between NCEI and OSTP. (DOC-NOAA-2017-001670). This request is substantively similar to three other existing requests, including the request in litigation from Judicial Watch referenced later in this report.

Additionally, a request was submitted by Citizens for Responsible Zoning and Landowner Rights for records about the Lake Michigan National Marine Sanctuary. (DOC-NOAA-2017-00001678).

In litigation (b)(5)

. (Complaint attached).

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,)	
425 Third Street SW, Suite 800)	
Washington, DC 20024,)	
)	
Plaintiff,)	
)	Civil Action No.
v.)	
)	
UNITED STATES DEPARTMENT)	
OF COMMERCE,)	
1401 Constitution Avenue, NW)	
Washington, DC 20230,)	
)	
Defendant.)	
<hr style="border: 0.5px solid black;"/>		

COMPLAINT

Plaintiff Judicial Watch, Inc. brings this action against Defendant U.S. Department of Commerce to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As grounds therefor, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff Judicial Watch, Inc. is a not-for-profit, educational organization incorporated under the laws of the District of Columbia and headquartered at 425 Third Street SW, Suite 800, Washington, DC 20024. Plaintiff seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law. As part of its mission, Plaintiff regularly requests records from federal agencies pursuant to FOIA. Plaintiff analyzes the

responses and disseminates its findings and the requested records to the American public to inform them about “what their government is up to.”

4. Defendant U.S. Department of Commerce is an agency of the United States Government. Defendant has possession, custody, and control of records to which Plaintiff seeks access. Defendant is headquartered at 1401 Constitution Avenue, NW, Washington, DC 20230.

STATEMENT OF FACTS

5. On February 6, 2017 Plaintiff submitted a FOIA request to the National Oceanic and Atmospheric Administration (“NOAA”), a component of Defendant, seeking the following:

Any and all records of communications between NOAA scientist Thomas Karl and Director of the Office of Science and Technology Policy John Holdren.

The timeframe of the request was identified as “January 20, 2009 through January 20, 2017.”

The request was submitted by certified mail.

6. According to U.S. Postal Service records, the request was received by NOAA on February 7, 2017.

7. NOAA confirmed that it received the request on February 8, 2017, assigning the request Tracking Number DOC-NOAA-2017-000580.

8. As of the date of this Complaint, Defendant has failed to: (i) produce all the requested records or demonstrate that the requested records are lawfully exempt from production; and (ii) notify Plaintiff of the scope of responsive records Defendant intends to produce or withhold and the reasons for any withholdings.

COUNT I

Violation of FOIA, 5 U.S.C. § 552

9. Plaintiff realleges paragraphs 1 through 8 as if fully stated herein.

10. Plaintiff is being irreparably harmed by reason of Defendant's violation of FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply with FOIA.

11. To trigger FOIA's administrative exhaustion requirement, Defendant was required to determine whether to comply with Plaintiff's request by March 31, 2017 at the latest. At a minimum, Defendant was required to: (i) gather and review the requested documents; (ii) determine and communicate to Plaintiff the scope of any responsive records Defendant intended to produce or withhold and the reasons for any withholdings; (iii) inform Plaintiff that it may appeal any adequately specific, adverse determination; and (iv) make the records available promptly thereafter. *See, e.g., Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188-89 (D.C. Cir. 2013).

12. Because Defendant failed to determine whether to fully comply with Plaintiff's request within the time period required by FOIA, Plaintiff is deemed to have exhausted its administrative appeal remedies. 5 U.S.C. § 552(a)(6)(C)(i).

WHEREFORE, Plaintiff respectfully requests that the Court: (1) order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request; (2) order Defendant to produce, by a date certain, any and all non-exempt records to Plaintiff's FOIA request and a Vaughn index of any responsive records withheld under claim of exemption; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request; (4) grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (5) grant Plaintiff such other relief as the Court deems just and proper.

Dated: June 29, 2017

Respectfully submitted,

s/ Chris Fedeli

Chris Fedeli

D.C. Bar No. 472919

JUDICIAL WATCH, INC.

425 Third Street SW, Suite 800

Washington, DC 20024

(202) 646-5172

Counsel for Plaintiff

Tracking Number	Type	Requester
DOC-NOAA-2017-001670	Request	Kathleen Casey
DOC-NOAA-2017-001661	Request	Molly Masterton
DOC-NOAA-2017-001678	Request	James Zeiler
DOC-NOAA-2017-001677	Request	Robert C. Stober, Esq.
DOC-NOAA-2017-001647	Request	Ingrid N. Visser
DOC-NOAA-2017-001646	Request	Douglas Mackenzie
DOC-NOAA-2017-001645	Request	Teresa Marshall
DOC-NOAA-2017-001643	Request	Sarah B. Brady
DOC-NOAA-2017-001642	Request	Lisa Demer
DOC-NOAA-2017-001635	Request	Russ Kick

Requester Organization	Submitted	Received	Assigned To
American Bridge 21st Century	08/08/2017	08/08/2017	NOAA
Natural Resouces Defense Council	08/07/2017	08/07/2017	NOAA
Citizens for Responsible Zoning and Landowner Rights	08/07/2017	08/07/2017	NOAA
Hershoff, Lupino & Yagel, LLP	08/07/2017	08/07/2017	NOAA
Orca Research Trust	08/04/2017	08/04/2017	NOAA
	08/03/2017	08/03/2017	NOAA
PETA Foundation	08/03/2017	08/03/2017	NOAA
Delaware Riverkeeper Network	08/03/2017	08/03/2017	NOAA
Alaska Dispatch News	08/02/2017	08/02/2017	NOAA
	08/02/2017	08/02/2017	NOAA

Detail

Incoming-And-Outgoing Correspondence Between The National Centers for Environmental Information And The C
Please produce all records in the Department's possession, custody, or control that support, explain, or otherwise r
We are requesting copies of all emails, sent or received, of NOAA employees Ellen Brody and Russ Green that coi
Request all records associated with the Reportable Marine Incident that occurred on 13MAR2015 involving the UT'
I am applying for an Marine Mammal Inventory Report (MMIR) which includes all living and dead captive orca, liste
Dear NOAA: I request copies of records under the Freedom of Information Act (5 U.S.C. 552) containing data that
The most recent MMIR.

Please see attachment.

Please provide the letter of advisement sent by NOAA to the Alaska villages of Toksook Bay and Nighthmute regard
I hereby request the detailed, hour-by-hour calendar/schedule for the Administrator or Acting Administrator, from J:

Office Of Science & Technology Policy From February 2017 Through August 2017. I am requesting
relate to the Secretary of Commerce's (Secretary's) decision dated July 10, 2017, and final notice published
contain the "key words" Lake Michigan, Lake Michigan National Marine Sanctuary, Lake Michigan
V LITTLE BULLY. A copy of the Captain of the Port Order 15-002 is attached. The undersigned attorney
and globally. Thank you for your assistance.

refers to and/or describes the dispersal of materials in the atmosphere visible over Monterey County, California

including a humpback whale they hunted and killed. The letter was likely sent in 2016.

January 1, 2017, to June 30, 2017. Further, I ask that these documents be sent to me in any digital format

copies of incoming-and-outgoing correspondence, which should include emails, between the National C
hed on July 20, 2017, determining that the state of New Jersey was in compliance with regard to manag
gan NMS, Wisconsin, or any combination of those words related to the creation of an National Marine Sa
' has been retained by SeaTow Islamorada. SeaTow Islamorada was contracted to provide services to L

alifornia on August 3, 2017, including but not limited to, the composition(s) of the materials dispersed and

its in which they exist, such as PDF. Under the terms of the E-FOIA Amendments of 1996, Section 5, if :

centers for Environmental Information within the National Oceanic and Atmospheric Administration and the management of its recreational summer flounder fishery under the Atlantic Coastal Fisheries Cooperative Management Act in Lake Michigan. The period for the requested emails is January 1, 2017 through July 31, 2017 regarding the vessel LITTLE BULLY and its barge while grounded.

and the quantities of each material dispersed. On information and observation, I have probable cause to suspect

that if a document exists in electronic format, it must be released in that format upon request. This request is for

he Office Of Science & Technology Policy, within the Executive Office of the President, from Febru:
agement Act (ACFCMA), 16 U.S.C. Secs 5101-5108 (2012). For the period on or after February 2, 2017
'.

nspect that the materials dispersed include at least Welsbach and Welsbach-like materials (such as the

or my personal use and will not be used in a commercial manner. I agree to pay up to \$10 for this reque:

ary 3, 2017, through the present date
' . (Please see original request for add

oxides of metals), coal as

st. If it will be more than this, plea

Scott Kathey - NOAA Federal

From: Scott Kathey - NOAA Federal
Sent: Wednesday, August 9, 2017 6:00 PM
To: Martha McCoy - NOAA Federal
Cc: Aida Pettegrue; Karen Grimmer; Michelle Mills; Mark Graff - NOAA Federal; Stephanie Altman - NOAA Federal; Jackie Rolleri - NOAA Federal
Subject: Re: Fwd: New FOIA Request from Sarah Emerson - FOIA 2017-001569
Attachments: FOIA Withholding Review Worksheet.doc

Marty,

The following are specific questions I have for our call Thursday morning:

(b)(5) [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

(b)(5) [Redacted]

Thanks,

Scott

Scott Kathey
Federal Regulatory Coordinator
Monterey Bay National Marine Sanctuary
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
99 Pacific Street, 455A
Monterey, California 93940
Phone: 831-647-4251
Fax: 831-647-4250

On Wed, Aug 9, 2017 at 12:21 PM, Martha McCoy - NOAA Federal <martha.mccoy@noaa.gov> wrote:
ATTORNEY-CLIENT CONFIDENTIAL

Apologies, one point of clarificatio (b)(5) [Redacted]

Thank you,

Marty

On Wed, Aug 9, 2017 at 3:19 PM, Martha McCoy - NOAA Federal <martha.mccoy@noaa.gov> wrote:
ATTORNEY-CLIENT CONFIDENTIAL

All,

Thank you for your emails on this matter. (b)(5) [Redacted]

(b)(5)

[Redacted]

[Redacted]

- [Redacted]
- [Redacted]
- [Redacted]

[Redacted]

- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

Thanks and I look forward to discussing tomorrow,
Marty

On Mon, Aug 7, 2017 at 1:31 PM, Scott Kathey <scott.kathey@noaa.gov> wrote:
Marty,

(b)(5) [Redacted]

(b)(5)

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted] Is my understanding correct?

Thanks,

Scott

Scott Kathey
Federal Regulatory Coordinator
Monterey Bay National Marine Sanctuary
National Oceanic & Atmospheric Administration
U.S. Department of Commerce
99 Pacific Street, Bldg 455A
Monterey, California 93940
Phone: [831-647-4251](tel:831-647-4251)
FAX: [831-647-4250](tel:831-647-4250)

On 8/7/17 8:26 AM, Aida Pettegrue wrote:

Hi Scott:

(b)(5)

aida

----- Forwarded Message -----

Subject: New FOIA Request from Sarah Emerson - FOIA 2017-001569

Date: Fri, 28 Jul 2017 13:09:25 -0400

From: Aida Pettegrue <aida.pettegrue@noaa.gov>

To: Karen Grimmer <Karen.Grimmer@noaa.gov>

CC: Martha McCoy - NOAA Federal <martha.mccoy@noaa.gov>, Aida Pettegrue <Aida.Pettegrue@noaa.gov>, Michelle Mills <Michelle.Mills@noaa.gov>

Hi Karen:

Since Scott is out of the office until August 7t (b)(5)

. I have also attached a copy of Ms. Emerson's original request (FOIA 2017-001348).

Please let me know if you would like me to set-up a conference call with Marty.

Thank you.

aida

----- Forwarded Message -----

Subject: Re: Status of FOIA 2017-001348 - Requester: Sarah Emerson

Date: Thu, 27 Jul 2017 19:40:40 -0400

From: Martha McCoy - NOAA Federal <martha.mccoy@noaa.gov>

To: Aida Pettegrue <aida.pettegrue@noaa.gov>

CC: Nkolika Ndubisi - NOAA Federal <nkolika.ndubisi@noaa.gov>, Michelle Mills <Michelle.Mills@noaa.gov>

Thank you, Nikki. Aida (b)(5)

Best,
Marty

----- Forwarded Message -----

Subject: Re: Status of FOIA 2017-001348 - Requester: Sarah Emerson

Date: Thu, 27 Jul 2017 11:49:31 -0400

From: Nkolika Ndubisi - NOAA Federal <nkolika.ndubisi@noaa.gov>

To: Aida Pettegrue <aida.pettegrue@noaa.gov>

CC: Martha McCoy - NOAA Federal <martha.mccoy@noaa.gov>, Michelle Mills <Michelle.Mills@noaa.gov>

Hi Aida,

I just wanted to inform you that the requester submitted a new FOIA request (b)(5)

. Let me know if you have any questions.

Thanks,

Nkolika Ndubisi (Nikki)
Administration Division
Management and Budget
National Ocean Service
[\(240\) 533-0937](tel:(240)533-0937)

On Wed, Jul 19, 2017 at 5:00 PM, Nkolika Ndubisi - NOAA Federal <nkolika.ndubisi@noaa.gov> wrote:

Hi Aida,

I was just informed that requester withdrew her request and re-file it to reflect the appropriate organization. Once she re-files, I will task it out to you.

Thanks
Nikki

On Wednesday, July 19, 2017, Aida Pettegrue <aida.pettegrue@noaa.gov> wrote:

Hi Marty:

When I accessed FOIA Online today, the system reflects that I do not have any cases assigned to me (see below). Did Ms. Emerson withdraw her request?

Thanks

aida

Welcome, Aida Pettegrue

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[FOIAonline Logo](#)



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--

Nkolika Ndubisi (Nikki)
Administration Division
Management and Budget
National Ocean Service

[\(240\) 533-0937](tel:2405330937)

--

Martha McCoy

Attorney-Advisor

NOAA Office of the General Counsel, Oceans and Coasts Section

SSMC-4 /Room 6128

1305 East-West Highway

Silver Spring, MD 20910

[301-713-7391](tel:3017137391)

--

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--

Martha McCoy

Attorney-Advisor

NOAA Office of the General Counsel, Oceans and Coasts Section

SSMC-4 /Room 6128

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FREEDOM OF INFORMATION ACT WITHHOLDING REVIEW
(Worksheet)

Requester:

Request:

Name and title of official filling out this worksheet:

1.0. (B) (5) (Exemption 5)

FOIA Exemption (b)(5) incorporates the Deliberative Process, Attorney-Client Communication, and Attorney Work Product privileges.

1.1. Deliberative Process Privilege

This privilege applies to draft documents, pre-decisional documents, meeting notes between supervisors and employees, and other types of documents that reflect an agency's decisionmaking process.

Indicate number of documents to be withheld, and/or number of pages, and nature of the documents (e.g., emails w/w/o attachments, electronic documents, hard-copy documents, etc.):

1.1.1 For the responsive documents, identify the applicable interest protected by privilege:

- _____ A. Encourage open, frank discussions on matters of policy between subordinates and superiors
- _____ B. Protect against premature disclosure of proposed policies before they are finally adopted
- _____ C. Protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action

1.1.2 Articulate factual background about the records at issue (here and elsewhere, use more space if necessary):

1.1.3 Based on the factors above, briefly articulate why release of the records would harm the interest protected by the Deliberative Process Privilege. Consider whether any harm to the interest protected by the privilege is outweighed by the presumption that information is releasable under FOIA.

- _____ A. The information concerns a sensitive or controversial matter.
- _____ B. The decision making process requires total candor and confidentiality
- _____ C. The information concerns a pending decision.
- _____ D. Disclosure of the information would affect other employees who are similarly situated
- _____ E. Disclosure of this information would likely inhibit or chill the exchange of views between agency personnel thereby diminishing the deliberative quality of agency's decision.

_____ F. The information concerns a decision that the agency made in the last 12 months.

CONCLUSION:

1.2 Attorney-Client Communication

This privilege applies to discussions on matters of law, and application of law to a specific subject or policy between an attorney (NOAA General Counsel) and the client.

Indicate number of documents, and/or number of pages to be withheld, and nature of the documents (e.g., emails w/w/o attachments, electronic documents, hard-copy documents, etc.):

1.2.1 Based on the factors below, briefly articulate why release of the records would harm the interest protected by the Attorney-Client Communication privilege. Consider whether any harm to the interest protected by the privilege is outweighed by the presumption that information is releasable under FOIA.

_____ The information reflects an attorney's mental impressions, conclusions, opinions, or legal theories as opposed to factual information.

_____ The information is in connection with a case that is still pending.

_____ The information is in connection with a case that has ended but remains sensitive due to its connection with to similar or recurring litigation.

_____ Disclosure of this information would likely inhibit or chill the exchange of views between agency attorneys and clients, thereby diminishing the deliberative quality of agency decisions on legal matters.

CONCLUSION:

1.3. Attorney Work Product

This privilege applies to materials prepared by an attorney, or under an attorney's direction, in connection with a civil or criminal matter, or in reasonable anticipation of litigation. The attorney decides whether to release these records. Foreseeable harm for this privilege must be completed in conjunction with the appropriate NOAA General Counsel office.

Indicate number of documents, and/or number of pages, and nature of the documents (e.g., emails w/w/o attachments, electronic documents, hard-copy documents, etc.):

1.3.1 Briefly articulate why release of the records would harm the interest protected by the Attorney Work Product privilege. Consider whether any harm to the interest protected by the privilege is outweighed by the presumption that information is releasable under FOIA.

_____ The information reflects an attorney's mental impressions, conclusions, opinions, or legal theories as opposed to factual information.

_____ The information is in connection with a case that is still pending.

_____ The information is in connection with a case that has ended but remains sensitive due to its connection with similar or recurring litigation.

CONCLUSION:

NMFS HQ PR FOIA Requests - NOAA Service Account

From: NMFS HQ PR FOIA Requests - NOAA Service Account
Sent: Thursday, August 10, 2017 10:19 AM
To: Mark Graff - NOAA Federal; Lola Stith - NOAA Affiliate
Subject: FOR YOUR RECORD: FW: Gotfredson 2017-001195 [Appeal# 17-1507]
Attachments: Gotfredson DOC-OS-2017-001507 memo.docx; Gotfredson DOC-OS-2017-001507 letter.docx

Forwarding this message so you can have the attachments, in case you wish to speak with DOC Atty concerning this matter.

thx
Jerenda

----- Forwarded message -----

From: Potts, Kristina (Federal) <Kristina.Potts@doc.gov>
Date: Thu, Aug 10, 2017 at 7:16 AM
Subject: FW: Gotfredson
To: "nmfs.hq.pr.foia@noaa.gov" <nmfs.hq.pr.foia@noaa.gov>
Cc: "Skidmore, Jennifer (Federal)" <Jennifer.Skidmore@noaa.gov>, "Goodman, Steven (Federal)" <Steven.Goodman@noaa.gov>, "Dixon, Samuel (Contractor)" <Samuel.Dixon@noaa.gov>, "Smith, Courtney (Contractor)" <Courtney.Smith@noaa.gov>, "Hodge-Tonic, Peaches (Federal)" <Peaches.Hodge-Tonic@noaa.gov>, "Burroughs, Jerenda (Contractor)" <Jerenda.Burroughs@noaa.gov>

H (b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

Kristina E. Potts
Department of Commerce
Office of General Counsel
HCHB 5098
Email: Kristina.potts@doc.gov
Phone: 202-482-7863
Iphon (b)(6) [Redacted]

--

NOAA / National Marine Fisheries Service
FREEDOM OF INFORMATION OFFICE (FOIA)
Office of Protected Resources
Tawand Tonic, acting PR FOIA Coordinator
Phone: 301 - 427 - 8482

(b) (5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Bogomolny, Michael (Federal)

From: Bogomolny, Michael (Federal)
Sent: Thursday, August 10, 2017 10:46 AM
To: Graff, Mark (Federal)
Cc: Stith, Lola (Contractor); Whitmeyer, Mary Ann (Federal)
Subject: RE: Final Disposition, Request DOC-NOAA-2016-000069
Attachments: 2017.06.12 L. Caudle Memo.docx; 2017.06.12 L. Caudle Ltr.docx

Mark,

Attached, please find a draft memo and letter for this appeal (b)(5)

-bogo

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Thursday, August 10, 2017 10:30 AM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Cc: Stith, Lola (Contractor) <Lola.M.Stith@noaa.gov>; Whitmeyer, Mary Ann (Federal) <Mary.Ann.Whitmeyer@noaa.gov>
Subject: Re: Final Disposition, Request DOC-NOAA-2016-000069

Hi Bogo--

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Thu, Aug 10, 2017 at 10:04 AM, Mary Ann Whitmeyer - NOAA Federal

<mary.ann.whitmeyer@noaa.gov> wrote:

Hi,

The requester is asking for a status of this appeal. How can I find out?

(b)(5)

Thank you,

Mary Ann

On Mon, Sep 19, 2016 at 6:17 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Hi Mary Ann,

(b)(5)

Mark H. Graff
FOIA Officer/Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) (C)

On Thu, Sep 15, 2016 at 4:19 PM, Mary Ann Whitmeyer - NOAA Federal
<mary.ann.whitmeyer@noaa.gov> wrote:

Hi,

The requester is asking for a status of the appeal of the above numbered case. What should I tell him?

Thank you,

Mary Ann

----- Forwarded message -----

From: **Mary Ann Whitmeyer - NOAA Federal** <mary.ann.whitmeyer@noaa.gov>
Date: Tue, Aug 23, 2016 at 2:43 PM
Subject: Re: Final Disposition, Request DOC-NOAA-2016-000069
To: FOIA Office - NOAA Service Account <foia@noaa.gov>

Hi,

The requester is asking for a status of the appeal. What should I tell him?

Thank you,

Mary Ann

On Wed, Aug 17, 2016 at 3:31 PM, FOIA Office - NOAA Service Account <foia@noaa.gov> wrote:

Hi Mary Ann (b)(5)

Thanks!

Lola

On Wed, Aug 17, 2016 at 2:56 PM, Mary Ann Whitmeyer - NOAA Federal <mary.ann.whitmeyer@noaa.gov> wrote:

Hi,

This request was exempted and withheld under (b)(5) and I believe is being appealed by the requester (b)(5)?

Thank you,

Mary Ann

--

Mary Ann Whitmeyer
Financial Management Analyst
Office of the Chief Administrative Officer
Department of Commerce/NOAA
Phone [\(301\) 628-0999](tel:3016280999)

--

Mary Ann Whitmeyer
Financial Management Analyst
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--

Mary Ann Whitmeyer
Financial Management Analyst
Office of the Chief Administrative Officer
Department of Commerce/NOAA
Phone [\(301\) 628-0999](tel:3016280999)

--

Mary Ann Whitmeyer
NOAA Deemed Export Compliance Program
Department of Commerce/NOAA
Phone [\(301\) 628-0999](tel:3016280999)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Ana Liza Malabanan - NOAA Federal

From: Ana Liza Malabanan - NOAA Federal
Sent: Thursday, August 10, 2017 12:22 PM
To: Laurie Beale - NOAA Federal
Cc: Doug Chow; Mark Graff - NOAA Federal; Samuel Dixon - NOAA Affiliate; Lola Stith - NOAA Affiliate; Brittany Pugh - NOAA Federal
Subject: Amended FAL for FOIA DOC-NOAA-2016-001479 (NFIP Litigation)
Attachments: DOC-NOAA-2016-001479 Signed Amended FAL.pdf

Good morning,

Sam sent me the signed amended final action letter (attached).

I am updating the FOIAonline case and will request close out shortly. I will let you all know when the letter is transmitted to the requester via FOIAonline.

Ana Liza

--

Ana Liza S. Malabanan
Freedom of Information Act (FOIA) Coordinator
Information Services and Management Branch
Operations, Management & Information Division
NOAA Fisheries West Coast Region
U.S. Department of Commerce
Office: [562-980-4008](tel:562-980-4008)





UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, Maryland 20910
THE DIRECTOR

Christopher Hudak, Esq.
Environmental Advocates
5135 Anza Street
San Francisco, CA 94121

AUG 10 2017

Re: FOIA Request No. DOC-NOAA-DOC-NOAA-2016-001479
Amended FOIA Response Letter

Dear Mr. Hudak:

This letter amends NOAA's previous response letter of January 12, 2017, to your Freedom of Information Act (FOIA) request entered into FOIAonline on July 20, 2016. You requested:

1. Any reports, memoranda, correspondence, or other documents (including electronic mail messages) concerning any Endangered Species Act ("ESA") section 7 consultations (16 U.S.C. § 1536) that have been initiated or proposed, including Biological Opinions, Biological Assessments, or informal consultations, pertaining to the implementation of the National Flood Insurance Program ("NFIP") by the Federal Emergency Management Agency ("FEMA") at the California statewide level or relating to any of the following California counties and/or towns/cities/unincorporated territories therein: Humboldt, Santa Cruz, Monterey, Ventura, Santa Barbara, San Luis Obispo, San Mateo, Marin, and Sonoma Counties.
2. Any reports, memoranda, correspondence, or other documents (including electronic mail messages) concerning any ESA section 10 permits that have been applied for or issued, pertaining to the implementation of the NFIP in California at any location within any of the following California counties and/or towns/cities/unincorporated territories therein Humboldt, Santa Cruz, Monterey, Ventura, Santa Barbara, San Luis Obispo, San Mateo, Marin, and Sonoma Counties.
3. Any reports, memoranda, correspondence, or other documents (including electronic mail messages) submitted to NMFS by FEMA, U.S. Fish and Wildlife Service ("USFWS"), the California Department of Fish and Wildlife, or any other State or Federal agency or department pertaining to how implementation of the NFIP in California may affect species listed as threatened or endangered under the federal Endangered Species Act ("ESA") or critical habitat for such species located within the following California counties: Humboldt, Santa Cruz, Monterey, Ventura, Santa Barbara, San Luis Obispo, San Mateo, Marin, and Sonoma Counties.



4. Any reports, memoranda, correspondence to or from NMFS, or other documents (including Biological Opinions, Biological Assessments, informal consultation letters and other correspondence, or electronic mail messages) concerning or pertaining to any ESA section 7 consultations (either formal or informal) that have been initiated, proposed, or considered for any national level draft or final rule(s) related to the NFIP, in what may be known by NMFS, FEMA, or USFWS personnel as "draft rule/rulemaking regarding updates to the National Flood Insurance Program to facilitate improved Endangered Species Act compliance," "new proposed minimum floodplain management criteria," "proposed ESA-related performance standard," or some related variation thereof.

On August 16, 2016, you agreed to narrow the scope of point 4 of your request, which pertains to materials related to national level National Flood Insurance Program ("NFIP") ESA section 7 consultations, as follows:

"(1) We agree to exclude from point 4 of our pending request any materials that pertain specifically to the NMFS Biological Opinion on the NFIP in Oregon, the final version of which was issued April 14, 2016.

(2) We agree to narrow the timeframe of point 4 of our pending request to 2013-present. We did not specifically discuss on our call yesterday when in 2013 would be the cut-off date, but we agree to the earliest date in 2013 for which NMFS has searchable electronic records."

We located 6,066 records responsive to your request. Our three interim releases dated September 22, 2016, September 30, 2016, and November 22, 2016, provided you with a total of 3,220 records. We provided an additional 1,340 records with our January 12, 2017, response letter.

A total of 43 records responsive to your request were determined exempt from mandatory public disclosure, and were withheld entirely under FOIA Exemption 5, 5 U.S.C. § 552(b) (5). The fully withheld records consist of opinions, recommendations, and other reflections of staff thinking integral to pre-decisional, deliberative process and/or contain attorney client privileged information.

We also released 675 records responsive to your request that were partially redacted under FOIA Exemption 5, 5 U.S.C. § 552(b) (5) and (b)(6). The redacted portion of the records consist of opinions, recommendations, and other reflections of staff thinking integral to predecisional, deliberative process. The portion redacted under Exemption (b)(6) consists of personal telephone numbers. This information is exempt from release under FOIA Exemption 6, 5 U.S.C. § 552(b) (6), because the individuals' right to privacy outweighs the general public's interest in release of personally identifying information.

During our search for records responsive to your request, we identified 788 records that contain information that originated with other Federal agencies. We referred 689 records to the Federal Emergency Management Agency (FEMA Disclosure Branch email at femafoia@dhs.gov or by phone 202-646-3323), 90 records to the U.S. Fish and Wildlife Service (FWS Region 1 FOIA Coordinator via email John.DeClerck@fws.gov or via telephone 503-231-2072), and 9 records to the Army Corps of Engineers (South Pacific Division via email foiaspd@usace.army.mil or telephone 415-503-6635) for a release determination/direct response to you. The U.S. Fish and Wildlife Service provided you with their determination April 20, 2017. The Army Corps of Engineers provided you with their determination on February 7, 2017 (interim), and February 22, 2017 (final).

We have determined that 14 records were inadvertently released in their entirety in the prior productions. We are therefore amending our prior response to correct the inadvertent release and provide you with the correct determinations.

The following five (5) records should have been referred to FEMA:

- 0.7.1471.69558
- 0.7.1471.59276-000001
- 0.7.1471.64479
- 0.7.1471.64493 (NMFS portions are being released)
- 0.7.1471.64503 (NMFS portions are being released)

The following two (2) records should have been referred to FWS:

- 0.7.1471.25614 (NMFS portions are being released)
- 0.7.1471.19536-000001

The following two (2) records should have been referred to FEMA and to FWS:

- 0.7.1471.59342
- 0.7.1471.59262

The following three (3) records should have been identified as privileged by NMFS and partially redacted under FOIA Exemption 5, 5 U.S.C. § 552(b) (5) prior to referral. The NMFS privileged portion of the records consist of opinions, recommendations, and other reflections of staff thinking integral to pre-decisional, deliberative process.

- 0.7.1471.69561 (redacted, remainder referred to FEMA)
- 0.7.1471.64480 (redacted, remainder referred to FEMA)
- 0.7.1471.64514 (redacted, remainder referred to FEMA)

We are now providing you with a redacted version of the records to identify the NMFS privileged information. The remaining portion of the records, as well as the records that should have been referred in their entirety, are being referred to FEMA and/or Fish and Wildlife Service.

The following two (2) records were inadvertently released and should have been withheld in their entirety under FOIA Exemption 5, 5 U.S.C. § 552(b) (5):

- 0.7.1471.19415 (withheld under the deliberative process privilege and attorney-client privilege)
- 0.7.1471.59222-000002 (withheld under the deliberative process privilege)

Please return the inadvertently released records to our office and destroy any copies, whether in electronic format or hard copy, that you may have made of these 14 records.

You have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:

Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, by facsimile (fax) to 202-482-2552, or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

For your appeal to be complete, it must include the following items:

- a copy of the original request,
- our response to your request,
- a statement explaining why the withheld records should be made available, and why the denial of the records was in error.
- "Freedom of Information Act Appeal" must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
Email: ogis@nara.gov

Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence, please contact Ana Liza Malabanan, FOIA Coordinator, at ana.liza.malabanan@noaa.gov or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,



Samuel D. Rauch III,
Deputy Assistant Administrator
for Regulatory Programs

cc: FEMA FOIA
FWS FOIA
Department of Commerce Office of General Counsel/FOIA Appeal DOC-OS-2017-000941

Ellen Clark - NOAA Federal

From: Ellen Clark - NOAA Federal
Sent: Thursday, August 10, 2017 2:16 PM
To: Mark Graff - NOAA Federal
Subject: Fwd: Weekly FOIA Incoming and High Visibility Requests
Attachments: Re-Filed JW v. DOC Complaint.pdf; Weekly FOIA Incoming and High Visibility Requests 08.02.17 - 08.08.17.xls

Hi Mark,

Rob Moller just forwarded your email below. I'm wondering if you could add the DUS-O staff to your weekly distribution so that we could remain aware of ongoing issues and raise to Ben's attention, as necessary. Our email is duso.staff@noaa.gov

Many thanks for considering,

Ellen

----- Forwarded message -----

From: Robert Moller - NOAA Federal <robert.moller@noaa.gov>
Date: Thu, Aug 10, 2017 at 1:29 PM
Subject: Fwd: Weekly FOIA Incoming and High Visibility Requests
To: Michael Weiss - NOAA Federal <michael.weiss@noaa.gov>, Devin Brakob - NOAA Federal <devin.r.brakob@noaa.gov>, Ellen Clark - NOAA Federal <ellen.clark@noaa.gov>
Cc: Matthew Womble - NOAA Affiliate <matthew.womble@noaa.gov>

Does anyone in DUS-O or CoS office get these? I see Troy is on the list...

----- Forwarded message -----

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Wed, Aug 9, 2017 at 5:32 PM
Subject: Weekly FOIA Incoming and High Visibility Requests
To: Stephen Lipps - NOAA Federal <stephen.lipps@noaa.gov>, "Holmes, Colin" <cholmes@doc.gov>, Robert Moller - NOAA Federal <robert.moller@noaa.gov>, Scott Smullen - NOAA Federal <scott.smullen@noaa.gov>, Jeff Dillen - NOAA Federal <jeff.dillen@noaa.gov>, Kristen Gustafson - NOAA Federal <kristen.l.gustafson@noaa.gov>, Robert Hogan <robert.j.hogan@noaa.gov>
Cc: Tom Taylor <tom.taylor@noaa.gov>, Kimberly Katzenbarger - NOAA FEDERAL <kimberly.katzenbarger@noaa.gov>, Charles <charles.green@noaa.gov>, Dennis Morgan - NOAA Federal <dennis.morgan@noaa.gov>, Stacey Nathanson - NOAA Federal <stacey.nathanson@noaa.gov>, Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>, Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>, Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Zachary Goldstein - NOAA Federal <Zachary.Goldstein@noaa.gov>, Douglas Perry - NOAA Federal <Douglas.A.Perry@noaa.gov>, Nkolika Ndubisi - NOAA Federal <nkolika.ndubisi@noaa.gov>, Jeri Dockett - NOAA Affiliate <jeri.dockett@noaa.gov>, "Cc: OCIO/OPPA" <ocio.ppa@noaa.gov>, Troy Wilds - NOAA Federal <troy.wilds@noaa.gov>, Lawrence Charters - NOAA Federal <lawrence.charters@noaa.gov>, Allison Soussi-Tanani - NOAA Federal <Allison.Soussi-Tanani@noaa.gov>, "Bogomolny, Michael (Federal)" <MBogomolny@doc.gov>, Roxie Allison-Holman -

NOAA Federal <roxie.allison-holman@noaa.gov>, John Almeida - NOAA Federal <john.almeida@noaa.gov>

Good Afternoon,

Attached is this week's report.

American Bridge 21st Century submitted a request seeking communications between NCEI and OSTP. (DOC-NOAA-2017-001670). This request is substantively similar to three other existing requests, including the request in litigation from Judicial Watch referenced later in this report.

Additionally, a request was submitted by Citizens for Responsible Zoning and Landowner Rights for records about the Lake Michigan National Marine Sanctuary. (DOC-NOAA-2017-00001678).

In litigation (b)(5) [REDACTED]
[REDACTED] The underlying request sought communications between Tom Karl and John Holdren. (Complaint attached).

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) [REDACTED] (C)

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--
Robert Moller
Deputy Director
Office of Legislative and Intergovernmental Affairs
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230
Phone: [202-482-3596](tel:2024823596)
Fax: [202-482-4960](tel:2024824960)

--
Ellen J. Clark
Chief of Staff
Deputy Under Secretary for Operations
National Oceanic and Atmospheric Administration

1401 Constitution Ave., NW, Room 58018R

Washington, D.C. 20230

Cell: 301-518-2265 DC Office: 202-482-2820 SS Office: 301-628-1969

responses and disseminates its findings and the requested records to the American public to inform them about “what their government is up to.”

4. Defendant U.S. Department of Commerce is an agency of the United States Government. Defendant has possession, custody, and control of records to which Plaintiff seeks access. Defendant is headquartered at 1401 Constitution Avenue, NW, Washington, DC 20230.

STATEMENT OF FACTS

5. On February 6, 2017 Plaintiff submitted a FOIA request to the National Oceanic and Atmospheric Administration (“NOAA”), a component of Defendant, seeking the following:

Any and all records of communications between NOAA scientist Thomas Karl and Director of the Office of Science and Technology Policy John Holdren.

The timeframe of the request was identified as “January 20, 2009 through January 20, 2017.”

The request was submitted by certified mail.

6. According to U.S. Postal Service records, the request was received by NOAA on February 7, 2017.

7. NOAA confirmed that it received the request on February 8, 2017, assigning the request Tracking Number DOC-NOAA-2017-000580.

8. As of the date of this Complaint, Defendant has failed to: (i) produce all the requested records or demonstrate that the requested records are lawfully exempt from production; and (ii) notify Plaintiff of the scope of responsive records Defendant intends to produce or withhold and the reasons for any withholdings.

COUNT I

Violation of FOIA, 5 U.S.C. § 552

9. Plaintiff realleges paragraphs 1 through 8 as if fully stated herein.

10. Plaintiff is being irreparably harmed by reason of Defendant's violation of FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply with FOIA.

11. To trigger FOIA's administrative exhaustion requirement, Defendant was required to determine whether to comply with Plaintiff's request by March 31, 2017 at the latest. At a minimum, Defendant was required to: (i) gather and review the requested documents; (ii) determine and communicate to Plaintiff the scope of any responsive records Defendant intended to produce or withhold and the reasons for any withholdings; (iii) inform Plaintiff that it may appeal any adequately specific, adverse determination; and (iv) make the records available promptly thereafter. *See, e.g., Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188-89 (D.C. Cir. 2013).

12. Because Defendant failed to determine whether to fully comply with Plaintiff's request within the time period required by FOIA, Plaintiff is deemed to have exhausted its administrative appeal remedies. 5 U.S.C. § 552(a)(6)(C)(i).

WHEREFORE, Plaintiff respectfully requests that the Court: (1) order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request; (2) order Defendant to produce, by a date certain, any and all non-exempt records to Plaintiff's FOIA request and a Vaughn index of any responsive records withheld under claim of exemption; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request; (4) grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (5) grant Plaintiff such other relief as the Court deems just and proper.

Dated: June 29, 2017

Respectfully submitted,

s/ Chris Fedeli

Chris Fedeli

D.C. Bar No. 472919

JUDICIAL WATCH, INC.

425 Third Street SW, Suite 800

Washington, DC 20024

(202) 646-5172

Counsel for Plaintiff

Tracking Number	Type	Requester
DOC-NOAA-2017-001670	Request	Kathleen Casey
DOC-NOAA-2017-001661	Request	Molly Masterton
DOC-NOAA-2017-001678	Request	James Zeiler
DOC-NOAA-2017-001677	Request	Robert C. Stober, Esq.
DOC-NOAA-2017-001647	Request	Ingrid N. Visser
DOC-NOAA-2017-001646	Request	Douglas Mackenzie
DOC-NOAA-2017-001645	Request	Teresa Marshall
DOC-NOAA-2017-001643	Request	Sarah B. Brady
DOC-NOAA-2017-001642	Request	Lisa Demer
DOC-NOAA-2017-001635	Request	Russ Kick

Requester Organization	Submitted	Received	Assigned To
American Bridge 21st Century	08/08/2017	08/08/2017	NOAA
Natural Resouces Defense Council	08/07/2017	08/07/2017	NOAA
Citizens for Responsible Zoning and Landowner Rights	08/07/2017	08/07/2017	NOAA
Hershoff, Lupino & Yagel, LLP	08/07/2017	08/07/2017	NOAA
Orca Research Trust	08/04/2017	08/04/2017	NOAA
	08/03/2017	08/03/2017	NOAA
PETA Foundation	08/03/2017	08/03/2017	NOAA
Delaware Riverkeeper Network	08/03/2017	08/03/2017	NOAA
Alaska Dispatch News	08/02/2017	08/02/2017	NOAA
	08/02/2017	08/02/2017	NOAA

Detail

Incoming-And-Outgoing Correspondence Between The National Centers for Environmental Information And The C
Please produce all records in the Department's possession, custody, or control that support, explain, or otherwise r
We are requesting copies of all emails, sent or received, of NOAA employees Ellen Brody and Russ Green that coi
Request all records associated with the Reportable Marine Incident that occurred on 13MAR2015 involving the UT'
I am applying for an Marine Mammal Inventory Report (MMIR) which includes all living and dead captive orca, liste
Dear NOAA: I request copies of records under the Freedom of Information Act (5 U.S.C. 552) containing data that
The most recent MMIR.

Please see attachment.

Please provide the letter of advisement sent by NOAA to the Alaska villages of Toksook Bay and Nighthmute regard
I hereby request the detailed, hour-by-hour calendar/schedule for the Administrator or Acting Administrator, from J:

Office Of Science & Technology Policy From February 2017 Through August 2017. I am requesting
relate to the Secretary of Commerce's (Secretary's) decision dated July 10, 2017, and final notice published
contain the "key words" Lake Michigan, Lake Michigan National Marine Sanctuary, Lake Michigan
V LITTLE BULLY. A copy of the Captain of the Port Order 15-002 is attached. The undersigned attorney
and globally. Thank you for your assistance.

refers to and/or describes the dispersal of materials in the atmosphere visible over Monterey County, California

including a humpback whale they hunted and killed. The letter was likely sent in 2016.

January 1, 2017, to June 30, 2017. Further, I ask that these documents be sent to me in any digital format

copies of incoming-and-outgoing correspondence, which should include emails, between the National C
hed on July 20, 2017, determining that the state of New Jersey was in compliance with regard to manag
gan NMS, Wisconsin, or any combination of those words related to the creation of an National Marine Sa
' has been retained by SeaTow Islamorada. SeaTow Islamorada was contracted to provide services to L

alifornia on August 3, 2017, including but not limited to, the composition(s) of the materials dispersed and

its in which they exist, such as PDF. Under the terms of the E-FOIA Amendments of 1996, Section 5, if :

centers for Environmental Information within the National Oceanic and Atmospheric Administration and the management of its recreational summer flounder fishery under the Atlantic Coastal Fisheries Cooperative Management Act in Lake Michigan. The period for the requested emails is January 1, 2017 through July 31, 2017 regarding the vessel LITTLE BULLY and its barge while grounded.

and the quantities of each material dispersed. On information and observation, I have probable cause to suspect

that if a document exists in electronic format, it must be released in that format upon request. This request is for

he Office Of Science & Technology Policy, within the Executive Office of the President, from Febru:
agement Act (ACFCMA), 16 U.S.C. Secs 5101-5108 (2012). For the period on or after February 2, 2017
'.

nspect that the materials dispersed include at least Welsbach and Welsbach-like materials (such as the

or my personal use and will not be used in a commercial manner. I agree to pay up to \$10 for this reque:

ary 3, 2017, through the present date
' . (Please see original request for add

oxides of metals), coal as

st. If it will be more than this, plea

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Thursday, August 10, 2017 3:12 PM
To: Lola Stith - NOAA Affiliate
Subject: Re: ACTION REQUIRED: Task for DOC-OS-2017-001241 (REVIEW/SIGN)
Attachments: NOAA RESPONSE_Harkavy_DOC-OS-2017-001241 Fee Estimate Tasker mhg.pdf

Awesome--signed and approved.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

Confidentiality Notice: This e-mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.

On Thu, Aug 10, 2017 at 2:01 PM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Mark (b)(5)

I have attached a draft of the fee estimate tasker for your review/signature. Please sign and return to me.

Thanks!
Lola

----- Forwarded message -----

From: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>
Date: Thu, Aug 10, 2017 at 1:27 PM
Subject: Re: DOC-OS-2017-001241
To: Velna Bullock - NOAA Federal <velna.l.bullock@noaa.gov>
Cc: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Thank you Velna (b)(5)

R/
Lola

On Thu, Aug 10, 2017 at 1:18 PM, Velna Bullock - NOAA Federal <velna.l.bullock@noaa.gov> wrote:

I have nothing on this FOIA except my free estimate. Can you please close. Thank you

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

lola.m.stith@noaa.gov

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

lola.m.stith@noaa.gov



June 21, 2017

MEMORANDUM FOR: Bobbie Parsons, IOS
Pam Moulder, ESA
Jennifer Kuo, BIS
Josephine Arnold, MBDA
Wayne Strickland, NTIS
Mark Graff, NOAA
Ricou Heaton, PTO

Vernon E. Curry, CEN
Stephen Kong, EDA
Victor Powers, ITA
Catherine Fletcher, NIST
Stacy Cheney, NTIA
Jennifer Piel, OIG
Dondi Staunton, BEA

FROM: Michael Toland, Ph.D.
Deputy Chief FOIA Officer
Office of Privacy & Open Government

SUBJECT: Fee Estimate for FOIA Request – DOC-OS-2017-001241
Anne Harkavy, Democracy Forward Foundation

The Department has received a Freedom of Information Act (FOIA) request from Margaret Touchton. The **AMENDED** short description of the FOIA request is, “1. All communications, including any attachments, sent to or from Carl Icahn, Rudolph Giuliani, Richard LeFrak, Steven Roth, Robert Kraft, Ike Perlmutter, Steve Schwarzman, Phil Ruffin, Rupert Murdoch, Corey Lewandowski, Newt Gingrich, Thomas Barrack, Jr., Eric Trump, or Donald Trump, Jr.
2. All communications, including any attachments, made or received in relation to or reflecting the conduct of government business using any nongovernmental email account or nongovernmental communications device established, controlled or used by Carl Icahn, Rudolph Giuliani, Richard LeFrak, Steven Roth, Robert Kraft, Ike Perlmutter, Steve Schwarzman, Phil Ruffin, Rupert Murdoch, Corey Lewandowski, Newt Gingrich, Thomas Barrack, Jr., Eric Trump, or Donald Trump, Jr. *See Competitive Enterprise Institute v. Office of Science and Technology Policy*, 827 F.3d 145 (D.C. Cir. 2016); 36 C.F.R. §§ 1222.10, 1220.18.
3. For both requests, please search the email accounts of all employees of the following offices: Office of the Secretary and Offices of the Under Secretaries. Please also search the email accounts of the following people: Todd Abrajano, Brooke Alexander, Dina Beaumont, Eric Branstad, Austin Browning, Michael Burgess, Henry Childs II, Earl Comstock, Cameron Dorsey, James Edelen, Richard Fuhrman, John Guido, Consuella Jordan, Clay Kiefaber, Peter Krug, Brendan McCommas, William Reinert, James Rockas, Kelly Rzendzian, James Uthmeier, Frederick Volcansek, and Barbara Yankasky-Norton” The FOIA requester is in the “**Other**” category. Per the statutory guidelines of 15 C.F.R.§4.11:

- The chargeable services for “Commercial” are search, review and duplication.
- The chargeable services for “Media, Educational, and/or Non-commercial Scientific Institution” are duplication, excluding the first 100 pages.
- The chargeable services for “Other” are search and duplication, excluding the first two hours of search and the first 100 pages.

Please determine the fee estimate with respect to responsive documents located within your office. **DO NOT SEARCH YET.** Rather, we need an **ESTIMATE** from you as to how many hours/pages you may locate for this request. **This is only a good faith estimate, you should not search in order to come up with the estimate.** Also, a search need not actually find documents in order to be chargeable, so long as, at the outset, there is a reasonable likelihood that there may be responsive documents, and the search is conducted with due diligence.

Please fill in the applicable information and return this sheet by C.O.B. June 26, 2017 to: Ayana Crawford, Freedom of Information Act Specialist, Office of Privacy and Open Government, Room 52010FB, Washington, D.C. 20230, Telephone – 202-482-9109, e-mail – acrawford@doc.gov.

For documents responsive under the Freedom of Information Act:

Computer Search (Complete if necessary.)

Total estimated cost for duplication in electronic version (cost of disc or CD). _____

Total estimated hours of time for electronic search. _____

Total estimated dollar amount for electronic search. _____

Total estimated hours for review. _____

Total estimated dollar amount for review. _____

Manual Search (Complete if necessary.)

Total estimated number of pages of documents. _____

Total estimated dollar amount for duplication. _____

Total estimated hours for search. _____

Total estimated dollar amount for search. _____

Total estimated hours for review. _____

Total estimated dollar amount for review. _____

This information is needed to compute a total “OS” fee estimate for the requester.

No records. X

GRAFF.MARK.HY
RUM.1514447892

Digitally signed by GRAFF.MARK.HYRUM.1514447892
DN: c=US, ou=U.S. Government, ou=DOD, ou=PKI,
ou=OTHER, cn=GRAFF.MARK.HYRUM.1514447892
Date: 2017.08.10 15:10:04 -04'00'

NOAA

Signature (Senior Official)

Bureau

Date

Ana Liza Malabanan - NOAA Federal

From: Ana Liza Malabanan - NOAA Federal
Sent: Thursday, August 10, 2017 4:26 PM
To: Sander, Emile. (Federal)
Cc: Laurie Beale - NOAA Federal; Mark Graff - NOAA Federal
Subject: Amended response for FOIA DOC-NOAA-2016-001479
Attachments: DOC-NOAA-2016-001479 Signed Amended FAL.pdf

Hi Emile,

FYI and for your reference for pending appeal case DOC-OS-2017-000941. We have updated the FOIAonline case for DOC-NOAA-2016-001479.

Regards,

Ana Liza

--

Ana Liza S. Malabanan
Freedom of Information Act (FOIA) Coordinator
Information Services and Management Branch
Operations, Management & Information Division
NOAA Fisheries West Coast Region
U.S. Department of Commerce
Office: 562-980-4008





UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, Maryland 20910
THE DIRECTOR

Christopher Hudak, Esq.
Environmental Advocates
5135 Anza Street
San Francisco, CA 94121

AUG 10 2017

Re: FOIA Request No. DOC-NOAA-DOC-NOAA-2016-001479
Amended FOIA Response Letter

Dear Mr. Hudak:

This letter amends NOAA's previous response letter of January 12, 2017, to your Freedom of Information Act (FOIA) request entered into FOIAonline on July 20, 2016. You requested:

1. Any reports, memoranda, correspondence, or other documents (including electronic mail messages) concerning any Endangered Species Act ("ESA") section 7 consultations (16 U.S.C. § 1536) that have been initiated or proposed, including Biological Opinions, Biological Assessments, or informal consultations, pertaining to the implementation of the National Flood Insurance Program ("NFIP") by the Federal Emergency Management Agency ("FEMA") at the California statewide level or relating to any of the following California counties and/or towns/cities/unincorporated territories therein: Humboldt, Santa Cruz, Monterey, Ventura, Santa Barbara, San Luis Obispo, San Mateo, Marin, and Sonoma Counties.
2. Any reports, memoranda, correspondence, or other documents (including electronic mail messages) concerning any ESA section 10 permits that have been applied for or issued, pertaining to the implementation of the NFIP in California at any location within any of the following California counties and/or towns/cities/unincorporated territories therein Humboldt, Santa Cruz, Monterey, Ventura, Santa Barbara, San Luis Obispo, San Mateo, Marin, and Sonoma Counties.
3. Any reports, memoranda, correspondence, or other documents (including electronic mail messages) submitted to NMFS by FEMA, U.S. Fish and Wildlife Service ("USFWS"), the California Department of Fish and Wildlife, or any other State or Federal agency or department pertaining to how implementation of the NFIP in California may affect species listed as threatened or endangered under the federal Endangered Species Act ("ESA") or critical habitat for such species located within the following California counties: Humboldt, Santa Cruz, Monterey, Ventura, Santa Barbara, San Luis Obispo, San Mateo, Marin, and Sonoma Counties.



4. Any reports, memoranda, correspondence to or from NMFS, or other documents (including Biological Opinions, Biological Assessments, informal consultation letters and other correspondence, or electronic mail messages) concerning or pertaining to any ESA section 7 consultations (either formal or informal) that have been initiated, proposed, or considered for any national level draft or final rule(s) related to the NFIP, in what may be known by NMFS, FEMA, or USFWS personnel as "draft rule/rulemaking regarding updates to the National Flood Insurance Program to facilitate improved Endangered Species Act compliance," "new proposed minimum floodplain management criteria," "proposed ESA-related performance standard," or some related variation thereof.

On August 16, 2016, you agreed to narrow the scope of point 4 of your request, which pertains to materials related to national level National Flood Insurance Program ("NFIP") ESA section 7 consultations, as follows:

"(1) We agree to exclude from point 4 of our pending request any materials that pertain specifically to the NMFS Biological Opinion on the NFIP in Oregon, the final version of which was issued April 14, 2016.

(2) We agree to narrow the timeframe of point 4 of our pending request to 2013-present. We did not specifically discuss on our call yesterday when in 2013 would be the cut-off date, but we agree to the earliest date in 2013 for which NMFS has searchable electronic records."

We located 6,066 records responsive to your request. Our three interim releases dated September 22, 2016, September 30, 2016, and November 22, 2016, provided you with a total of 3,220 records. We provided an additional 1,340 records with our January 12, 2017, response letter.

A total of 43 records responsive to your request were determined exempt from mandatory public disclosure, and were withheld entirely under FOIA Exemption 5, 5 U.S.C. § 552(b) (5). The fully withheld records consist of opinions, recommendations, and other reflections of staff thinking integral to pre-decisional, deliberative process and/or contain attorney client privileged information.

We also released 675 records responsive to your request that were partially redacted under FOIA Exemption 5, 5 U.S.C. § 552(b) (5) and (b)(6). The redacted portion of the records consist of opinions, recommendations, and other reflections of staff thinking integral to predecisional, deliberative process. The portion redacted under Exemption (b)(6) consists of personal telephone numbers. This information is exempt from release under FOIA Exemption 6, 5 U.S.C. § 552(b) (6), because the individuals' right to privacy outweighs the general public's interest in release of personally identifying information.

During our search for records responsive to your request, we identified 788 records that contain information that originated with other Federal agencies. We referred 689 records to the Federal Emergency Management Agency (FEMA Disclosure Branch email at femafoia@dhs.gov or by phone 202-646-3323), 90 records to the U.S. Fish and Wildlife Service (FWS Region 1 FOIA Coordinator via email John.DeClerck@fws.gov or via telephone 503-231-2072), and 9 records to the Army Corps of Engineers (South Pacific Division via email foiaspd@usace.army.mil or telephone 415-503-6635) for a release determination/direct response to you. The U.S. Fish and Wildlife Service provided you with their determination April 20, 2017. The Army Corps of Engineers provided you with their determination on February 7, 2017 (interim), and February 22, 2017 (final).

We have determined that 14 records were inadvertently released in their entirety in the prior productions. We are therefore amending our prior response to correct the inadvertent release and provide you with the correct determinations.

The following five (5) records should have been referred to FEMA:

- 0.7.1471.69558
- 0.7.1471.59276-000001
- 0.7.1471.64479
- 0.7.1471.64493 (NMFS portions are being released)
- 0.7.1471.64503 (NMFS portions are being released)

The following two (2) records should have been referred to FWS:

- 0.7.1471.25614 (NMFS portions are being released)
- 0.7.1471.19536-000001

The following two (2) records should have been referred to FEMA and to FWS:

- 0.7.1471.59342
- 0.7.1471.59262

The following three (3) records should have been identified as privileged by NMFS and partially redacted under FOIA Exemption 5, 5 U.S.C. § 552(b) (5) prior to referral. The NMFS privileged portion of the records consist of opinions, recommendations, and other reflections of staff thinking integral to pre-decisional, deliberative process.

- 0.7.1471.69561 (redacted, remainder referred to FEMA)
- 0.7.1471.64480 (redacted, remainder referred to FEMA)
- 0.7.1471.64514 (redacted, remainder referred to FEMA)

We are now providing you with a redacted version of the records to identify the NMFS privileged information. The remaining portion of the records, as well as the records that should have been referred in their entirety, are being referred to FEMA and/or Fish and Wildlife Service.

The following two (2) records were inadvertently released and should have been withheld in their entirety under FOIA Exemption 5, 5 U.S.C. § 552(b) (5):

- 0.7.1471.19415 (withheld under the deliberative process privilege and attorney-client privilege)
- 0.7.1471.59222-000002 (withheld under the deliberative process privilege)

Please return the inadvertently released records to our office and destroy any copies, whether in electronic format or hard copy, that you may have made of these 14 records.

You have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:

Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, by facsimile (fax) to 202-482-2552, or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

For your appeal to be complete, it must include the following items:

- a copy of the original request,
- our response to your request,
- a statement explaining why the withheld records should be made available, and why the denial of the records was in error.
- "Freedom of Information Act Appeal" must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
Email: ogis@nara.gov

Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence, please contact Ana Liza Malabanan, FOIA Coordinator, at ana.liza.malabanan@noaa.gov or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,



Samuel D. Rauch III,
Deputy Assistant Administrator
for Regulatory Programs

cc: FEMA FOIA
FWS FOIA
Department of Commerce Office of General Counsel/FOIA Appeal DOC-OS-2017-000941

Michael Weiss - NOAA Federal

From: Michael Weiss - NOAA Federal
Sent: Friday, August 11, 2017 4:37 AM
To: Mark Graff - NOAA Federal
Subject: Fwd: Weekly FOIA Incoming and High Visibility Requests
Attachments: Re-Filed JW v. DOC Complaint.pdf; Weekly FOIA Incoming and High Visibility Requests 08.02.17 - 08.08.17.xls

Good morning Mark.

I am now the NOAA Deputy Chief of Staff, succeeding Troy Wilds. Would you please substitute my name for his on the cc list for future distribution of these updates.

Thanks very much,

Michael

--

Michael Weiss
Office of the Under Secretary
National Oceanic and Atmospheric Administration
202-482-5958 (w)
(b)(6) (c)

----- Forwarded message -----

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Wed, Aug 9, 2017 at 5:32 PM
Subject: Weekly FOIA Incoming and High Visibility Requests
To: Stephen Lipps - NOAA Federal <stephen.lipps@noaa.gov>, "Holmes, Colin" <cholmes@doc.gov>, Robert Moller - NOAA Federal <robert.moller@noaa.gov>, Scott Smullen - NOAA Federal <scott.smullen@noaa.gov>, Jeff Dillen - NOAA Federal <jeff.dillen@noaa.gov>, Kristen Gustafson - NOAA Federal <kristen.l.gustafson@noaa.gov>, Robert Hogan <robert.j.hogan@noaa.gov>
Cc: Tom Taylor <tom.taylor@noaa.gov>, Kimberly Katzenbarger - NOAA FEDERAL <kimberly.katzenbarger@noaa.gov>, Charles <charles.green@noaa.gov>, Dennis Morgan - NOAA Federal <dennis.morgan@noaa.gov>, Stacey Nathanson - NOAA Federal <stacey.nathanson@noaa.gov>, Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>, Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>, Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Zachary Goldstein - NOAA Federal <Zachary.Goldstein@noaa.gov>, Douglas Perry - NOAA Federal <Douglas.A.Perry@noaa.gov>, Nkolika Ndubisi - NOAA Federal <nkolika.ndubisi@noaa.gov>, Jeri Dockett - NOAA Affiliate <jeri.dockett@noaa.gov>, "Cc: OCIO/OPPA" <ocio.ppa@noaa.gov>, Troy Wilds - NOAA Federal <troy.wilds@noaa.gov>, Lawrence Charters - NOAA Federal <lawrence.charters@noaa.gov>, Allison Soussi-Tanani - NOAA Federal <Allison.Soussi-Tanani@noaa.gov>, "Bogomolny, Michael (Federal)" <MBogomolny@doc.gov>, Roxie Allison-Holman - NOAA Federal <roxie.allison-holman@noaa.gov>, John Almeida - NOAA Federal <john.almeida@noaa.gov>

Good Afternoon,

Attached is this week's report.

American Bridge 21st Century submitted a request seeking communications between NCEI and OSTP. (DOC-NOAA-2017-001670). This request is substantively similar to three other existing requests, including the request in litigation from Judicial Watch referenced later in this report.

Additionally, a request was submitted by Citizens for Responsible Zoning and Landowner Rights for records about the Lake Michigan National Marine Sanctuary. (DOC-NOAA-2017-00001678).

In litigation (b)(5) [REDACTED]. The underlying request sought communications between Tom Karl and John Holdren. (Complaint attached).

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) [REDACTED] (C)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,)	
425 Third Street SW, Suite 800)	
Washington, DC 20024,)	
)	
Plaintiff,)	
)	Civil Action No.
v.)	
)	
UNITED STATES DEPARTMENT)	
OF COMMERCE,)	
1401 Constitution Avenue, NW)	
Washington, DC 20230,)	
)	
Defendant.)	
<hr style="border: 0.5px solid black;"/>		

COMPLAINT

Plaintiff Judicial Watch, Inc. brings this action against Defendant U.S. Department of Commerce to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As grounds therefor, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff Judicial Watch, Inc. is a not-for-profit, educational organization incorporated under the laws of the District of Columbia and headquartered at 425 Third Street SW, Suite 800, Washington, DC 20024. Plaintiff seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law. As part of its mission, Plaintiff regularly requests records from federal agencies pursuant to FOIA. Plaintiff analyzes the

responses and disseminates its findings and the requested records to the American public to inform them about “what their government is up to.”

4. Defendant U.S. Department of Commerce is an agency of the United States Government. Defendant has possession, custody, and control of records to which Plaintiff seeks access. Defendant is headquartered at 1401 Constitution Avenue, NW, Washington, DC 20230.

STATEMENT OF FACTS

5. On February 6, 2017 Plaintiff submitted a FOIA request to the National Oceanic and Atmospheric Administration (“NOAA”), a component of Defendant, seeking the following:

Any and all records of communications between NOAA scientist Thomas Karl and Director of the Office of Science and Technology Policy John Holdren.

The timeframe of the request was identified as “January 20, 2009 through January 20, 2017.”

The request was submitted by certified mail.

6. According to U.S. Postal Service records, the request was received by NOAA on February 7, 2017.

7. NOAA confirmed that it received the request on February 8, 2017, assigning the request Tracking Number DOC-NOAA-2017-000580.

8. As of the date of this Complaint, Defendant has failed to: (i) produce all the requested records or demonstrate that the requested records are lawfully exempt from production; and (ii) notify Plaintiff of the scope of responsive records Defendant intends to produce or withhold and the reasons for any withholdings.

COUNT I

Violation of FOIA, 5 U.S.C. § 552

9. Plaintiff realleges paragraphs 1 through 8 as if fully stated herein.

10. Plaintiff is being irreparably harmed by reason of Defendant's violation of FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply with FOIA.

11. To trigger FOIA's administrative exhaustion requirement, Defendant was required to determine whether to comply with Plaintiff's request by March 31, 2017 at the latest. At a minimum, Defendant was required to: (i) gather and review the requested documents; (ii) determine and communicate to Plaintiff the scope of any responsive records Defendant intended to produce or withhold and the reasons for any withholdings; (iii) inform Plaintiff that it may appeal any adequately specific, adverse determination; and (iv) make the records available promptly thereafter. *See, e.g., Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188-89 (D.C. Cir. 2013).

12. Because Defendant failed to determine whether to fully comply with Plaintiff's request within the time period required by FOIA, Plaintiff is deemed to have exhausted its administrative appeal remedies. 5 U.S.C. § 552(a)(6)(C)(i).

WHEREFORE, Plaintiff respectfully requests that the Court: (1) order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request; (2) order Defendant to produce, by a date certain, any and all non-exempt records to Plaintiff's FOIA request and a Vaughn index of any responsive records withheld under claim of exemption; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request; (4) grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (5) grant Plaintiff such other relief as the Court deems just and proper.

Dated: June 29, 2017

Respectfully submitted,

s/ Chris Fedeli

Chris Fedeli

D.C. Bar No. 472919

JUDICIAL WATCH, INC.

425 Third Street SW, Suite 800

Washington, DC 20024

(202) 646-5172

Counsel for Plaintiff

Tracking Number	Type	Requester
DOC-NOAA-2017-001670	Request	Kathleen Casey
DOC-NOAA-2017-001661	Request	Molly Masterton
DOC-NOAA-2017-001678	Request	James Zeiler
DOC-NOAA-2017-001677	Request	Robert C. Stober, Esq.
DOC-NOAA-2017-001647	Request	Ingrid N. Visser
DOC-NOAA-2017-001646	Request	Douglas Mackenzie
DOC-NOAA-2017-001645	Request	Teresa Marshall
DOC-NOAA-2017-001643	Request	Sarah B. Brady
DOC-NOAA-2017-001642	Request	Lisa Demer
DOC-NOAA-2017-001635	Request	Russ Kick

Requester Organization	Submitted	Received	Assigned To
American Bridge 21st Century	08/08/2017	08/08/2017	NOAA
Natural Resouces Defense Council	08/07/2017	08/07/2017	NOAA
Citizens for Responsible Zoning and Landowner Rights	08/07/2017	08/07/2017	NOAA
Hershoff, Lupino & Yagel, LLP	08/07/2017	08/07/2017	NOAA
Orca Research Trust	08/04/2017	08/04/2017	NOAA
	08/03/2017	08/03/2017	NOAA
PETA Foundation	08/03/2017	08/03/2017	NOAA
Delaware Riverkeeper Network	08/03/2017	08/03/2017	NOAA
Alaska Dispatch News	08/02/2017	08/02/2017	NOAA
	08/02/2017	08/02/2017	NOAA

Detail

Incoming-And-Outgoing Correspondence Between The National Centers for Environmental Information And The C
Please produce all records in the Department's possession, custody, or control that support, explain, or otherwise r
We are requesting copies of all emails, sent or received, of NOAA employees Ellen Brody and Russ Green that coi
Request all records associated with the Reportable Marine Incident that occurred on 13MAR2015 involving the UT'
I am applying for an Marine Mammal Inventory Report (MMIR) which includes all living and dead captive orca, liste
Dear NOAA: I request copies of records under the Freedom of Information Act (5 U.S.C. 552) containing data that
The most recent MMIR.

Please see attachment.

Please provide the letter of advisement sent by NOAA to the Alaska villages of Toksook Bay and Nighthmute regard
I hereby request the detailed, hour-by-hour calendar/schedule for the Administrator or Acting Administrator, from J:

Office Of Science & Technology Policy From February 2017 Through August 2017. I am requesting
relate to the Secretary of Commerce's (Secretary's) decision dated July 10, 2017, and final notice published
contain the "key words" Lake Michigan, Lake Michigan National Marine Sanctuary, Lake Michigan
V LITTLE BULLY. A copy of the Captain of the Port Order 15-002 is attached. The undersigned attorney
and globally. Thank you for your assistance.

refers to and/or describes the dispersal of materials in the atmosphere visible over Monterey County, California

including a humpback whale they hunted and killed. The letter was likely sent in 2016.

January 1, 2017, to June 30, 2017. Further, I ask that these documents be sent to me in any digital format

copies of incoming-and-outgoing correspondence, which should include emails, between the National C
hed on July 20, 2017, determining that the state of New Jersey was in compliance with regard to manag
gan NMS, Wisconsin, or any combination of those words related to the creation of an National Marine Sa
' has been retained by SeaTow Islamorada. SeaTow Islamorada was contracted to provide services to L

alifornia on August 3, 2017, including but not limited to, the composition(s) of the materials dispersed and

its in which they exist, such as PDF. Under the terms of the E-FOIA Amendments of 1996, Section 5, if :

centers for Environmental Information within the National Oceanic and Atmospheric Administration and the management of its recreational summer flounder fishery under the Atlantic Coastal Fisheries Cooperative Management Act in Lake Michigan. The period for the requested emails is January 1, 2017 through July 31, 2017 regarding the vessel LITTLE BULLY and its barge while grounded.

and the quantities of each material dispersed. On information and observation, I have probable cause to suspect

that if a document exists in electronic format, it must be released in that format upon request. This request is for

he Office Of Science & Technology Policy, within the Executive Office of the President, from Febru:
agement Act (ACFCMA), 16 U.S.C. Secs 5101-5108 (2012). For the period on or after February 2, 2017
'.

nspect that the materials dispersed include at least Welsbach and Welsbach-like materials (such as the

or my personal use and will not be used in a commercial manner. I agree to pay up to \$10 for this reque:

ary 3, 2017, through the present date
' . (Please see original request for add

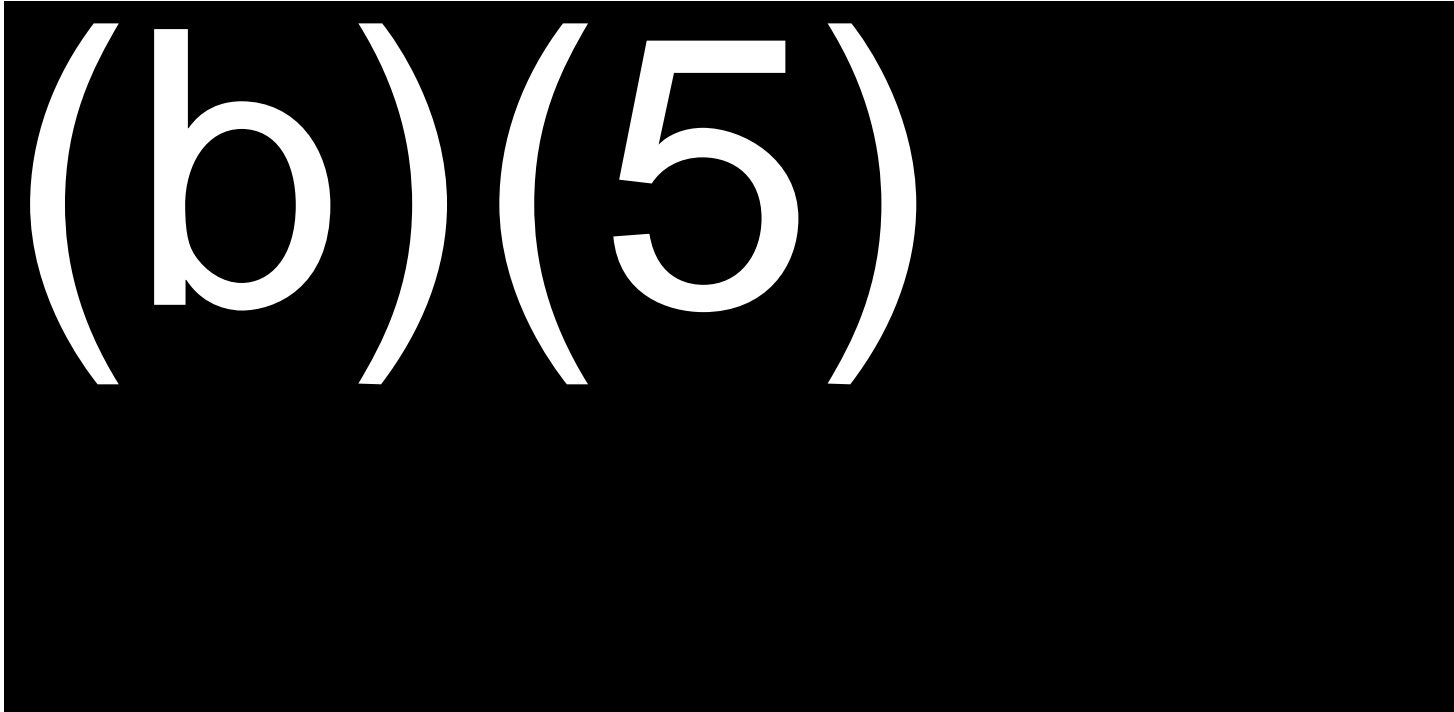
oxides of metals), coal as

st. If it will be more than this, plea

NMFS HQ PR FOIA Requests - NOAA Service Account

From: NMFS HQ PR FOIA Requests - NOAA Service Account
Sent: Friday, August 11, 2017 10:55 AM
To: Mark Graff - NOAA Federal; Lola Stith - NOAA Affiliate; Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate
Cc: Peaches Hodge-Tonic - NOAA Federal
Subject: TEMPLATE REQUESTED: "NOTICE OF DEADLINE VIOLATION / OFFER TO ASSIST for FOIA Request"
Attachments: 2016-000603 Notice of Deadline Violation Email re Letter & Offer to Assist_.pdf; 2017.08.10 NMFS Notice of Violation - Offer to Assist DOC-NOAA-2017-001431.pdf

Good Morning,



(b)(5)

thanks for your time regarding this matter, PR awaits your response and guidance

thx
Jerenda

--
NOAA / National Marine Fisheries Service
FREEDOM OF INFORMATION OFFICE (FOIA)
Office of Protected Resources
[Tawand Tonic, acting PR FOIA Coordinator](#)
Phone: 301 - 427 - 8482



NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov>

FW: Notice of Deadline Violation Letter and Offer to Assist: DOC-NOAA-2016-000603

Lamar Turner - NOAA Federal <lamar.turner@noaa.gov>

Mon, Oct 3, 2016 at 6:37 AM

To: Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>

Cc: NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov>, Lamar Turner - NOAA Federal <lamar.turner@noaa.gov>, Angela Somma - NOAA Federal <angela.somma@noaa.gov>, Jennifer Schultz - NOAA Federal <jennifer.schultz@noaa.gov>

Ruth Ann, I can respond acknowledgement of receipt. However, do you wish to do so, as the attorney?

Lamar N. Turner

FOIA Coordinator

Office of Protected Resources

NOAA Fisheries

1315 East West Highway

Bldg. SSMC3, Room 13733

Silver Spring, Maryland 20910

301-427-8492

From: Christopher Rawlings [mailto:crawlings@biologicaldiversity.org]**Sent:** Friday, September 30, 2016 6:59 PM**To:** lamar.turner@noaa.gov**Cc:** foia@biologicaldiversity.org**Subject:** Notice of Deadline Violation Letter and Offer to Assist: DOC-NOAA-2016-000603

Dear FOIA Officer,

Please see the attached letter from the Center for Biological Diversity ("Center") providing a notice of deadline violation, request for determination, and offer to assist. If you could please acknowledge that you have received this letter, I would appreciate it.

If you have any questions, please feel free to contact me. We look forward to your response.

Thank you,

Chris Teutimez Rawlings

Office Manager / Program Assistant

Center for Biological Diversity

Portland, OR



2016.09.30 DOC-NOAA-2016-00603 Notice of Violation Letter - Offer to Assist.pdf

146K



August 10, 2017

VIA ELECTRONIC MAIL

FOIA Officer
National Marine Fisheries Service
Public Reference Facility (SOU1000)
1315 East-West Highway, Room 9719 (SSMC3)
Silver Spring, MD 20910
nmfs.hq.pr.foia@noaa.gov
pamela.lawrence@noaa.gov

RE: Notice of Deadline Violation and Request for Estimated Date of Completion for National Marine Fisheries Service FOIA Request DOC-NOAA-2017-001431/Offer to Assist

Dear FOIA Coordinator:

I am writing regarding the above-referenced request by the Center for Biological Diversity (“Center”) pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”).

On June 27, 2017, the Center sent via FOIAOnline a request pursuant to FOIA to the National Marine Fisheries Service (“NMFS”). In that request, the Center requested:

1. All records mentioning, including, and/or referencing the draft and/or final biological evaluation of chlorpyrifos under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”);
2. All records mentioning, including, and/or referencing the draft and/or final biological evaluation of malathion under the ESA;
3. All records mentioning, including, and/or referencing the draft and/or final biological evaluation of diazinon under ESA;
4. All records mentioning, including, and/or referencing the draft and/or final biological opinion of chlorpyrifos under the ESA;
5. All records mentioning, including, and/or referencing the draft and/or final biological opinion of malathion under the ESA; and
6. All records mentioning, including, and/or referencing the draft and/or final

biological opinion of diazinon under ESA.

On the same day, FOIAOnline provided the Center an automated receipt of submission and assigned the request tracking number DOC-OS-2017-001431.

On June 28, 2017, NMFS sent the Center an email to notify of the FOIA request tracking number change to DOC-NOAA-2017-001431.

On July 7, 2017, NMFS sent the Center an acknowledgment letter with a request to discuss the scope.

On July 12, 2017, the Center called NMFS to clarify the scope. That same day, NMFS emailed the Center a summary of the phone call, which the Center confirmed to accurately reflect the agreement and understanding made.

On July 17, 2017, NMFS sent the Center an email invoking a ten working day extension. NMFS also suggested a change in the search terms used. The next day, NMFS sent another email suggesting further edits to the search terms. The Center replied in acceptance to the suggested proposal.

On July 25, 2017, NMFS sent an email and automated FOIAOnline email granting the Center's request for a fee waiver.

Since the date the request was received, 31 workdays have passed without receiving any responsive records from NMFS.

Pursuant to FOIA, 5 U.S.C. § 552(a)(6)(A)(i), a determination on this request was due 20 business days after your receipt of the request, or July 26, 2017. Furthermore, FOIA allows an agency to extend the decision deadline beyond the 20 workdays only with "written notice to the person making such request setting forth unusual circumstances for the requested extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days" 5 U.S.C. § 552(a)(6)(B)(i). As described above, NMFS invoked the ten working day extension; however, it has not provided an estimated date of completion.

At this time, the Center is not exercising our legal option under FOIA to file suit to compel NMFS's compliance with FOIA's time limits. 5 U.S.C. § 552(a)(6)(C). However, be informed that time is of the essence in this matter and our patience is not without limits. As the Center informed you in its request letter, the requested information is to better understand the political interference at NMFS from Dow Chemical and industry, the impacts of pesticides on endangered species nationwide. The rationale driving this request is to inform the public about these present issues, and the Center's need to access the requested records is therefore very time sensitive.

Nevertheless, the Center does not wish to initiate litigation at this time because it believes that a cooperative approach is a more productive way to manage and resolve NMFS's delay. Therefore, I am offering to assist your office in any way that I can in order to facilitate NMFS's prompt release of the requested records.

Additionally, beyond the estimated decision date mandate that 5 U.S.C. § 522(a)(6)(B)(i) imposes, as noted above, for any response taking longer than ten days, NMFS must inform the requester “(i) the date on which the agency originally received the request; and (ii) an estimated date on which the agency will complete action on the request.” *Id.* at § 552(a)(7)(B). Therefore, as required by 5 U.S.C. § 552(a)(7)(B)(ii), we request that NMFS immediately provide an estimated date by which we can expect completion of the agency’s unlawfully delayed response to our FOIA request. The Center is mindful that we have legal options available if NMFS fails to respond. *See, e.g., Muttitt v. U.S. Central Command*, 813 F.Supp.2d 221 (D.D.C. 2011) (requester permitted to bring free-standing FOIA claim for agency’s failure to provide ECD).

As we evaluate the need to seek judicial review of this matter, it would be useful if you could let us know whether you have implemented a “first-in/first-out” system for processing a backlog of FOIA requests and, if so, the number of requests in line ahead of this. Although the Center is not pursuing litigation at this time, because of the time-sensitive nature of the requested data, legal action will be required if NMFS fails to make a prompt determination.

If you have any questions, please contact me at (971) 717-6409 or foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below. We look forward to your timely response.

Sincerely,

A handwritten signature in black ink that reads "Margaret E. Townsend". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Margaret E. Townsend
Open Government Staff Attorney
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
foia@biologicaldiversity.org

Ana Liza Malabanan - NOAA Federal

From: Ana Liza Malabanan - NOAA Federal
Sent: Friday, August 11, 2017 7:22 PM
To: Mark Graff - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Samuel Dixon - NOAA Affiliate; Stacey Nathanson - NOAA Federal
Subject: Fwd: DOC-NOAA-2017-000226
Attachments: NMFS FOIA Interim Tasker 2017-000226.pdf; 8-04-2017 SNathanson Email - Update on 226.pdf; 7-19-2017 SNathanson - Re_ GC_F review of DOC-NOAA-2017-00226 (Hiolski - West Coast Crab fisheries disaster).pdf

Mark,

(b)(5)

Stacey,

(b)(5)

I hope you are enjoying your time off!

Ana Liza

----- Forwarded message -----

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Tue, Aug 8, 2017 at 5:06 AM
Subject: DOC-NOAA-2017-000226
To: Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov>
Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>

Hi Ana Liza,

I just checked the status of this request (b)(5) ? We're getting pinged on a lot of these older requests to try to get resolution.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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--

Ana Liza S. Malabanan
Freedom of Information Act (FOIA) Coordinator
Information Services and Management Branch
Operations, Management & Information Division
NOAA Fisheries West Coast Region
U.S. Department of Commerce
Office: 562-980-4008





Re: GC/F review of DOC-NOAA-2017-00226 (Hiolski - West Coast Crab fisheries disaster)

Stacey Nathanson - NOAA Federal <stacey.nathanson@noaa.gov>
To: Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov>

Wed, Jul 19, 2017 at 11:00 AM

Absolutely!

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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On Wed, Jul 19, 2017 at 1:44 PM, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov> wrote:
Thanks. I just left a voicemail message for requester and will try to get an extension.

Can we sent out an interim release of any records?

On Wed, Jul 19, 2017 at 10:03 AM, Stacey Nathanson - NOAA Federal <stacey.nathanson@noaa.gov> wrote:

As Leila said, (b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Thanks!

Stacey

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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On Wed, Jul 19, 2017 at 12:57 PM, Leila Afzal - NOAA Federal <leila.afzal@noaa.gov> wrote:

(b)(5)

L

Sent from my iPhone

On Jul 19, 2017, at 12:47 PM, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov> wrote:

Good morning ladies,

Just following up to confir (b)(5) ?

Thanks!

Ana Liza

On Fri, Jul 14, 2017 at 12:38 PM, Leila Afzal - NOAA Federal <leila.afzal@noaa.gov> wrote:

Stacey has been on another FOIA all day that has a very tight deadline as well. We plan to spend all day Monday going through the documents.

Leila

Sent from my iPhone

On Jul 14, 2017, at 2:44 PM, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov> wrote:

Hi Stacey,

Just following up on your consultation(s) with Mark Graff and your GC colleagues regarding legal review of the records found in response to FOIA DOC-NOAA-2017-000226 (b)(5)

Thank you!

Ana Liza

--
[Ana Liza S. Malabanan](#)
Freedom of Information Act (FOIA) Coordinator
Information Services and Management Branch
Operations, Management & Information Division
NOAA Fisheries West Coast Region
U.S. Department of Commerce
Office: 562-980-4008



Ana Liza S. Malabanan
Freedom of Information Act (FOIA) Coordinator
Information Services and Management Branch
Operations, Management & Information Division
NOAA Fisheries West Coast Region
U.S. Department of Commerce
Office: 562-980-4008



NOAA FISHERIES
West Coast Region



Update on 226

Stacey Nathanson - NOAA Federal <stacey.nathanson@noaa.gov>
To: Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov>

Fri, Aug 4, 2017 at 8:51 AM

Hi Ana Liza,

I just wanted to give you an update on my review of the files for 226. (b)(5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Does that work for you? Thanks!

Stacey
Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: 301-713-9673
Email: Stacey.Nathanson@noaa.gov

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August 9, 2017

TASK MEMORANDUM FOR: Lead FOIA Coordinator
FROM: NOAA FOIA Office (NOS)
SUBJECT: FOIA Request No. DOC-NOAA-2017-000226

I am forwarding a copy of the attached FOIA request for your attention. Please follow this procedure:

1. Note the Time Period and Due Date:

The search period date for this FOIA is **February 9, 2016 to December 6, 2016** or the start date of actual document search. In order to complete this request within the regulatory time-frame, please respond to the requester by **January 5, 2017**.

2. Attach Completed FOIA Search Log(s) (See “Correspondence Other” in FO for template)

Search every location that could reasonably contain responsive documents.

3. Assemble Potentially Responsive Records:

Note that potentially responsive records may include emails with attachments, final documents, draft documents, maps, shapefiles, raw data, handwritten notes, informal records, and electronic records.

4. Produce Two Document Sets:

Once assembled, produce two document-sets in electronic format. Mark each identical page from each document-set with a uniquely identifiable number. Maintain one set as an original set. The original documents must have no redactions. Maintain the original document set in an accessible repository for six years.

Use the second document-set to apply FOIA exemptions. **Annotate the FOIA exemptions next to, or over, each redaction.**

As you organize the potentially responsive documents, please identify documents or portions of documents that originated with another office, agency, or bureau. Please refer the documents, or request a consultation, as required by FOIA regulations.

5. Summarize the FOIA Review:

Please check **ALL** appropriate boxes.

Interim Response number **1** made in **August 2017**

Final Response

The NMFS FOIA office closed this request due to non-payment of fees, or requester's failure to respond to correspondence or,

Responsive records in our possession can be released in their entirety.

Responsive records in our possession contain segregable exempted material and should be partially withheld. The applicable exemption is noted over all drawn redactions.

Responsive records in our possession contain exempted material and should be withheld in full. The applicable exemption is noted over all drawn redactions and/or listed in the response letter and index.

Responsive records in our possession belonging to another, office, bureau, or federal agency for disclosure determination(s) have been sent to that component for referral or consultation.

Responsive records in our possession are openly available to the public.

A reasonable search was conducted and no responsive records were located.

A foreseeable harm review and analysis was not applicable.

A foreseeable harm review and analysis was completed for documents containing entirely or partially withheld content. Reviewers determined that disclosure of withheld content would result in harm to an interest protected by the statutory exemption(s), or that disclosure is prohibited by law.

Check **all** exemptions that apply to this foreseeable harm review:

(b)(2) Agency Personnel Rules/Practices

(b)(3) Federal Law Prohibits Disclosure

(b)(4) Business Trade and Financial Information

(b)(5) Attorney Work Product/Attorney-Client Privilege/Deliberative Process

(b)(6) Personal Privacy Protection

(b)(7) Law Enforcement Purposes

6. Verify the following items if a Final Response is being made:

Admin Cost tab has been completed (or request is being closed as Failure to Pay Fee or Failure to Clarify Scope).

NMFS FOIA Liaison (or assistant) has been set as first reviewer in the Review tab.

The responsive records have been uploaded to FOIAonline (FO) and properly coded for release type (UR, RR, etc.).

Exemptions used have also been noted in FO next to each record (click the pencil icon).

A FORDEM or Bulk Upload memo is being used in place of the responsive records and has been uploaded to both the Records tab and Other Correspondence.

Search Logs have been properly filled out, signed, and uploaded to Other Correspondence (if search was conducted).

The Final Action Letter (FAL) contains an accurate count of the records being released and describes all exemption(s) being applied to the records.

Draft FAL is uploaded to Other Correspondence.

7. Obtain Signatures to Verify Review:

MALABANAN.ANA
LIZA.S.1365888147




Digitally signed by MALABANAN.ANA
LIZA.S.1365888147
Date: 2017.08.09 12:45:33 -07'00'

Lead Coordinator

Date

WULFF.RYAN.J.1
370086890



Digitally signed by
WULFF.RYAN.J.1370086890
Date: 2017.08.09 13:06:05 -07'00'

RO/LO Senior Official

Date

See email from Stacey Nathanson, GC/F, dated 7-19-2017 and 8-04-2017

*General Counsel

Date

GC was consulted on this response, but did not review documents. GC has no legal objection assuming the information contained in this form is accurate.

GC was consulted and reviewed certain documents containing possible redactions and withholdings. GC has no legal objection to the agency's response for those specific documents.

*** NOTE:** GC review is necessary for any FOIA release that is in litigation or is related to a request in litigation. However, GC signature is not necessary for full releases that do not involve litigation or the threat of litigation.

Peaches Hodge-Tonic - NOAA Federal

From: Peaches Hodge-Tonic - NOAA Federal
Sent: Sunday, August 13, 2017 11:56 PM
To: Adam Issenberg - NOAA Federal; Anthony Winbush - NOAA Federal; Beverly Smith - NOAA Federal; Bonnie Hossack - NOAA Affiliate; Brent Miyamoto - NOAA Federal; Daniel Pollak - NOAA Federal; Ellen Sebastian - NOAA Federal; Garth Griffin - NOAA Federal; Kelly Shotts - NOAA Federal; Kirk Essmyer - NOAA Federal; Kristen Gustafson - NOAA Federal; Laurie Mukai - NOAA Federal; Mark Capelli - NOAA Federal; Mark Graff - NOAA Federal; NMFS HQ PR FOIA Requests - NOAA Service Account; Pam Lawrence; Pua Kamaka - NOAA Federal; Rodney Vieira - NOAA Federal; Samuel Dixon - NOAA Affiliate; Ron Aldrich - NOAA Affiliate; Sonja Kromann - NOAA Federal; Stephen Lipps - NOAA Federal; Steven Goodman - NOAA Federal
Cc: Peaches Hodge-Tonic
Subject: ACTION: FOIA Request 2017-001431 Pesticides Final Biological Evaluations
Attachments: SME Search Tasker 17-001431_rev PT 8_11_11.pdf; Scope narrowed and confirmed by requester.pdf; 2017.06.27 FOIA Request to DOC RE Pesticides Final Bio Evals.pdf

To The Following Regions, Headquarters, Science Centers, GC Attorneys, FOIA Coordinator (FC) Assistant FOIA Coordinator (AFC), POC's and Subject Matter Experts:

(b) (5)

(b) (5)

Please see the attached FOIA request along with Subject Matter Expert Review and Search Task Memo related to the above.

Please note, the **FOIA scope has been narrowed** from the original attached request.

We would greatly appreciate receiving all responsible records no **later than COB by August 18, 2017.**

Please see the attachment for more specifics on how to process responsive records you discover.

If you have questions, please contact Office of Protected Resources, SME & POC; Thomas Hooper @ Thomas.hooper@noaa.gov

Thanks

Peaches Tonic
Acting FOIA Coordinator
Office of Protected Resources
301-427-8482



June 27, 2017

[VIA FOIAONLINE.REGULATIONS.GOV](http://VIA.FOIAONLINE.REGULATIONS.GOV)

U.S. Department of Commerce

Re: Freedom of Information Act Request: Pesticides' Final Biological Evaluations

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), from the Center for Biological Diversity (“Center”), a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process.

REQUESTED RECORDS

The Center requests the following records from the U.S. Department of Commerce (“DOC”) from April 1, 2017 to the date of this search:

1. All records mentioning, including, and/or referencing the draft and/or final biological evaluation of chlorpyrifos under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”);
2. All records mentioning, including, and/or referencing the draft and/or final biological evaluation of malathion under the ESA;
3. All records mentioning, including, and/or referencing the draft and/or final biological evaluation of diazinon under ESA;
4. All records mentioning, including, and/or referencing the draft and/or final biological opinion of chlorpyrifos under the ESA;
5. All records mentioning, including, and/or referencing the draft and/or final biological opinion of malathion under the ESA; and
6. All records mentioning, including, and/or referencing the draft and/or final biological opinion of diazinon under ESA.

Please note that this request does not apply to documents found online or under the docket EPA-HQ-OPP-2016-0167.

For this request, the term “all records” refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, letters,

notes, telephone records, telephone notes, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, telephone logs, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request. 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 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, 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 determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

The Center is willing to receive records on a rolling basis.

Finally, FOIA's "frequently requested record" provision was enacted as part of the 1996 Electronic Freedom of Information Act Amendments, and requires all federal agencies to give "reading room" treatment to any FOIA-processed records that, "because of the nature of their subject matter, the agency determines have become the subject of subsequent requests for substantially the same records." *See* 5 U.S.C. § 552(a)(2)(D)(ii)(I). Also, enacted as part of the 2016 FOIA Improvement Act, FOIA's Rule of 3 requires all federal agencies to proactively "make available for public inspection in an electronic format" "copies of records, regardless of form or format ... that have been released to any person ... and ... that have been requested 3 or more times." 5 U.S.C. § 552(a)(2)(D)(ii)(II). Therefore, we respectfully request that you make available online any records that the agency determines will become the subject of subsequent

requests for substantially the same records, and records that have been requested three or more times.

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 ask that you please provide all records in an electronic format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or Excel spreadsheet, or; (2) for files that are in .PDF format, without any “portfolios” or “embedded files.” Portfolios and embedded files within files are not readily accessible. *Please do not provide the records in a single, or “batched,” .PDF file.* We appreciate the inclusion of an index.

RECORD DELIVERY

We appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). Failure to comply within the statutory timeframe may result in the Center taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. You may email or mail copies of the requested records to:

Margaret E. Townsend
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211
mtownsend@biologicaldiversity.org

If you find that this request is unclear, or if the responsive records are voluminous, please call me at (971) 717-6409 to discuss the scope of this request.

REQUEST FOR FEE WAIVER

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 the Center 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. The Center 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 DOC FOIA regulations at 15 C.F.R. § 4.11(l) establish the same standard.

Thus, DOC 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. 15 C.F.R. § 4.11(l)(2)(i) – (iv). As shown below, the Center 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 DOC. This request asks for from April 1, 2017 to the date of this search: (1) all records mentioning, including, and/or referencing the draft and/or final biological evaluation of chlorpyrifos under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA"); (2) all records mentioning, including, and/or referencing the draft and/or final biological evaluation of malathion under the ESA; (3) all records mentioning, including, and/or referencing the draft and/or final biological evaluation of diazinon under ESA; (4) all records mentioning, including, and/or referencing the draft and/or final biological opinion of chlorpyrifos under the ESA; (5) all records mentioning, including, and/or referencing the draft and/or final biological opinion of malathion under the ESA; and (6) all records mentioning, including, and/or referencing the draft and/or final biological opinion of diazinon under ESA. Please note that this request does not apply to documents found online or under the docket EPA-HQ-OPP-2016-0167.

This FOIA will provide the Center and the public with crucial insight into the DOC's compliance with the ESA. It is clear that the biological evaluations under the ESA are specific and identifiable activities of the government, in this case the executive branch agency, the DOC.

Judicial Watch, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, the Center meets this factor.

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

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 the Center to convey to the public information about the political interference at DOC from Dow Chemical and industry, and will use the records to understand the impacts of pesticides on endangered species nationwide. In 2017, Dow Chemical sent letters to the DOC requesting that the National Marine Fisheries Service cease work on the biological opinions on three pesticides, despite the clear requirement of the ESA to make decisions solely on the best available science and complete consultations under a timeframe set by law. These records will show whether political appointees unlawfully blocked the completion of the biological opinions. Once the information is made available, the Center will analyze it and present it to its 1.3 million members and online activists 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 DOC operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons’ Understanding of Pesticides’ Final Biological Evaluations

The requested records will contribute to public understanding of how the DOC’s actions and decisions are consistent with the ESA. As explained above, the records will contribute to public understanding of this topic.

Activities of the DOC generally, and specifically whether the DOC based its decisions to unlawfully preclude completion of draft biological evaluations in improper political influence, are areas of interest to a reasonably broad segment of the public. The Center will use the information it obtains from the disclosed records to educate the public at large about to what extent industry special interests manipulated decisions relating to these biological evaluations. *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 the Center’s synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained in 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 the DOC’s preclusion of completion of biological evaluations of pesticides that are not currently in the public domain. *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... .”¹

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of the DOC’s decision to thwart completion of biological evaluations of pesticides. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about whether political appointees unlawfully blocked the completion of biological evaluations.

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

The Center 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 DOC’s decisions and actions surrounding the pesticides’ evaluations, 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 because the requested records will help reveal more about the DOC’s directive to halt completion of pesticides’ evaluations.

The records are also certain to shed light on the DOC’s compliance with the ESA. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Center meets this factor as well.

¹ In this connection, it is immaterial whether any portion of the Center’s request may currently be in the public domain because the Center requests considerably more than any piece of information that may currently be available to other individuals. *See Judicial Watch*, 326 F.3d at 1315.

II. The Center has a Demonstrated Ability to Disseminate the Requested Information Broadly.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the activities of numerous government agencies for over 25 years, and has consistently displayed its ability to disseminate information granted to it through FOIA. In consistently granting the Center's fee waivers, agencies have recognized: (1) that the information requested by the Center 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 the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center's track record of active participation in oversight of governmental activities and decision making, and its consistent contribution to the public's understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

The Center intends to use the records requested here similarly. The Center's work appears in more than 2,500 news stories online and in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, and *Los Angeles Times*. Many media outlets have reported on Dow Chemical and industries' influence on federal agencies' decision making utilizing information obtained by the Center from federal agencies including DOC. In 2016, more than 2 million people visited the Center's extensive website, viewing a total of more than 5.2 million pages. The Center sends out more than 277 email newsletters and action alerts per year to more than 1.3 million members and supporters. Three times a year, the Center sends printed newsletters to more than 58,016 members. More than 233,000 people have "liked" the Center on Facebook, and there are regular postings regarding the changing priorities under the Trump administration. The Center also regularly tweets to more than 52,200 followers on Twitter. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Public oversight and enhanced understanding of DOC'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). The Center 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 the Center to show how it distributes information to the public generally. *Id.*

III. Obtaining the Requested Records is of No Commercial Interest to the Center.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. Founded in 1994, the Center is a

501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than 1.3 million members and online activists dedicated to the protection of endangered and threatened species and wild places. The Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

IV. Conclusion

For all of the foregoing reasons, the Center qualifies for a full fee waiver. We hope that the DOC 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 (971) 717-6409 or foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,

A handwritten signature in black ink, appearing to read "Margaret E. Townsend". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Margaret E. Townsend
Open Government Staff Attorney
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
foia@biologicaldiversity.org

From: Pamela Lawrence - NOAA Federal [mailto:pamela.lawrence@noaa.gov]

Sent: Wednesday, July 12, 2017 11:32 AM

To: Margaret Townsend; Peaches Hodge-Tonic - NOAA Federal; Cathy Tortorici - NOAA Federal; Thomas Hooper; Daniel Pollak - NOAA Federal

Subject: FOIA 2017-001431 - Scope

Per our phone call, we have tentatively agreed, pending confirmation with your requester, to the following limitations:

We will only include in your request documents regarding the FWS biological opinion when we have relied on information found in those documents.

We will exclude from your request the following:

- 1 - routine internal reporting of pending matters
- 2 - personnel matters
- 3 - printed materials unless those printed materials have handwritten notes

You have also tentatively agreed that when the last email in an unbroken email chain contains all of the earlier emails, we may exclude all but that last email. In the case that the first email in such a chain had an attachment, we would treat that attachment as included in your request.

Please advise as to whether this accurately captures our conversation, and whether your requester is comfortable with these changes.

--

Pamela Lawrence, Attorney Advisor

National Oceanic and Atmospheric Administration

U.S. Department of Commerce

Office (301) 713-9672; Cell (240) 328-9928

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MEMORANDUM TO: All Offices Holding Responsive Records

FROM: Tawand Tonic, Acting FOIA Coordinator
Thomas Hooper/Cathy Tortorici (SMEs)

SUBJECT: **DOC-NOAA-2017-001431**
Requester: Margaret E. Townsend, Center for Biological Diversity
Subject Matter: Pesticides' Final Biological Evaluations

We are compiling records responsive to the following FOIA request:

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(b) (5)

Kolsky, Joshua (USADC)

From: Kolsky, Joshua (USADC)
Sent: Monday, August 14, 2017 1:53 PM
To: Mark Graff - NOAA Federal; Bogomolny, Michael (Federal)
Cc: Nathanson, Stacey (Federal); Almeida, John (Federal); Amanda Patterson - NOAA Federal
Subject: RE: Proposed production schedule for Cause of Action v. NOAA
Attachments: Answer.docx; Complaint.pdf

(b)(5)

Thanks,
Josh

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Monday, August 14, 2017 1:41 PM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Cc: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>; Amanda Patterson - NOAA Federal <amanda.patterson@noaa.gov>
Subject: Re: Proposed production schedule for Cause of Action v. NOAA

Good Afternoon,

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)

(b)(6) (C)

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On Mon, Aug 14, 2017 at 11:45 AM, Bogomolny, Michael (Federal) <MBogomolny@doc.gov> wrote:

Works for me.

-bogo

From: Kolsky, Joshua (USADC) [mailto:Joshua.Kolsky@usdoj.gov]
Sent: Monday, August 14, 2017 10:28 AM

To: Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>;
Graff, Mark (Federal) <Mark.Graff@noaa.gov>
Subject: RE: Proposed production schedule for Cause of Action v. NOAA

Fine with me.

From: Stacey Nathanson - NOAA Federal [<mailto:stacey.nathanson@noaa.gov>]
Sent: Monday, August 14, 2017 10:11 AM
To: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>;
Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Subject: Re: Proposed production schedule for Cause of Action v. NOAA

Good morning --

Just confirming our call this afternoon. Can we start at 1:30 instead? Please let me know if that works for all. If it does, the call in number is [301-713-9666](tel:301-713-9666). No passcode needed. Thanks!

Stacey

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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On Tue, Aug 8, 2017 at 2:12 PM, Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov> wrote:

Fine with me.

From: Bogomolny, Michael (Federal) [<mailto:MBogomolny@doc.gov>]
Sent: Tuesday, August 8, 2017 1:21 PM
To: Almeida, John (Federal) <John.Almeida@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>

Subject: RE: Proposed production schedule for Cause of Action v. NOAA

For me as well.

From: John Almeida - NOAA Federal [<mailto:john.almeida@noaa.gov>]

Sent: Tuesday, August 08, 2017 1:10 PM

To: Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>

Cc: Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>

Subject: Re: Proposed production schedule for Cause of Action v. NOAA

Works for me.

On Tue, Aug 8, 2017 at 1:08 PM, Stacey Nathanson - NOAA Federal <stacey.nathanson@noaa.gov> wrote:

I propose we talk on Monday, August 14, early afternoon (b)(5) [REDACTED]
[REDACTED] Does 1 pm work for folks? Thanks!

Stacey

On Tuesday, August 8, 2017, Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov> wrote:

(b)(5) [REDACTED]
[REDACTED]
[REDACTED].

(b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

Thanks,
Josh

From: Stacey Nathanson - NOAA Federal [<mailto:stacey.nathanson@noaa.gov>]

Sent: Friday, August 4, 2017 11:32 PM

To: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>

Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>

Subject: Re: Proposed production schedule for Cause of Action v. NOAA

(b)(5) [REDACTED]

(b)(5)
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
(b)(6)

Thanks!

Stacey

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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On Fri, Aug 4, 2017 at 6:11 PM, Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov> wrote:

(b)(5)
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

From: Bogomolny, Michael (Federal) [<mailto:MBogomolny@doc.gov>]
Sent: Friday, August 4, 2017 3:50 PM
To: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Almeida, John (Federal) <John.Almeida@noaa.gov>
Subject: RE: Proposed production schedule for Cause of Action v. NOAA

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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--

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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(b) (5)

(b)(5)

(b) (5)

(b)(5)

(b)(5)

3. The records at issue in the second request concern all communications sent or received by employees of NOAA's National Marine Fisheries Service ("NFMS") who attended the April 18–20, 2017 New England Fishery Management Council ("NEFMC") meeting. During this meeting, the NEFMC considered and took final action on portions of the Industry-Funded Monitoring Omnibus Amendment ("Omnibus Amendment"). CoA Institute filed this request in pursuit of educating interested segments of the public about NOAA's communications regarding the Omnibus Amendment and to explore the Omnibus Amendment's impact on the economic viability of domestic fisheries. This educational goal is all the more important in light of the Secretary of Commerce's ongoing review of the rule for compliance with federal law.

4. By failing to provide a final determination on either of the foregoing requests or to produce non-exempt portions of responsive records in a timely manner, NOAA and its components have withheld records to which CoA Institute has a right and that serve the public interest in transparent and accountable government.

JURISDICTION AND VENUE

5. Jurisdiction is asserted pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

6. Venue is proper pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 552(a)(4)(B).

PARTIES

7. CoA Institute is a 501(c)(3) non-profit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair. In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. It regularly requests access under the FOIA to the public records of federal agencies, entities, and offices, including NOAA, and disseminates its findings, analysis, and commentary to the general public.

8. NOAA is an agency within the meaning of 5 U.S.C. § 552(f)(1). NOAA components—*viz.*, OGC and NMFS—have possession, custody, and/or control of records to which CoA Institute seeks access and which are the subject of this Complaint.

FACTS

A. The April 27, 2017 FOIA Request – DOC-NOAA-2017-001101

9. By letter, dated April 27, 2017, CoA Institute submitted a FOIA request to NOAA seeking access to “any final guidance concerning the retention of instant messaging sessions created or received through the ‘Google Chat’ or ‘Google Hangouts’ feature of [NOAA’s] United Messaging System (*i.e.*, NOAA’s Google-hosted agency e-mail platform).” Ex. 1 at 2. CoA Institute specified that any records concerning NOAA OGC’s 2012 “direction” that Google Chat and Google Hangout message be considered “off the record” would be responsive, as would “other records reflecting agency-wide guidance on the retention of chat/instant or text messages created or received through NOAA’s Google-hosted e-mail platform.” Ex. 1 at 2.

10. CoA Institute also requested a public interest fee waiver and classification as a representative of the news media for fee purposes. Ex. 1 at 2–4.

11. NOAA received CoA Institute’s FOIA request on April 27, 2017 and assigned it tracking number DOC-NOAA-2017-001101. Ex. 2. The agency did not provide an estimated date of completion.

12. By letter, dated May 19, 2017, NOAA “discretionarily granted [CoA Institute] a full waiver” of fees associated with processing CoA Institute’s FOIA request. Ex. 3 at 3. NOAA did not provide a determination on CoA Institute’s request for news media requester status.

13. To date, NOAA has failed to provide any update on its processing of CoA Institute's FOIA request number DOC-NOAA-2017-001101. The agency has yet to issue an interim response, final determination, or production of records.

B. The May 1, 2017 FOIA Request – DOC-NOAA-2017-001194

14. By letter, dated May 1, 2017, CoA Institute submitted a second FOIA request to NOAA seeking access to “all communications—including, but not limited to, e-mail, instant messaging, Google hangouts or Google chat messages, text messages, SMS messages, Blackberry messages, Skype messages, handwritten notes, or communications through any other media—sent or received by any and all NOAA employees who attended the April 18–20, 2017 NEFMC meetings in their official capacity.” Ex. 4 at 3. CoA Institute further specified that the list of individual employees “should include, but not be limited to: John Bullard, Michael Pentony, Elizabeth Chilton, Amy Martins, J. Michael Lanning, Jon Hare, Moira Kelly, and Carrie Nordeen.” Ex. 4 at 3.

15. CoA Institute also requested expedited processing for this request, Ex. 4 at 3–4, as well as a public interest fee waiver and classification as a representative of the news media for fee purposes. Ex. 4 at 4–5.

16. NOAA acknowledged receipt of CoA Institute's FOIA request by letter, dated May 11, 2017, and assigned it tracking number DOC-NOAA-2017-001194. Ex. 5. The agency invoked a ten-day extension for its response due to “unusual circumstances” and estimated a completion date of June 22, 2017. Ex. 5.

17. On May 17, 2017, NOAA determined CoA Institute's request for a fee waiver “to be not applicable as the request is not billable.” Ex. 6.

18. NOAA denied CoA Institute's request for expedited processing on May 18, 2017. Ex. 7. CoA Institute appealed this denial by letter, dated May 23, 2017. Ex. 8. The appeal was subsequently denied on June 20, 2017. Ex. 9.

19. By e-mail, dated May 25, 2017, NOAA rescinded its initial non-billable fee determination and requested supplemental information to re-evaluate CoA Institute's request for a public interested fee waiver. Ex. 10. NOAA further indicated that "[n]o action will be taken on [the] request pending [CoA Institute's] response . . . and [the] request will be tolled pending [any] response." Ex. 10.

20. On May 31, 2017, CoA Institute responded via e-mail to NOAA's request for supplemental information. Ex. 11. This reply ended the tolling period. *See* 5 U.S.C. § 552(a)(6)(A)(ii)(II) ("[T]he agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.").

21. To date, NOAA has failed to provide any update on its processing of CoA Institute's FOIA request number DOC-NOAA-2017-001194. The agency has also failed to issue a fee waiver determination in light of CoA Institute's May 31, 2017 letter, let alone an interim response, final determination, or production of non-exempt records.

COUNT I

Violation of the FOIA: Failure to Comply with Statutory Requirements

22. CoA Institute repeats all of the above paragraphs.

23. The FOIA requires an agency to accept and process any request for access to agency records that (a) "reasonably describes such records," and (b) "is made in accordance with published rules stating the time, place, fees, . . . and procedures to be followed[.]" 5 U.S.C. § 552(a)(3)(A).

24. The FOIA further requires an agency to respond to a valid request within twenty (20) business days or, in "unusual circumstances," within thirty (30) business days. *Id.*

§ 552(a)(6)(A)–(B). If an agency requires additional time, the FOIA mandates that the agency provide the requester “an opportunity to arrange with the agency an alternative time frame for processing the request[.]” *Id.* § 552(a)(6)(B)(ii).

A. April 27, 2017 Request – DOC-NOAA-2017-001101

25. CoA Institute’s April 27, 2017 FOIA request seeks access to agency records maintained by NOAA, reasonably describes the records sought, and otherwise complies with the FOIA and applicable NOAA regulations.

26. More than thirty (30) business days have passed since NOAA received CoA Institute’s FOIA request on April 27, 2017.

27. NOAA has failed to issue a final determination on or produce records responsive to CoA Institute’s FOIA request within the applicable FOIA time limits.

28. CoA Institute has fully exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C).

B. May 1, 2017 Request – DOC-NOAA-2017-001194

29. CoA Institute’s May 1, 2017 FOIA request seeks access to agency records maintained by NOAA, reasonably describes the records sought, and otherwise complies with the FOIA and applicable NOAA regulations.

30. More than thirty (30) business days have passed since NOAA received CoA Institute’s FOIA request on April 27, 2017. Between NOAA’s acknowledgement on May 11, 2017 and its request for supplemental information on May 25, 2017, at which point the response period was tolled, nine (9) business days passed. Since CoA Institute’s response on May 31, 2017, which restarted the clock, an additional twenty-five (25) business days have passed.

31. NOAA has failed to issue a final determination on or produce records responsive to CoA Institute's FOIA request within the applicable FOIA time limits.

32. CoA Institute has fully exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C).

RELIEF REQUESTED

WHEREFORE, CoA Institute respectfully requests and prays that this Court:

- a. Order NOAA to process CoA Institute's April 27, 2017 and May 1, 2017 FOIA requests and to issue determinations on those requests within twenty (20) business days of the date of the Order;
- b. Order NOAA to produce all responsive records promptly upon issuing its final determinations on the April 27, 2017 and May 1, 2017 FOIA requests;
- c. Award CoA Institute its costs and reasonable attorney fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
- d. Grant such other relief as the Court may deem just and proper.

//

//

//

Dated: July 6, 2017

Respectfully submitted,

/s/ Ryan P. Mulvey

Ryan P. Mulvey

D.C. Bar No. 1024362

Julie A. Smith

D.C. Bar No. 435292

Eric R. Bolinder

D.C. Bar No. 1028335

CAUSE OF ACTION INSTITUTE

1875 Eye Street, N.W., Suite 800

Washington, D.C. 20006

Telephone: (202) 499-4232

Facsimile: (202) 330-5842

ryan.mulvey@causeofaction.org

julie.smith@causeofaction.org

eric.bolinder@causeofaction.org

Counsel for Plaintiff CoA Institute

NMFS HQ PR FOIA Requests - NOAA Service Account

From: NMFS HQ PR FOIA Requests - NOAA Service Account
Sent: Monday, August 14, 2017 6:16 PM
To: Mark Graff - NOAA Federal; Lola Stith - NOAA Affiliate; Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate
Cc: Peaches Hodge-Tonic - NOAA Federal
Subject: In Your FO Queue for Review/Closeout: 16-603 & 16-604 Admin Withdrawals
Attachments: 16-603 & 16-604 Withdrawal Letter (8-14-17).pdf; 16-603 & 16-604 Withdrawal Tasker (signed).pdf; GC clearance_ 16-603 & 604 combined Withdrawal letter.pdf; Update Discussion 8-9-17 Requester email to Withdraw.pdf

(b)(5) [Redacted]

[Redacted]

- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

thx
Jerenda

--
NOAA / National Marine Fisheries Service
FREEDOM OF INFORMATION OFFICE (FOIA)
Office of Protected Resources
Tawand Tonic, acting PR FOIA Coordinator
Phone: 301 - 427 - 8482



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

August 15, 2017

Ms. Margaret Townsend
Center for Biological Diversity
P. O Box 11374
Portland, OR 97211-0374

Re: FOIA Request DOC-NOAA-2016-000603
FOIA Request DOC-NOAA-2016-000604

Dear Ms. Townsend:

This confirms that, pursuant to the email from Virginia Wu dated August 8, 2017 (in response to the FOIA Officer's inquiry), CBD has indicated it wishes to withdraw the Freedom of Information Act (FOIA) requests of February 10, 2016 for records relating to:

2016-000603

Critical Habitat Rulemaking and Policy:

1. All records related to Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat, Docket No. NOAA-NMFS-2014-0093-0001.
2. All records related to Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, Docket No. FWS-R9-ES-2011-0104-0026.

2016-000604

Interagency Cooperation: Endangered Species Act – Incidental Take Statements, Docket No. NOAA_FRDOC_0001-3430.

As we understand the August 8 email to supersede our prior scoping communications, we are discontinuing processing of these requests.

The withdrawal of your requests does not preclude you from filing other requests in the future. If you have any questions regarding your request, you may contact Tawand Tonic, at nmfs.hq.pr.foia@noaa.gov or on 301-427-8402.

Sincerely,

TONIC.TAWAND.H
EDGE.118119499
1

Digitally signed by
TONIC.TAWAND.HODGE.1181194991
DN: c=US, o=U.S. Government, ou=DoD,
ou=PKI, ou=OTHER,
cn=TONIC.TAWAND.HODGE.1181194991
Date: 2017.08.14 12:20:00 -0400'

Tawand Tonic, *acting* FOIA Coordinator
Office of Protected Resources



August 14, 2017

TASK MEMORANDUM FOR:

Steven Goodman - NMFS

FROM:

Lola Stith, NOAA FOIA Office

REQUESTER:

**Ms. Margaret Townsend @
Center for Biological Diversity**

SUBJECT:

FOIA Request No. DOC-NOAA-2016-000603
Records relating to “Critical Habitat Rulemaking and Policy”:

1. All records related to: *Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat*, Docket No. NOAA-NMFS-2014-0093-0001; and
2. All records related to: *Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act*, Docket No. FWS-R9-ES-2011-0104-0026.

(b) (5)

SUBJECT:

FOIA Request No. DOC-NOAA-2016-000604
All records related to: *Interagency Cooperation: Endangered Species Act – Incidental Take Statements*, Docket No. NOAA_FRDOC_0001-3430

(b) (5)

2. Document the Search: N/A

3. Assemble Potentially Responsive Records: N/A

4. Produce Two Document Sets: N/A

5. Summarize the FOIA Review: Please check ALL appropriate boxes.

My office closed this request due to “withdrawal of request by Requester”
respond to correspondence (aka administrative close-out).
See Other Correspondence email communications dated 8/8/17

6. Obtain Signatures to Verify Review:

TONIC.TAWAND.H
ODGE.1181194991

Digitally signed by
TONIC.TAWAND.HODGE.1181194991
DN: c=US, o=U.S. Government, ou=DoD,
ou=PKI, ou=OTHER,
cn=TONIC.TAWAND.HODGE.1181194991
Date: 2017.08.14 12:21:26 -04'00'

Signature **(Tawand Tonic – acting, PR FOIA Coordinator)**
For Jerenda Burroughs, FOIA POC

Date



Digitally signed by
BESS.DANIEL.ANDREW.1216192920
DN: c=US, o=U.S. Government, ou=DoD,
ou=PKI, ou=OTHER,
cn=BESS.DANIEL.ANDREW.1216192920
Date: 2017.08.14 16:33:38 -04'00'

Signature **(Daniel Bess – PR4, Division Chief)**

Date

see email pdf of review/clearance

8-11-17 & 8/14/17

Signature **(NOAA GC-Ruth Ann Lowery)**

Date

Signature **(NOAA GC-Chris McNulty)**

Signature **(NOAA FOIA-Mark Graff)**



NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov>

Re: FOR GC REVIEW: Revised 16-603 & 604 combined Withdrawal letter [final draft]

Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Mon, Aug 14, 2017 at 10:30 AM

To: Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>

Cc: Chris McNulty - NOAA Federal <chris.mcnulty@noaa.gov>, NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov>, Peaches Hodge-Tonic - NOAA Federal <peaches.hodge-tonic@noaa.gov>

No issues with this from me (b)(5).

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Mon, Aug 14, 2017 at 10:22 AM, Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov> wrote:

And to me also. Thanks, Jerenda.

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor

NOAA Office of General Counsel

Fisheries & Protected Resources Section

1315 East-West Highway, SSMC III, Room 15114

Silver Spring, MD 20910

(301)713-9671

Fax: (301) 713-0658

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From: Chris McNulty - NOAA Federal [mailto:chris.mcnulty@noaa.gov]
Sent: Friday, August 11, 2017 3:44 PM
To: NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov>
Cc: Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>; Graff, Mark <Mark.Graff@noaa.gov>; Peaches Hodge-Tonic - NOAA Federal <peaches.hodge-tonic@noaa.gov>
Subject: Re: FOR GC REVIEW: Revised 16-603 & 604 combined Withdrawal letter [final draft]

Looks good to me.

--

Chris McNulty
Northwest Section Chief
NOAA Office of General Counsel
[206.526.6077](tel:206.526.6077) (direct)

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On Fri, Aug 11, 2017 at 12:06 PM, NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov> wrote:

Here is the final draft with edits added.

(b)(5)

thx

Jerenda

On Fri, Aug 11, 2017 at 2:29 PM, NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov> wrote:

okay will work on the updates shortly and resend to everyone

thx

Jerenda

On Fri, Aug 11, 2017 at 2:24 PM, Chris McNulty - NOAA Federal <chris.mcnulty@noaa.gov> wrote:

No additional comments from me. Thanks Jerenda.

--

Chris McNulty
Northwest Section Chief
NOAA Office of General Counsel
[206.526.6077](tel:206.526.6077) (direct)

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On Fri, Aug 11, 2017 at 7:21 AM, Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov> wrote:

(b)(5) [Redacted]

[Redacted]. Please let us know if you disagree or would like to discuss.

Ruth Ann

On Thursday, August 10, 2017, NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov> wrote:

Ruth Ann & Chris,

Here is the combined letter for your review.

(b)(5) [Redacted]

[Redacted]

thx

Jerenda

--

NOAA / National Marine Fisheries Service
FREEDOM OF INFORMATION OFFICE (FOIA)

Office of Protected Resources

Tawand Tonic, acting PR FOIA Coordinator

Phone: 301 - 427 - 8482

--

Ruth Ann Lowery
Attorney Advisor
NOAA Office of the General Counsel, Fisheries and Protected Resources

U.S. Department of Commerce

--

NOAA / National Marine Fisheries Service

FREEDOM OF INFORMATION OFFICE (FOIA)

Office of Protected Resources

Tawand Tonic, acting PR FOIA Coordinator

Phone: 301 - 427 - 8482

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NOAA / National Marine Fisheries Service

FREEDOM OF INFORMATION OFFICE (FOIA)

Office of Protected Resources

Tawand Tonic, acting PR FOIA Coordinator

Phone: 301 - 427 - 8482



Jerenda Burroughs - NOAA Affiliate <jerenda.burroughs@noaa.gov>

Fwd: Update Discussion

FOIA Office - NOAA Service Account <foia@noaa.gov>
To: Jerenda Burroughs <jerenda.burroughs@noaa.gov>

Wed, Aug 9, 2017 at 11:30 AM

Hi,

Please process the closeout of these two FOIA requests. A copy of this correspondence has been uploaded to both requests.

Thank you.

Lola

----- Forwarded message -----

From: <foia@biologicaldiversity.org>
Date: Tue, Aug 8, 2017 at 12:02 PM
Subject: RE: Update Discussion
To: foia@noaa.gov
Cc: foia@biologicaldiversity.org

Dear Mr. Graff,

This email is indeed the correct contact for the Center. At this time, we would like to close both requests. Thank you for providing us with records, we look forward to working with you on future FOIAs.

Best,

Virginia Vu, Filing Clerk

Endangered Species Program

Center for Biological Diversity

P.O. Box 11374

Portland, OR 97211

vvu@endangerearth.org

From: foia@noaa.gov [mailto:foia@noaa.gov]
Sent: Monday, August 7, 2017 12:58 PM
To: foia@biologicaldiversity.org
Subject: Update Discussion

08/07/2017 03:55 PM

FOIA Request: DOC-NOAA-2016-000603 and DOC-NOAA-2016-000604

I recently reached out to follow up on the interim release made in May to confirm whether or not the records released were in line with the scope of the records you were seeking, and if the production was received by you. I reached out to the CBD switchboard, but they were unable to connect me with you, as they indicated you were in a different State--and the intake account you created within FOIAOnline does not maintain your contact phone number. As such, I wanted to determine if we still have the correct contact information for you. I also wanted to determine (1) whether having reviewed the records you were still interested in the request and (2) whether the temporal responsive time cutoff needed to be changed with a subsequent submission considering the timeframe since the original request was submitted. Please feel free to reach out to me at [\(301\)-628-5658](tel:301-628-5658) to discuss your request. Thank you and best regards.

Mark Graff

NOAA FOIA Officer

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, August 15, 2017 10:19 AM
To: Bogomolny, Michael (Federal)
Cc: Stacey Nathanson - NOAA Federal; John Almeida - NOAA Federal; Robert Swisher - NOAA Federal
Subject: Re: Proposed production schedule for Cause of Action v. NOAA
Attachments: Answer mhg edits.docx

Hi Bogo,

Here are my edits on the draft Answer. Please let me know anything else you need on this.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Mon, Aug 14, 2017 at 6:04 PM, Bogomolny, Michael (Federal) <MBogomolny@doc.gov> wrote:

(b)(5)

From: Kolsky, Joshua (USADC) [mailto:Joshua.Kolsky@usdoj.gov]
Sent: Monday, August 14, 2017 1:53 PM
To: Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Cc: Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>; Patterson, Amanda (Federal) <Amanda.Patterson@noaa.gov>
Subject: RE: Proposed production schedule for Cause of Action v. NOAA

(b)(5)

Thanks,

Josh

From: Mark Graff - NOAA Federal [<mailto:mark.graff@noaa.gov>]

Sent: Monday, August 14, 2017 1:41 PM

To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>

Cc: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>; Amanda Patterson - NOAA Federal <amanda.patterson@noaa.gov>

Subject: Re: Proposed production schedule for Cause of Action v. NOAA

Good Afternoon,

(b)(5)

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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On Mon, Aug 14, 2017 at 11:45 AM, Bogomolny, Michael (Federal) <MBogomolny@doc.gov> wrote:

Works for me.

-bogo

From: Kolsky, Joshua (USADC) [<mailto:Joshua.Kolsky@usdoj.gov>]

Sent: Monday, August 14, 2017 10:28 AM
To: Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>
Subject: RE: Proposed production schedule for Cause of Action v. NOAA

Fine with me.

From: Stacey Nathanson - NOAA Federal [<mailto:stacey.nathanson@noaa.gov>]
Sent: Monday, August 14, 2017 10:11 AM
To: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>; Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Subject: Re: Proposed production schedule for Cause of Action v. NOAA

Good morning --

Just confirming our call this afternoon. Can we start at 1:30 instead? Please let me know if that works for all. If it does, the call in number is [301-713-9666](tel:301-713-9666). No passcode needed. Thanks!

Stacey

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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this message in error, and delete the message.

On Tue, Aug 8, 2017 at 2:12 PM, Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov> wrote:

Fine with me.

From: Bogomolny, Michael (Federal) [mailto:MBogomolny@doc.gov]
Sent: Tuesday, August 8, 2017 1:21 PM
To: Almeida, John (Federal) <John.Almeida@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>
Subject: RE: Proposed production schedule for Cause of Action v. NOAA

For me as well.

From: John Almeida - NOAA Federal [mailto:john.almeida@noaa.gov]
Sent: Tuesday, August 08, 2017 1:10 PM
To: Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Subject: Re: Proposed production schedule for Cause of Action v. NOAA

Works for me.

On Tue, Aug 8, 2017 at 1:08 PM, Stacey Nathanson - NOAA Federal <stacey.nathanson@noaa.gov> wrote:

I propose we talk on Monday, August 14, early afterno (b)(5) Does 1 pm work for folks? Thanks!

Stacey

On Tuesday, August 8, 2017, Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov> wrote:

(b)(5)
[Redacted]

[Redacted]

[Redacted]

[Redacted]

Thanks,

Josh

From: Stacey Nathanson - NOAA Federal [<mailto:stacey.nathanson@noaa.gov>]
Sent: Friday, August 4, 2017 11:32 PM
To: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>
Subject: Re: Proposed production schedule for Cause of Action v. NOAA

(b)(5)
[Redacted]

(b)(5)

(b)(6)

(b)(6) Thanks!

Stacey

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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On Fri, Aug 4, 2017 at 6:11 PM, Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov> wrote:

(b)(5)

[Redacted]

[Redacted]

From: Bogomolny, Michael (Federal) [<mailto:MBogomolny@doc.gov>]
Sent: Friday, August 4, 2017 3:50 PM
To: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Almeida, John (Federal) <John.Almeida@noaa.gov>

Subject: RE: Proposed production schedule for Cause of Action v. NOAA

Josh,

(b)(5)

Thanks,

bogo

From: Kolsky, Joshua (USADC) [<mailto:Joshua.Kolsky@usdoj.gov>]

Sent: Tuesday, August 01, 2017 3:27 PM

To: Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>

Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>

Subject: RE: Proposed production schedule for Cause of Action v. NOAA

Thanks for the update (b)(5)

From: Stacey Nathanson - NOAA Federal [<mailto:stacey.nathanson@noaa.gov>]

Sent: Tuesday, August 1, 2017 9:51 AM

To: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>

Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; John Almeida - NOAA Federal <john.almeida@noaa.gov>

Subject: Proposed production schedule for Cause of Action v. NOAA

Good morning,

(b)(5)

(b)(5)

[REDACTED] Please let
me know if you have any questions on this matter.
Thanks!

Stacey

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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--

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

NMFS HQ PR FOIA Requests - NOAA Service Account

From: NMFS HQ PR FOIA Requests - NOAA Service Account
Sent: Tuesday, August 15, 2017 11:45 AM
To: Mark Graff - NOAA Federal; Lola Stith - NOAA Affiliate; Samuel Dixon - NOAA Affiliate
Cc: Peaches Hodge-Tonic - NOAA Federal
Subject: Guidance Requested: Pending Fee Waiver & FAL Pkt ready ... 2017-001610
Attachments: 17-1610 No Documents Ltr (draft2).docx; GC CLEARANCE_ 17-1610 (No Records).pdf; 17-1610 No Docs Tasker signed.pdf; 17-1610 PR Search Log signed.pdf

Good Morning,

I am in the process o (b)(5)

(b)(5)

(b)(5)

Not sure how to proceed, please provide guidance/next steps

thx
Jerenda

--

NOAA / National Marine Fisheries Service
FREEDOM OF INFORMATION OFFICE (FOIA)
Office of Protected Resources
Tawand Tonic, acting PR FOIA Coordinator
Phone: 301 - 427 - 8482

August 14, 2017

TASK MEMORANDUM FOR: Lead FOIA POC – Jerenda Burroughs

FROM: NOAA FOIA Office

SUBJECT: **FOIA Request No. DOC-NOAA-2017-001610**

- any and all information you have regarding any upcoming transfers of dolphins, walrus, seals, or sea lions in and/or out of Six Flags Discovery Kingdom in Vallejo, CA
- Please provide
 - where these mammals are coming from and going to,
 - what their names are, and
 - when the expected transfers will be made.

(b) (5)

(b) (5)

see pdf of review/clearance

8/17/17

Signature **(NOAA GC-Mary O'Brien)**

Date

(b)(5)

(b)(5)

(b)(5)

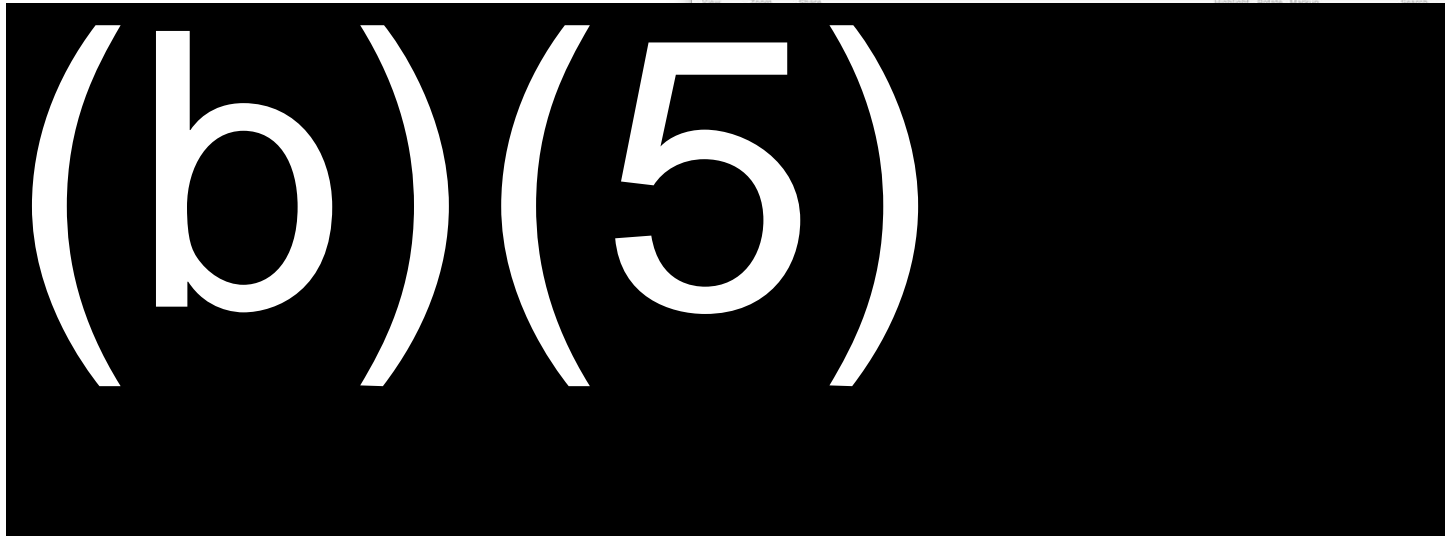
FOIA Search Log

FOIA Number **2017-001610**

REQUESTER: **Ms. Janet Locke**

SUBJECT: **requesting any and all information you have regarding any upcoming transfers of dolphins, walrus, seals, or sea lions in and/or out of Six Flags Discovery Kingdom in Vallejo, CA**

Please provide where these mammals are coming from and going to, what their names are, and when the expected transfers will be made.



(b) (5)



NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov>

Re: FOR GC REVIEW/CLEARANCE: 2017-001610 [Six Flags Discovery Kingdom Transfers] ... drafts #2

Mary O'Brien - NOAA Federal <mary.obrien@noaa.gov>

Mon, Aug 14, 2017 at 4:05 PM

To: NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov>

Cc: Courtney Smith - NOAA Affiliate <courtney.smith@noaa.gov>, Peaches Hodge-Tonic - NOAA Federal <peaches.hodge-tonic@noaa.gov>

(b)(5) (b)(5)

(b)(5). Thanks so much!

On Mon, Aug 14, 2017 at 2:28 PM, NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov> wrote:

Thanks Mary (b)(5)

thx
Jerenda

On Mon, Aug 14, 2017 at 2:22 PM, Mary O'Brien - NOAA Federal <mary.obrien@noaa.gov> wrote:
Here's my proposed edit to the reply letter, which we can fill in when we hear from Stacey.

On Mon, Aug 14, 2017 at 2:10 PM, NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov> wrote:

(b)(5)

Please advise
Jerenda

On Mon, Aug 14, 2017 at 2:01 PM, Mary O'Brien - NOAA Federal <mary.obrien@noaa.gov> wrote:

(b)(5) ?

On Mon, Aug 14, 2017 at 1:44 PM, NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov> wrote:

Hi Mary,

(b)(5)

thx

Jerenda

--

NOAA / National Marine Fisheries Service
FREEDOM OF INFORMATION OFFICE (FOIA)
Office of Protected Resources
Tawand Tonic, acting PR FOIA Coordinator
Phone: 301 - 427 - 8482

--

NOAA / National Marine Fisheries Service
FREEDOM OF INFORMATION OFFICE (FOIA)
Office of Protected Resources
Tawand Tonic, acting PR FOIA Coordinator
Phone: 301 - 427 - 8482

--

NOAA / National Marine Fisheries Service
FREEDOM OF INFORMATION OFFICE (FOIA)
Office of Protected Resources
Tawand Tonic, acting PR FOIA Coordinator
Phone: 301 - 427 - 8482

Submission Details

Case File

Admin Cost

Assigned Tasks

Comments (2)

Review


Request Handling


? Requester Info Available to the Public :

Request Track :

Fee Category :


Fee Waiver Requested: Yes

Fee Waiver Status: Pending Decision 

Expedited Processing: No 

? Request Perfected: Yes

Perfected Date : 08/10/2017

Acknowledgement Sent Date: 


? Unusual Circumstances ? : No

Litigation :

Request Details

Tracking Number : DOC-NOAA-2017-001610

Submitted Date : 07/27/2017

 Requester : Ms. Janet Locke

Perfected Date : 08/10/2017

Organization : Ms.

Last Assigned Date : 08/11/2017

Requester Has Yes
Account :

Fee Limit : \$30.00



Submission Details



Case File

Admin Cost

Assigned Tasks

Comments (2)

Review

<i>Outcome</i> ◆	<i>Assigned To</i> ◆	<i>Assigned By</i> ◆	<i>Creation Date</i> ▼	<i>Due Date</i> ◆	<i>Closed Date</i> ◆	<i>Detail</i>
Pending	NOAA	Janet Locke	07/27/2017	07/27/2017 		

Description : Fee Waiver Task

Comments : (b)(5)

(b)(5)

Symone Stone - NOAA Affiliate

From: Symone Stone - NOAA Affiliate
Sent: Tuesday, August 15, 2017 1:07 PM
To: Gregory Romano - NOAA Federal; Darone Jones - NOAA Federal
Cc: George Jungbluth - NOAA Federal; Lisa Love - NOAA Federal; Denise Hamilton - NOAA Federal; Mark Graff - NOAA Federal; Lola Stith - NOAA Affiliate
Subject: Fwd: FOIA-2017-000790
Attachments: Request BGaffney 3-10-17-1.pdf

Good Afternoon,

I am following up on the status of the document search on this FOIA request.

Please send me an update as soon as possible.

Symone

----- Forwarded message -----

From: **Symone Stone - NOAA Affiliate** <symone.stone@noaa.gov>
Date: Mon, Jul 31, 2017 at 11:36 AM
Subject: FOIA-2017-000790
To: Gregory Romano - NOAA Federal <gregory.romano@noaa.gov>, Darone Jones - NOAA Federal <darone.jones@noaa.gov>
Cc: George Jungbluth - NOAA Federal <George.jungbluth@noaa.gov>, Lisa Love - NOAA Federal <lisa.love@noaa.gov>, Denise Hamilton - NOAA Federal <denise.hamilton@noaa.gov>

Good Morning,

(b) (5)

Please let us know if you have any questions.

Thank you.

--

Symone Stone <symone.stone@noaa.gov>
Syneren Technologies Corporation
NOAA/National Weather Service
Office of the Chief Financial Officer
Management and Organization Division
Ph: [301-427-6936](tel:301-427-6936)

--

Symone Stone <symone.stone@noaa.gov>
Syneren Technologies Corporation
NOAA/National Weather Service
Office of the Chief Financial Officer
Management and Organization Division
Ph: [301-427-6936](tel:301-427-6936)

LAW OFFICES OF BRIAN GAFFNEY, A Professional Corporation

446 Old County Road, Suite 100-310

Pacifica, California 94044

(650) 219 3187 Phone

brian@gaffneylegal.com

March 10, 2017

Via U.S. Mail and Email

Department of Commerce
Departmental FOIA Office
14th and Constitution Avenue NW.
Mail Stop A300
Washington, DC 20230
EFoia@doc.gov

**Re: Freedom of Information Act Request
Fee Waiver Requested**

Dear Sir/Madam,

Records Requested

Pursuant to the Freedom of Information Act, through this office Stop Geoengineering Minnesota (“SGM”), requests all records¹ from January 1, 2015 to the present discussing, documenting, memorializing, or otherwise concerning:

- (1) weather modification within the Weather Service Organization Workforce Analysis;
- (2) the reason for adoption of the confidentiality provision of the “Operations and Workforce Analysis (OWA) Project: Charter for All Workstream Core Teams” a copy of which is attached hereto;

Fee Waiver Requested

Stop Geoengineering Minnesota (“SGM”) requests that the Department of Commerce waive any applicable fees because disclosure meets the statutory standard for waiver of fees in that it is “in the public interest because furnishing the information can be considered as primarily benefitting the general public,” 5 U.S.C. § 552(a)(4)(A). SGM is a project of the non-profit Minnesota Natural Health Coalition. SGM is itself a non-profit entity whose purpose is to

¹ “Records,” includes all documents, correspondence, including email; agency guidelines and policies; memoranda; agency Memoranda of Understanding; notices, comments, and responses to comments; biological, scientific, and other studies; reports; environmental analyses; surveys; timelines; charts; graphs; maps; analyses; data; meeting minutes and agendas; distribution lists; notes and transcripts of meetings and conversations; and any other relevant information, **whether in hard copy or electronic/computer format.**

educate the public about how geoengineering and weather modification can impact public health. SGM has no intention to use the information sought in furtherance of any commercial interest.

(1) The Subject of the Request. The requested records concern the activities of the Department of Commerce and other government agencies regarding weather modification. The subject matter of this request therefore involves information that will significantly contribute to the public's understanding of the government's operations and activities in regards to weather modification.

(2) The Informative Value of the Information to Be Disclosed. The requested records are likely to contribute to an understanding of government operations or activities. The Department of Commerce is involved in weather modification activities and research. The requested records will provide insight into the Department of Commerce's process for implementing and regulating weather modification. Many of the requested records may contain information that is not currently available to the general public; therefore, release of the requested records would represent a significant new contribution to the public domain. For these reasons, the requested records will be highly informative in relation to the subject matter of the request, and will further public understanding.

(3) Contribution to General Public Understanding. SGM's mission is to educate the public about how geoengineering and weather modification can impact public health. SGM makes this request for the purposes of providing information about governmental activities and standards, including those of Department of Commerce, to concerned members of the public. SGM is interested in the requested records because they will likely help SGM and the public better understand the methods and procedures which the Department of Commerce has for implementing and regulating weather modification.

(4) The Significance of the Contribution to Public Understanding. The requested records are likely to contribute significantly to public understanding of government operations or activities. SGM will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. SGM regularly informs, educates and counsels the public regarding weather modification and government involvement in implementing and regulating weather modification. The subject of this FOIA request will be used to contribute to one or more of the following: public presentations, news stories contributed to or written by SGM volunteers and/or members, and/or websites (<http://www.minnesotanaturalhealth.org/stopgeoengineeringmn.html> and <http://stopgeoengineeringmn.squarespace.com>). Exactly which of these uses of the information addressed in this FOIA request will be determined after complete review of the requested material. SGM's members, volunteers, and counsel bring a broad range of expertise, skills, and familiarity with weather modification that will enable SGM to review and understand the responsive records and to supply this information in a coherent and understandable way to the general public and the media. SGM can draw on scientists, attorneys, and others to review and summarize this information. SGM certainly has the necessary qualifications relevant to any use of the records that may come about upon reviewing them. SGM's contribution to the public understanding, as compared to the level of understanding prior to disclosure, as well as SGM's

intent to inform the public, are well established. Moreover, many of the records requested may not have been publicly released to date. A requester is likely to contribute significantly to the public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government. 132 Cong. Rec. H9464 (Reps. English and Kindness).

(5) The Existence and Magnitude of a Commercial Interest. SGM has no commercial interest that would be furthered by the requested disclosure. SGM is a non-profit entity and requests the information to further its scientific, legal, and educational efforts. The FOIA fee waiver amendments of 1986 were designed specifically to allow nonprofit, public interest groups, such as SGM, access to government records without the payment of fees. FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters.

Department of Commerce Response

Please submit responsive records, along with an index for any records withheld that clearly identifies the basis for withholding, to the letterhead address above. Please segregate any records you determine are exempt and provide the remainder and the reasons for not providing all of the responsive records.

The basic time limit for responding to FOIA requests is twenty work days. See 5 U.S.C. § 552(a)(6)(A). This time limit can be extended under certain limited circumstances for at most an additional ten working days. *See id.* at § 552(a)(6)(B).

Please provide all responsive documents that are in the files maintained by Department of Commerce personnel or offices on the date that Department of Commerce staff conducts their searches for the documents responsive to this request.¹ **SGM requests that to the extent that the Department of Commerce can do so, it furnish electronic copies of the above documents in lieu of paper copies (to minimize the expense and burden of copying).** 5 U.S.C. § 552(a)(3)(B) (note, as amended in 1996 FOIA mandates that “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.”)

Please contact this office if you have any questions regarding the scope of this request, the nature of the records sought, or any other aspect of this request. I look forward to hearing from you.

By signing below, I certify that the reasons provided for a fee waiver are true and correct.

Sincerely,



Brian Gaffney

¹ See *McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983); *Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002); *Oregon Natural Desert Ass'n v. Gutierrez*, 419 F. Supp. 2d 1284, 1288 (D. Or. 2006) (federal agencies must release all documents in their possession through the date they conduct the review of their files for documents responsive to FOIA requests).

Operations and Workforce Analysis (OWA) Project: Charter for All Workstream Core Teams

The National Weather Service (NWS) Operations and Workforce Analysis (OWA) project is supported by four “Core Teams” that are each focused on one of the following topics:

- Communications and stakeholder engagement
- Organizational structure
- Operating model (including Impact-based Decision Support Services or IDSS)
- Workforce analysis

The membership of the Core Teams include NWS employees from across the organization who were approved for participation by NWS leadership. They also include National Weather Service Employees Organization (NWSEO) bargaining unit members who were recommended by NWSEO for each workstream. McKinsey & Company, which is working as an independent third-party consultant for NWS, is also participating on the teams. The Core Teams will provide essential support to the overall OWA project. This charter will establish the scope of activities and responsibilities of the Core Teams.

The main activities of the Core Teams are to:

1. **Support the Operations and Workforce Committee (OWC)**¹ in reviewing project analyses, developing and assessing options for the OWA, and answering questions or replying to requests for additional information.
2. **Assist and collaborate** with NWS OWA project leadership and McKinsey as they conduct their assessment of the NWS to ensure a collaborative and customized approach while preserving objectivity and independence. This collaboration could include participation in data calls, working groups, and/or research, and through providing guidance on action steps to take leading up to OWC² meetings.
3. **Augment and support** the data, information, perspectives, and ideas collected through application of individual expertise, experience, and insights (e.g., adding the perspective of Weather Forecast Offices, recommending subject matter experts (SME) for specific topics).
4. **Review and engage** on McKinsey's methodologies, insights, results and recommendations for accuracy and suggest changes if needed. To ensure an unbiased assessment, McKinsey will have final determination on the content presented to the OWC but it will be developed in a joint and collaborative effort with the Core Teams and subject matter experts.

Expectations for each member of the Core Teams include the following (may be adapted as needed, and notice will be given to ensure awareness and agreement with any changes):

- **Confidentiality: Core Team members, consultants, and SMEs are expected to maintain at all times the highest level of privacy and confidentiality regarding all information and materials shared as part of the OWA project, including initial findings and of all Core Team discussions, unless otherwise indicated (e.g., to share an approved project update that is intended to reach all NWS staff). Any interim reports or materials are considered to be**

¹ The National Weather Service (NWS) Executive Council (EC) established the NWS Operations and Workforce Committee (OWC) for the purposes of providing guidance to and making decisions on the OWA project.

drafts and are not to be shared beyond the Core Team and any consultants or SMEs who are providing independent advice. Core Team members will indicate their understanding of this requirement by signing this Charter. Consultants and SMEs will be covered as appropriate by separate non-disclosure agreements.

- **Commitment:** Core Team members are expected to fully participate in regular team meetings (in person or as conference calls, depending on location); in addition they are responsible for completing document reviews, communication steps. and other actions between meetings.
- **Role:** Core Team members are critical to the OWA in contributing insights in their areas of expertise, conducting analyses of surveys and interviews and generating input / data / that can inform the options and reports that McKinsey provides to the OWC.
- **Scope:** The Core Team activities are pre-decisional, only. In this capacity Core Team members provide input / data / guidance, serving a critical role as action-oriented groups such that when decisions are made (e.g., the approval of language for a survey or information for the website), the teams will be responsible for next steps.
- **Support:** The Core Teams will call on and engage with a cohort of Subject Matter Experts (SMEs) within the organization when needed to address specific questions, analyses or provide other expert insight
- **Duration:** The Core Teams will be in place through Phase II of the OWA project and will be considered for extended participation Phase III based on availability, interest and relevance to their area of expertise. Phase II will extend through approximately mid-October of 2015.

If you, or another Core Team member, have any questions or concerns about the Core Team Charter or other aspects of your participation, please contact Joanne Swanson Kagan, NWS OWA Project leader, at joanne.swanson@noaa.gov; Direct: 301-427-9066 or Cell: 240-393-0415. Thank you for your service to this project.

I have reviewed the Operations and Workforce Analysis (OWA) Project: Charter for All Workstream Core Teams, and I confirm that I will strictly maintain the confidentiality of all information in accordance with the Charter.

Name	Signature	Date
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Potts, Kristina (Federal)

From: Potts, Kristina (Federal)
Sent: Tuesday, August 15, 2017 2:42 PM
To: Bogomolny, Michael (Federal)
Cc: Graff, Mark (Federal); Orr, Malcolm (Federal)
Subject: RE: Missing Kogan record
Attachments: 1501.57 Background.2docx.docx

Mik (b)(5)

V/R,

Kristina E. Potts
Department of Commerce
Office of General Counsel
HCHB 5098
Email: Kristina.potts@doc.gov
Phone: 202-482-7863
Iphon (b)(6)

From: Bogomolny, Michael (Federal)
Sent: Tuesday, August 15, 2017 2:31 PM
To: Potts, Kristina (Federal) <Kristina.Potts@doc.gov>
Cc: Graff, Mark (Federal) <Mark.Graff@noaa.gov>
Subject: Re: Missing Kogan record

Kristina,

(b)(5)

!)

-bogo

From: Potts, Kristina (Federal)
Sent: Tuesday, August 8, 2017 3:33 PM
To: Bogomolny, Michael (Federal)
Subject: RE: Missing Kogan record

Mik (b)(5)

. V/R,

Status	Requester	File Number	Agency	Action Officer	Submitted	Closed	FOIA Request #	FOIA Appeal #	Comment
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(b)(5)

Kristina E. Potts
Department of Commerce
Office of General Counsel
HCHB 5098
Email: Kristina.potts@doc.gov
Phone: 202-482-7863
Iphon (b)(6)

-----Original Message-----

From: Potts, Kristina (Federal)
Sent: Wednesday, August 02, 2017 7:02 AM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Subject: FW: file for you

Mike, (b)(5)

[Redacted]

Kristina E. Potts
Department of Commerce
Office of General Counsel
HCHB 5098
Email: Kristina.potts@doc.gov
Phone: 202-482-7863
Iphon (b)(6)

-----Original Message-----

From: Orr, Malcolm (Federal)
Sent: Tuesday, August 01, 2017 3:36 PM
To: Potts, Kristina (Federal) <Kristina.Potts@doc.gov>
Subject: RE: file for you

Hi Kristin (b)(5)

. Thanks,

Malcolm Orr
Senior Counsel, General Law Division
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230
Cell (b)(6)
Fax: 202-482-2888
morr@doc.gov

-----Original Message-----

From: Potts, Kristina (Federal)
Sent: Tuesday, August 01, 2017 2:30 PM
To: Orr, Malcolm (Federal) <MOrr@doc.gov>
Subject: FW: file for you

O (b)(5)

Kristina E. Potts
Department of Commerce
Office of General Counsel
HCHB 5098
Email: Kristina.potts@doc.gov
Phone: 202-482-7863
Iphon (b)(6)

-----Original Message-----

From: Bogomolny, Michael (Federal)
Sent: Tuesday, July 18, 2017 6:39 PM
To: Potts, Kristina (Federal) <Kristina.Potts@doc.gov>
Subject: file for you

(b)(5)

-bogo

November 6, 2015

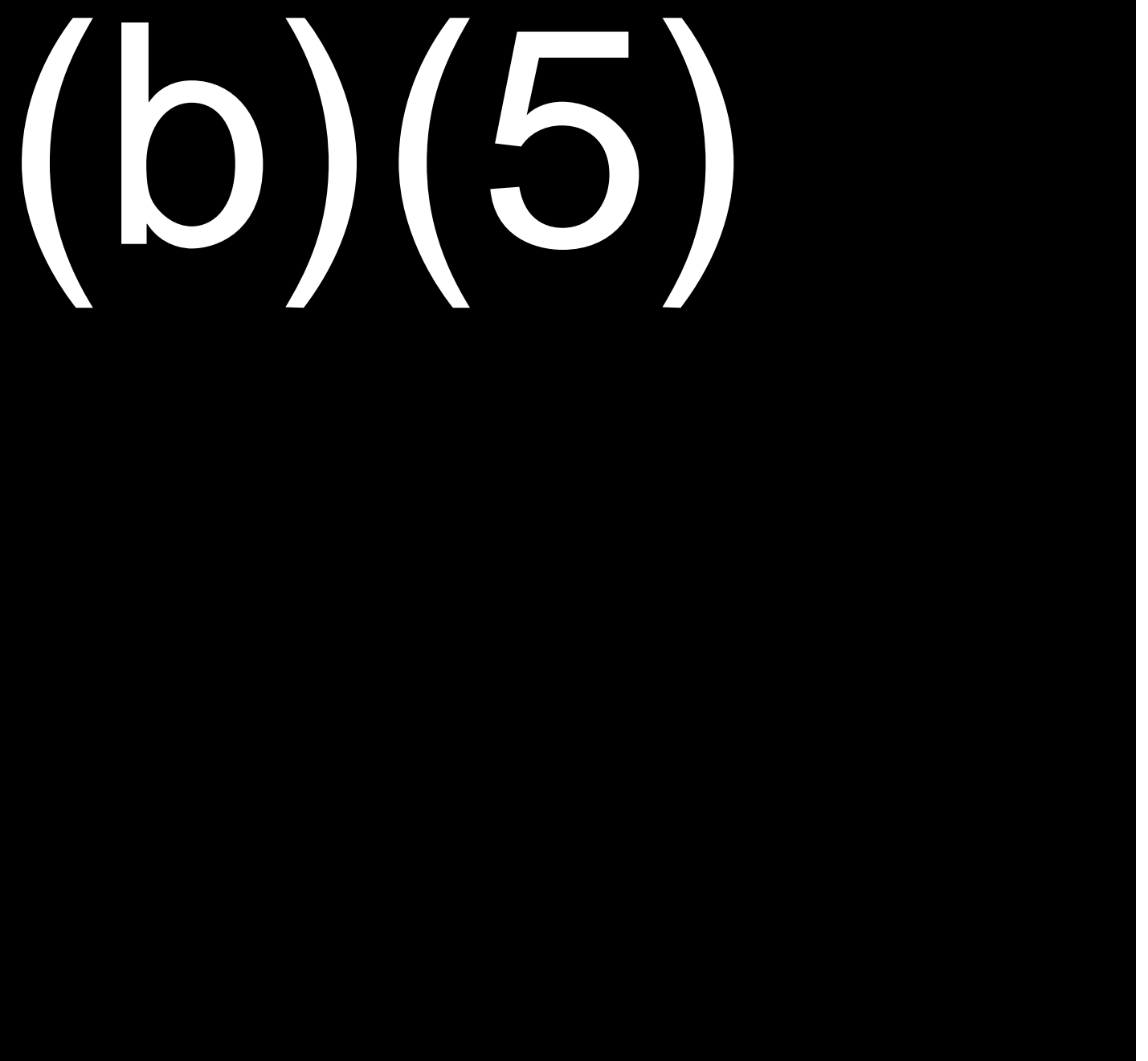
MEMORANDUM
FOR FILE (1501-57)

FROM: Malcolm Orr
General Law Division

SUBJECT: Background: Freedom of Information Act Fee Waiver Appeal of
Lawrence Kogan (DOC-NOAA-2014-001694)

(b) (5)

(b) (5)



Bogomolny, Michael (Federal)

From: Bogomolny, Michael (Federal)
Sent: Tuesday, August 15, 2017 3:07 PM
To: Kolsky, Joshua (USADC)
Cc: Nathanson, Stacey (Federal); Almeida, John (Federal); Graff, Mark (Federal)
Subject: Re: Proposed production schedule for Cause of Action v. NOAA
Attachments: COA v NOAA 17-1329 answer - DOC edits.docx; ATT00001.htm

Josh,

(b)(5)

Sincerely,

bogo

From: Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov>
Sent: Monday, August 14, 2017 1:53 PM
To: Graff, Mark (Federal); Bogomolny, Michael (Federal)
Cc: Nathanson, Stacey (Federal); Almeida, John (Federal); Patterson, Amanda (Federal)
Subject: RE: Proposed production schedule for Cause of Action v. NOAA

(b)(5)

Thanks,

Josh

From: Mark Graff - NOAA Federal [<mailto:mark.graff@noaa.gov>]
Sent: Monday, August 14, 2017 1:41 PM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Cc: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>;

Almeida, John (Federal) <John.Almeida@noaa.gov>; Amanda Patterson - NOAA Federal <amanda.patterson@noaa.gov>

Subject: Re: Proposed production schedule for Cause of Action v. NOAA

Good Afternoon,

(b)(5)

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

(301) 628-5658 (O)

(b)(6) (C)

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On Mon, Aug 14, 2017 at 11:45 AM, Bogomolny, Michael (Federal) <MBogomolny@doc.gov> wrote:

Works for me.

-bogo

From: Kolsky, Joshua (USADC) [mailto:Joshua.Kolsky@usdoj.gov]

Sent: Monday, August 14, 2017 10:28 AM

To: Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>

Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>

Subject: RE: Proposed production schedule for Cause of Action v. NOAA

Fine with me.

From: Stacey Nathanson - NOAA Federal [<mailto:stacey.nathanson@noaa.gov>]
Sent: Monday, August 14, 2017 10:11 AM
To: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>; Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Subject: Re: Proposed production schedule for Cause of Action v. NOAA

Good morning --

Just confirming our call this afternoon. Can we start at 1:30 instead? Please let me know if that works for all. If it does, the call in number is [301-713-9666](tel:301-713-9666). No passcode needed. Thanks!

Stacey

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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On Tue, Aug 8, 2017 at 2:12 PM, Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov> wrote:

Fine with me.

From: Bogomolny, Michael (Federal) [mailto:MBogomolny@doc.gov]
Sent: Tuesday, August 8, 2017 1:21 PM
To: Almeida, John (Federal) <John.Almeida@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>
Subject: RE: Proposed production schedule for Cause of Action v. NOAA

For me as well.

From: John Almeida - NOAA Federal [mailto:john.almeida@noaa.gov]
Sent: Tuesday, August 08, 2017 1:10 PM
To: Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Subject: Re: Proposed production schedule for Cause of Action v. NOAA

Works for me.

On Tue, Aug 8, 2017 at 1:08 PM, Stacey Nathanson - NOAA Federal <stacey.nathanson@noaa.gov> wrote:

I propose we talk on Monday, August 14, early afternoon (b)(5) [REDACTED]
[REDACTED] Does 1 pm work for folks? Thanks!

Stacey

On Tuesday, August 8, 2017, Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov> wrote:

(b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

(b)(5) [Redacted]

[Redacted]

Thanks,

Josh

From: Stacey Nathanson - NOAA Federal [<mailto:stacey.nathanson@noaa.gov>]
Sent: Friday, August 4, 2017 11:32 PM
To: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>
Subject: Re: Proposed production schedule for Cause of Action v. NOAA

(b)(5) [Redacted]

(b)(6)

Thanks!

Stacey

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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On Fri, Aug 4, 2017 at 6:11 PM, Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov> wrote:

(b)(5) [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]

From: Bogomolny, Michael (Federal) [<mailto:MBogomolny@doc.gov>]
Sent: Friday, August 4, 2017 3:50 PM
To: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Almeida, John (Federal) <John.Almeida@noaa.gov>
Subject: RE: Proposed production schedule for Cause of Action v. NOAA

Josh,

(b)(5) [REDACTED] ?

Thanks,

bogo

From: Kolsky, Joshua (USADC) [<mailto:Joshua.Kolsky@usdoj.gov>]
Sent: Tuesday, August 01, 2017 3:27 PM
To: Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>
Subject: RE: Proposed production schedule for Cause of Action v. NOAA

Thanks for the update (b)(5) [REDACTED]
[REDACTED]

From: Stacey Nathanson - NOAA Federal [<mailto:stacey.nathanson@noaa.gov>]
Sent: Tuesday, August 1, 2017 9:51 AM
To: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; John Almeida - NOAA Federal <john.almeida@noaa.gov>
Subject: Proposed production schedule for Cause of Action v. NOAA

Good morning,

(b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]. Please let me know if you have any questions on this matter.

Thanks!

Stacey

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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--

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Orr, Malcolm (Federal)

From: Orr, Malcolm (Federal)
Sent: Tuesday, August 15, 2017 3:18 PM
To: Potts, Kristina (Federal); Bogomolny, Michael (Federal)
Cc: Graff, Mark (Federal)
Subject: RE: Missing Kogan record
Attachments: ITSSD 1-7-15 Appeal of NOAA OCIO Fee Waiver Request Denial.pdf

Hi Kristina,

(b)(5)

Thanks,

Malcolm Orr
Senior Counsel
General Law Division
U.S. Department of Commerce
14th and Constitution Avenue, NW
Washington, D.C. 20230
202-322-2138 (office)
202-482-2888 (fax)
morr@doc.gov

From: Potts, Kristina (Federal)
Sent: Tuesday, August 15, 2017 2:42 PM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Cc: Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Orr, Malcolm (Federal) <MOrr@doc.gov>
Subject: RE: Missing Kogan record

Mik (b)(5)

. V/R,

Kristina E. Potts
Department of Commerce
Office of General Counsel
HCHB 5098
Email: Kristina.potts@doc.gov
Phone: 202-482-7863
Iphon (b)(6)

From: Bogomolny, Michael (Federal)
Sent: Tuesday, August 15, 2017 2:31 PM
To: Potts, Kristina (Federal) <Kristina.Potts@doc.gov>
Cc: Graff, Mark (Federal) <Mark.Graff@noaa.gov>
Subject: Re: Missing Kogan record

Kristina,

(b)(5)
[Redacted]

[Redacted]

-bogo

From: Potts, Kristina (Federal)
Sent: Tuesday, August 8, 2017 3:33 PM
To: Bogomolny, Michael (Federal)
Subject: RE: Missing Kogan record

(b)(5)
[Redacted] V/R,

FOIA Log

Status	Requester	File Number	Agency	Action Officer	Submitted	Closed	FOIA Request #	FOIA Appeal #	Comment
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(b)(5)

Kristina E. Potts
Department of Commerce
Office of General Counsel
HCHB 5098
Email: Kristina.potts@doc.gov
Phone: 202-482-7863
Iphon (b)(6)

-----Original Message-----

From: Potts, Kristina (Federal)
Sent: Wednesday, August 02, 2017 7:02 AM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>

Subject: FW: file for you

(b) (5)

Kristina E. Potts
Department of Commerce
Office of General Counsel
HCHB 5098
Email: Kristina.potts@doc.gov
Phone: 202-482-7863
lphon (b)(6)

-----Original Message-----

From: Orr, Malcolm (Federal)
Sent: Tuesday, August 01, 2017 3:36 PM
To: Potts, Kristina (Federal) <Kristina.Potts@doc.gov>
Subject: RE: file for you

Hi Kristin (b)(5)

Thanks,

Malcolm Orr
Senior Counsel, General Law Division
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230
Cell (b)(6)
Fax: 202-482-2888
morr@doc.gov

-----Original Message-----

From: Potts, Kristina (Federal)
Sent: Tuesday, August 01, 2017 2:30 PM
To: Orr, Malcolm (Federal) <MOrr@doc.gov>
Subject: FW: file for you

(b)(5)

(b)(5)

Kristina E. Potts
Department of Commerce
Office of General Counsel
HCHB 5098
Email: Kristina.potts@doc.gov
Phone: 202-482-7863
Iphon (b)(6)

-----Original Message-----

From: Bogomolny, Michael (Federal)
Sent: Tuesday, July 18, 2017 6:39 PM
To: Potts, Kristina (Federal) <Kristina.Potts@doc.gov>
Subject: file for you

(b)(5)

-bogo



January 7, 2015

Office of Assistant General Counsel for Administration
U.S. Department of Commerce
Room 5898-C
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

Page | 1

Re: *FREEDOM OF INFORMATION ACT APPEAL*
AMENDED/MODIFIED/BIFURCATED FOIA REQUEST
NO. DOC-NOAA-2014-001694

Attention:

The nonprofit Institute for Trade, Standards and Sustainable Development (ITSSD) hereby submits the attached APPEAL of the Denial of Fee Waiver Request issued by the U.S. Department of Commerce National Oceanic and Atmospheric Administration Office of the Chief Information Officer, dated December 11, 2014.

Please acknowledge receipt of this APPEAL

We look forward to receiving your determination.

Very truly yours,

Lawrence A. Kogan

Lawrence Kogan
CEO
ITSSD

**FREEDOM OF INFORMATION ACT APPEAL
OF DENIAL OF ITSSD REQUEST FOR FEE WAIVER
CORRESPONDING TO
AMENDED/MODIFIED/BIFURCATED
FOIA REQUEST NO./# DOC-NOAA-2014-001694**

The nonprofit Institute for Trade, Standards and Sustainable Development (“ITSSD”) hereby appeals the December 11, 2014 denial¹ by the U.S. Department of Commerce National Oceanic and Atmospheric Administration Office of the Chief Information Officer (“DOC-NOAA-OCIO”) of ITSSD’s Request for Fee Waiver dated and filed on December 5, 2014.²

**I.
PROCEEDINGS BELOW**

This is a FOIA case with a long history of NOAA-OCIO obstructionism dating back to ITSSD’s first FOIA Fee Waiver Request filed in March 2014.^{3 4 5 6 7 8} The objective of the former request, like that of the present one, has been to secure disclosure of agency records of critical interest and importance to the American public. These FOIAs have sought disclosure of agency records substantiating NOAA’s compliance with its legal responsibilities under the Information Quality Act (“IQA”) and applicable IQA-implementing Office of Management and Budget (“OMB”) and NOAA peer review process and administrative review standards. NOAA had been obliged to ensure that the mostly third party peer reviews of ten (10) NOAA-developed highly influential scientific assessments used to support the Environmental Protection Agency’s 2009 Clean Air Act Section 202(a) Greenhouse Gas Endangerment Findings and subsequently triggered major emissions control regulations had been adequately validated prior to their public dissemination in conformance with the IQA’s, OMB’s and NOAA’s most rigorous and least discretionary peer review independence, conflict of interest, panel balance and administrative review standards applicable to HISAs.

On September 22, 2014, ITSSD filed with NOAA-OCIO its New FOIA Fee Waiver Request which was subsequently designated Request No. DOC-NOAA-2014-001694.⁹ On the same date, ITSSD filed its corresponding Fee Waiver Request.¹⁰

Thereafter, on September 30, 2014, ITSSD filed with NOAA-OCIO a supplement to its September 22, 2014 Fee Waiver Request.¹¹ It “provided additional material and relevant evidence of ITSSD’s satisfaction of NOAA’s six-factor fee waiver test of 15 C.F.R. §4.11(k)(1)-(3).”¹²

On September 30, 2014, NOAA-OCIO dispatched to ITSSD an oblique request for clarification of its New FOIA Request without identifying any specific item requiring clarification. Its restatement of 15 C.F.R. 4.4(c) strongly suggested that NOAA-OCIO did not believe the New FOIA Request overall “reasonably described [...] the requested records in enough detail to enable Department personnel to locate them with a reasonable amount of effort.”¹³ *Notwithstanding NOAA-OCIO’s failure to provide guidance concerning what details, in particular, were missing*, ITSSD responded, on October 1, 2014, by preparing and dispatching to NOAA-OCIO a good faith clarification of ITSSD’s New FOIA Request as NOAA-OCIO had requested.¹⁴

On October 10, 2014, NOAA-OCIO issued an adverse fee waiver determination in response to ITSSD's September 22, 2014 Fee Waiver Request. The NOAA-OCIO denial stated, *without explanation*, that ITSSD's "fee waiver justification was insufficient in detail to enable me to grant [its] fee waiver request. [...] NOAA is still without the clarity and information required to grant you a fee waiver."¹⁵ It also provided an initial FOIA fee estimate of \$7500 for search fees *unaccompanied by any explanation or substantiation concerning how the fee estimate had been derived*.¹⁶

NOAA-OCIO's October 10, 2014 fee waiver denial thereafter prompted a series of oral and written correspondences between ITSSD and NOAA-OCIO and NOAA-OAR representatives spanning from October 21, 2014 to November 7, 2014.^{17 18} These correspondences reveal there was a consensus of the Parties that ITSSD's New FOIA Request was too 'complex' and required simplification and narrowing of scope to facilitate expedited processing by NOAA-OCIO. They also confirm that NOAA-OCIO acknowledged and accepted ITSSD's filing of a simplified and more narrowly drafted Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694 ("AMB FOIA Request"), dated October 27, 2014.¹⁹

Unlike ITSSD's New FOIA Request, the AMB FOIA Request seeks disclosure of the following well-defined groups of publicly unavailable government contracts further identified by specific name and number. A summary description of each of these groups is provided below along with references to their location in the AMB FOIA Request:

1. Six (6) contracts issued by NOAA (or on NOAA's behalf) commissioning the National Research Council/National Academy of Sciences to undertake the peer review of seven (7) of the ten (10) listed NOAA-developed scientific assessments (*See* AMB FOIA Request p. 4);
2. Three (3) contracts issued by NOAA (alone or jointly with another federal agency) commissioning the National Research Council/National Academy of Sciences to develop three new climate science-related reports (*See* AMB FOIA Request p. 4);
3. Thirty-nine (39) grant contracts/awards identified by alpha-numeric reference NOAA had issued to seventeen (17) universities and nonprofit institutes during 2004-2010 (*See* AMB FOIA Request pp. 5-6); *and*
4. One (1) or more unidentified grant contract(s)/award(s) NOAA issued to Oregon State University's Cooperative Institute for Oceanographic Satellite Studies (CIOSS) during said period (*See* AMB FOIA Request p. 6).

In addition, the AMB FOIA Request also seeks disclosure of specific agency files concerning a handful of NOAA-established *ad hoc* federal advisory committees identified by specific name. A summary description of this group is set forth below along with a reference to its location in the AMB FOIA Request:

5. Selection criteria and identities of each member of five (5) listed NOAA-established federal advisory committees involved with the development and/or peer review of five (5) of the ten (10) listed NOAA-developed scientific assessments (*See Amended/Modified/Bifurcated FOIA Request p. 3*).

In its November 7, 2014 email correspondence to ITSSD, NOAA-OCIO/NOAA-OAR representative Bruce Gibbs simultaneously thanked ITSSD for its simplified and narrowed AMB FOIA Request, and noted how NOAA-OCIO was “in the process of evaluating it to determine how to proceed.”²⁰

Thereafter, in an undated, unsigned and letterhead-free email correspondence received by ITSSD on November 12, 2014,²¹ NOAA-OCIO representative Gerald Fox provided a new FOIA Fee Estimate “to search for responsive records” in the amount of \$4,000. The language used in this highly irregular unfinished correspondence reverted back to ITSSD’s New FOIA Request and ignored the reduced scope of the AMB FOIA Request.²² *This fee estimate, as well, contained no explanation or substantiation concerning how the fee estimate had been derived.*

ITSSD responded by written correspondence dated November 14, 2014, seeking substantiation and reconciliation of the two fee estimates NOAA-OCIO/NOAA-OAR representatives had proffered, and reiterating its previous description of the easily searchable “specifically identified” NOAA files for which disclosure had been sought in ITSSD’s AMB FOIA Request.²³ Unfortunately, upon receiving the NOAA-OCIO/NOAA/OAR representative’s November 21, 2014 email response to its correspondence, ITSSD immediately recognized that NOAA-OCIO’s prior tone of ostensible cooperation had, once again, transformed into obstructionism. Remarkably, said representative’s email stated the following:

“[W]e are awaiting your confirmation or denial to pay the fee required for us to search for these records. The estimated fee is *for search* and not duplication. Please let us know of your intention before November 28, 2014. Please remember you have requested a fair amount of data, *that’s still somewhat vague in some areas*--but we will try to help you to the best of our ability” (emphasis added).²⁴

ITSSD thereafter dispatched another written correspondence dated, November 28, 2014, requesting substantiation and/or explanation of the bases for the search fee estimates that NOAA-OCIO/NOAA-OAR representatives had previously provided, and apprising the agency that ITSSD would be filing a Fee Waiver Request corresponding to its AMB FOIA Request.²⁵

On December 5, 2014, ITSSD filed the Fee Waiver Request NOAA-OCIO’s December 11, 2014 denial of *which is the subject matter of this Appeal*. It explains in detail why disclosure of the records specifically identified in ITSSD’s AMB FOIA Request is in the public interest and satisfies the six-factor fee waiver test set forth within the applicable NOAA FOIA fee waiver regulations.

II. NOAA-OCIO’S DENIAL OF ITSSD’S AMENDED/MODIFIED/BIFURCATED FEE WAIVER REQUEST

Institute for Trade, Standards and Sustainable Development (ITSSD)
P.O. Box 223
Princeton Junction, New Jersey USA 08550
(609) 658-7417
www.itssd.org

A. NOAA-OCIO's Denial of ITSSD's AMB Fee Waiver Request Was Not Reasonably Calculated to Put ITSSD on Notice as to the Deficiencies in its Case

The December 11, 2014 NOAA-OCIO correspondence drafted by the designated NOAA FOIA Officer clearly constitutes an adverse determination of a fee waiver request within the meaning of 15 C.F.R. §4.7(b).²⁶ NOAA-OCIO has denied ITSSD's request for a fee waiver, *without explanation*, on the grounds that “your fee waiver justification was insufficient in detail to enable me to grant your fee waiver request.”²⁷ NOAA-OCIO issued this denial notwithstanding ITSSD's preparation of a detailed annotated Fee Waiver Request that was *42-pages* in length.

As the history of this case shows (Part I above), this is certainly not the first time NOAA-OCIO has issued to ITSSD an adverse fee waiver determination without either citing a basis for such determination or stating a need for additional information or clarification. It employed precisely the same obtuse obstructionist language in its October 10, 2014 denial of the Fee Waiver Request ITSSD had previously filed on September 22, 2014, which had corresponded to ITSSD's New FOIA Request.

And, as the history of this case shows, such practice is *not* in line with prior agency practice relating to ITSSD's Original FOIA Request initially filed in March 2014 and subsequently clarified in April 2014. In May 2014, when NOAA-OCIO had denied ITSSD's clarified fee waiver request, it had provided the following bases:

“I determined that your fee waiver justification was insufficient in detail for the records listed above. The fee waiver request does not show that you would significantly advance the public understanding of a specific government operation or activity. You have not expressed a distribution plan with details about which websites will distribute the records, if any, to the general public or publication where your staff and Board of Advisor members have written commitments to publish the information that would then be accessible to the general public.”²⁸

In contrast to such past practice, NOAA-OCIO has failed to provide *any* bases for its most recent denials of ITSSD's Fee Waiver Requests corresponding, respectively, with its New FOIA Request filed in September 2014 and its AMB FOIA Request filed in October 2014 – both prepared in response to NOAA-OCIO requests for *further* clarification!

NOAA-OCIO did not indicate whether ITSSD's AMB Fee Waiver Request failed to show that the requested records concern “identifiable operations or activities of the federal government,” that they would be “meaningfully informative about government operations or activities,” or that “they would increase public understanding to ‘a significant extent.’” Furthermore, NOAA-OCIO did not indicate whether ITSSD's AMB Fee Waiver Request failed to show that it (including current staff and Board of Advisors members “have ‘expertise in the subject area’ or the ‘ability...to effectively convey information to the public.’” As a result, ITSSD remains unable to ascertain the nature of the deficiencies in its AMB Fee Waiver Request for purposes of correcting them.

NOAA-OCIO's failure to cite in its recent denial letter relating to ITSSD's AMB FOIA Request *any* particular element or point for which it seeks additional information or clarification, or *any* specific basis for reaching its determination, violates the agency's legal obligation, consistent with 15 C.F.R. §4.7(b)(2),²⁹ which states that a "denial letter [...] shall include [...] a] brief statement of the reason(s) for the denial."³⁰ In addition, such failure violates NOAA-OCIO's obligation, pursuant to FOIA jurisprudence, to ensure that the denial letter was "reasonably calculated to put the requester on notice as to the deficiencies in the requester's case."³¹

Indeed, while NOAA-OCIO/NOAA-OAR has neglected to search for any of the agency records for which disclosure has been sought, as specifically identified in ITSSD's AMB FOIA Request, it certainly has made haste in searching for new excuses to justify imposing unsubstantiated document search fees and its continued denials of ITSSD's New and AMB Fee Waiver Requests!

B. The Failure of NOAA-OCIO to Include in its Denial of ITSSD's AMB Fee Waiver Request Any Particular Reference or Basis Therefor Constitutes a Failure to Render a Timely "Determination" Within the Meaning of FOIA, Entitling ITSSD to a Waiver or Substantial Reduction in FOIA Search Fees and Excusing ITSSD From its Obligation to Exhaust its Administrative Remedies Under FOIA and Pursue This Appeal

FOIA jurisprudence establishes that, "[t]he burden of producing evidence and the burden of proof is on the agency to establish compliance with the FOIA time limitations and *determination* requirements" (emphasis added).³² 5 U.S.C. §552(a)(6)(A)(i) provides that,

"[e]ach agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall— (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such *determination* and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse *determination*" (emphasis added).³³

5 U.S.C. §552(a)(6)(C)(i) provides that,

"Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph."³⁴

FOIA jurisprudence indicates that NOAA's failure to include in its denial letter any basis for its denial of ITSSD's AMB Fee Waiver Request was tantamount to NOAA-OCIO's issuance of a mere "acknowledgement" letter. Consequently, NOAA-OCIO had failed to render a "determination" with respect to said request, and thus, failed to respond thereto within the statutorily prescribed period mandated by FOIA and applicable agency FOIA regulations, thereby entitling ITSSD, at the very least, to a substantially reduced search fee or no search fee at all, and at most, a legally sanctioned excuse for having to pursue this Appeal.³⁵ An agency "determination" with respect to a fee waiver

request must include at least “a statement of why the agency believes that waiver or reduction of the fee is not in the public interest and does not benefit the general public.”³⁶ The rationale behind this rule of interpretation is as follows:

“It would be impossible for a requesting person to effectively appeal an agency decision through the administrative process with any hope of changing the agency's mind if the person were denied access to adequate information about the adverse decision. A person cannot effectively appeal a decision about the releasability of documents or the charging of fees if he is not informed of at least a list of the documents to which he was denied access, what fees he will be charged for releasable documents, and why those decisions were made.”³⁷

Moreover, the District of Columbia Circuit clearly recognizes that the “[d]enial of this information would in all likelihood be a violation of due process as well as [an] effective[] gutting [of] the reasons for applying the exhaustion doctrine in FOIA cases.”³⁸ “A response is sufficient for purposes of requiring an administrative appeal if it includes: the agency’s determination of whether or not to comply with the request [setting forth] the reasons for its decision...”³⁹

Finally, FOIA jurisprudence holds that an agency’s failure to include any such particular reference in a denial letter, which is treated as part of the administrative record, will preclude a court of law, on judicial review, from considering it anew.^{40 41} Indeed, the administrative record that exists before NOAA at the time of this administrative appeal is limited to the initial FOIA request, the agency’s response and any subsequent materials related to the administrative appeal.⁴²

C. NOAA-OCIO’s Denial of ITSSD’s Fee Waiver Request Contravenes the Intent of Congress’ FOIA Amendments

The FOIA provides that an agency “shall” waive or reduce its fees “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 the government and is not primarily in the commercial interest of the requester.”⁴³ Courts have held that FOIA’s fee waiver provision is to “be liberally construed in favor of waivers for *noncommercial* requesters” (emphasis added).⁴⁴ The District of Columbia Circuit Court of Appeals, in particular, has noted that,

“The legislative history discussed in *McClellan supra*, *National Security Archive v. U.S. Dept. of Defense*, 880 F.2d 1381 (D.C.Cir.1989), cert. denied, 494 U.S. 1029, 110 S.Ct. 1478, 108 L.Ed.2d 615 (1990), and other cases demonstrates that Congress intended independent researchers, journalists, and public interest watchdog groups to have inexpensive access to government records in order to provide the type of public disclosure believed essential to our society. Moreover, in the 1986 amendments to FOIA, Congress ensured that *when such requesters demonstrated a minimal showing of their legitimate intention to use the requested information* in a way that contributes to public understanding of the operations of government agencies, no fee attaches to their request” (emphasis added)⁴⁵

Furthermore, the D.C. Circuit has found that the objective of the fee-waiver was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.”⁴⁶

D. NOAA-OCIO’s Denial of ITSSD’s AMB Fee Waiver Request Coupled With its Unsubstantiated Estimates of Search Fee Costs Which Must be Prepaid Before a Search Will be Conducted Indicate that NOAA-OCIO Did Not Undertake A Good Faith Search of the Specifically Identified Agency Records Reasonably Described in ITSSD’s AMB FOIA Request

FOIA jurisprudence reflects that “[a]n agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was ‘reasonably calculated to uncover all relevant documents.’”⁴⁷ “The agency is obligated to ‘make a good faith effort to conduct a search for the requested records using methods which can be reasonably expected to produce the information requested.’”⁴⁸ “The agency bears the burden of showing that its search was calculated to uncover all relevant documents.”⁴⁹ In order for an agency to “meet its burden” to conduct a good faith search, it must “provid[e] an affidavit or declaration which sets forth ‘the search terms and the type of search performed, and aver[] that all files likely to contain responsive materials...were searched.’”⁵⁰ Once provided, such an affidavit or declaration “enjoy[s] a presumption of good faith.”⁵¹ An agency’s release of documents “in a piecemeal fashion tends to show the agency’s good faith attempt to discover responsive files and release them when found.”⁵² In the end, “[a]n agency has a duty to make reasonable efforts to satisfy FOIA requests.”⁵³ “In determining reasonableness, the court’s inquiry is not whether responsive documents may exist that were not provided to the requester, but whether the manner in which the search was conducted was adequate.”⁵⁴ “An agency’s practices may constitute a ‘withholding’ of documents under FOIA if the practice results in significant impairment of the requester’s ability to obtain certain types of documents.”⁵⁵

As noted above, NOAA-OCIO’s undated, unsigned and letter-head free correspondence transmitted via email to ITSSD on November 12, 2014, NOAA-OCIO set forth a fee estimate of approximately \$4,000 relating to search for the agency records specifically identified and reasonably described in ITSSD’s AMB FOIA Request. However, NOAA-OCIO neglected to provide substantiation or explanation of that search fee estimate, as its only response was to state in a subsequent November 21, 2014 correspondence that, “Our current estimate is that it will take 98 hours to search for the documents you’ve requested, using professional labor at an average rate of \$41/hour.”⁵⁶ NOAA-OCIO provided no support for this estimate, and no other information beyond this bald statement. It did not provide, for example, how such estimate related to any search terms it may have used or planned to use to arrive at this result, or to any description of the type of search it would had already performed or planned to perform. In other words, if did not conduct a preliminary search that was “reasonably calculated to uncover all relevant documents,” it could not have come up with a reasonable FOIA fee estimate. Nevertheless, NOAA-OCIO has insisted, pursuant to 15 C.F.R. §4.11(i)(2) that ITSSD agree to prepay its estimate before the agency proceeds to ‘act’ on its request. This is nothing more than a disguised bad faith effort to conduct a good faith search for requested records under FOIA.

E. Notwithstanding NOAA-OCIO’s Failure to Render a Timely ‘Determination’ With Respect to its Denial of ITSSD’s AMB Fee Waiver Request, ITSSD Elects to Pursue this Appeal on the Merits by Resting on the Statements of Fact and Law and the Analyses Contained Therein

ITSSD submits that the Fee Waiver Request it filed on December 5, 2014 sufficiently explains how the AMB FOIA Request satisfies each and every one of the requirements of 15 C.F.R. §4.11(k)(1)-(3).

First, the AMB FOIA Request seeks disclosure of reasonably described agency records, including those relating to specifically identified NRC/NAS peer review contracts, NRC/NAS climate study/report development contracts, NOAA climate science research-related grant-funded contracts issued to universities and nonprofits participating in NOAA’s Cooperative Institutes Program, and NOAA-established ad hoc federal advisory committees involved with the development and/or peer review of NOAA-developed climate science-related HISAs:

- A. the subject of which records concern “identifiable operations or activities of the Federal Government,” consistent with 15 C.F.R. §4.11(k)(2)(i), as described in Section II, Factor 1 of the AMB Fee Waiver Request;
- B. which records, if disclosed, would be “meaningfully informative” about these critically important “government operations or activities”, and consequently, “likely to contribute to the [public’s] understanding” of them, consistent with 15 C.F.R. §4.11(k)(2)(ii), as described in Section II, Factor 2 of the AMB Fee Waiver Request;
- C. which records, if disclosed, would contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester, taking into account the requester’s demonstrated ability and intention to effectively convey such information to the public, consistent with 15 C.F.R. §4.11(k)(2)(iii), as described in Section II, Factor 3 of the AMB Fee Waiver Request; *and*
- D. which, if disclosed are likely to contribute ‘significantly’ to public understanding of government operations or activities, consistent with 15 C.F.R. §4.11(k)(2)(iv), as described in Section II, Factor 4 of the AMB Fee Waiver Request.

Second, the Requester (ITSSD) seeking disclosure of the agency records reasonably described in the AMB FOIA Request (as summarized above) has sufficiently demonstrated that:

- A. it has no known or identifiable direct commercial interest that would be furthered by the requested disclosure of such records, consistent with 15 C.F.R. §4.11(k)(3)(i), as described in Section II, Factor 5 of the AMB Fee Waiver Request; *and*
- B. any potentially identifiable indirect commercial interest it ultimately may have in the disclosure of such records is not sufficiently great in magnitude in comparison with the

public interest in disclosure thereof, such that the disclosure of the requested records is “not primarily in the commercial interests of the requester,” consistent with 15 C.F.R. §4.11(k)(3)(ii), as described in Factor 6 of the AMB Fee Waiver Request.

III. CONCLUSION

ITSSD’s AMB Fee Waiver Request shows not only “a connection between the material sought and a matter of genuine public concern, but...also indicate[s] that a fee waiver or reduction will primarily benefit the public.”⁵⁷ In other words, ITSSD’s AMB Fee Waiver Request shows ITSSD has satisfactorily demonstrated its satisfaction of the six fee waiver factors set forth in 15 C.F.R. §4.11(k)(1)-(3).

NOAA Office of General Counsel should recall that courts have held that if it is a ‘close call’ as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non-commercial entity should be given the benefit of the doubt and be granted the fee waiver.⁵⁸ In consideration thereof, NOAA-OCIO’s denial of ITSSD’s request to have its fees waived was made in error and should be overturned.

ENDNOTES

¹ See U.S. Department of Commerce, National Oceanic and Atmospheric Administration Office of the Chief Information Officer High Performance Computing and Communications, *Denial of ITSSD Fee Waiver Request on Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694* (Dec. 11, 2014), available at: <https://nebula.wsimg.com/b9f484e2c03a5683085e8037aa75b443?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

² See Institute for Trade, Standards and Sustainable Development, *Request for Waiver of Fees With Respect to Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694* (Dec. 5, 2014), available at: <https://nebula.wsimg.com/22066faa4e5166f932dca392680c8334?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

³ See Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-000714* (filed March 26, 2014), available at: <https://nebula.wsimg.com/1ec660f37bd6e62a136dbf64b95ff247?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (This FOIA request was originally filed as seven separate FOIA requests with NOAA-HQ and six NOAA Collaboration Team offices, but was immediately consolidated by NOAA-HQ as of April 1, 2014).

⁴ See U.S. Department of Commerce, National Oceanic and Atmospheric Administration Office of the Chief Information Officer, High Performance Computing and Communications, *Re: FOIA Request No. DOC-NOAA-2014-000714* (April 1, 2014), available at:

<https://nebula.wsimg.com/37bd0311492047e8e8a9a6cf331122b0?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (indicating that NOAA’s National FOIA Office (Office of the Chief Information Officer High Performance Computing and Communications (“OCIO”)) denied ITSSD’s FOIA fee waiver request on the grounds that it did not sufficiently “explain in detail how disclosure of the records requested would satisfy all the requirements for a fee waiver,” and that NOAA-OCIO also had sought clarification of such request by April 22).

⁵ See Institute for Trade, Standards and Sustainable Development, *ITSSD FOIA Request Clarification - Consolidated FOIA Request No. DOC-NOAA-2014-000714* (May 5, 2014), available at: <https://nebula.wsimg.com/c25e625aa81981536c980ec0f3307791?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (containing ITSSD’s May 5, 2014 filing with NOAA-OCIO of a detailed annotated FOIA request clarification).

⁶ See Institute for Trade, Standards and Sustainable Development, *ITSSD FOIA Fee Waiver Request Clarification Consolidated FOIA Request No. DOC-NOAA-2014-000714* (May 5, 2014), available at: <https://nebula.wsimg.com/8a36cc18e5e7c578018f7a8cf851766d?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (containing ITSSD’s filing of an annotated clarified FOIA fee waiver request of the same date).

⁷ See U.S. Department of Commerce, National Oceanic and Atmospheric Administration Office of the Chief Information Officer, High Performance Computing and Communications, *Re: FOIA Request No. DOC-NOAA-2014-000714* (May 28, 2014), available at: <https://nebula.wsimg.com/8b680576f0c313e223b87bf7c85995fa?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (containing NOAA-OCIO’s denial of ITSSD’s clarified fee waiver request because it did “not show that [ITSSD] would significantly advance the public understanding of a specific government operation or activity [...] and had] not expressed a distribution plan with details about which websites will distribute the records, if any, to the general public or publication where [ITSSD] staff and Board of Advisor members have written commitments to publish the information that would then be accessible to the general public”).

⁸ On June 12, 2014, ITSSD participated in a conference phone call with a representative from NOAA-OCIO and a representative from NOAA’s Office of General Counsel (“NOAA-OGC”). The purpose of the call was to address NOAA apparent ‘confusion(s)’ concerning the scope and focus of current ITSSD FOIA Request No. NOAA-HQ-2014-000714, particularly, its relevance to the FOIA requests and clarifications ITSSD had then filed with the EPA. *During the call, these NOAA personnel indicated that NOAA would not respond to ITSSD’s FOIA request, even as clarified, and suggested that if ITSSD desired a response, at all, it would need to withdraw the current request and replace it with a newly filed FOIA request.* This conference call had been recorded in accordance with New Jersey state privacy laws.

⁹ See Institute for Trade, Standards and Sustainable Development, *Filing of New ITSSD FOIA Request [[FOIA Request No. DOC-NOAA-2014-001694]; Withdrawal of FOIA Request No. DOC-NOAA-2014-000714* (Sept. 22, 2014), available at:

<https://nebula.wsimg.com/86e0c3d9f0c18e77b33e25d935498bcc?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁰ See Institute for Trade, Standards and Sustainable Development, *Filing of New FOIA Fee Waiver Request [FOIA Request No. DOC-NOAA-2014-001694] to Accompany New FOIA Request; Withdrawal of Fee Waiver Request Relating to Withdrawn FOIA Request No. DOC-NOAA-2014-000714* (Sept. 22, 2014), available at: <https://nebula.wsimg.com/f05a58d9e07c072567b5ba64b612b984?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹¹ See *Supplement to New FOIA Fee Waiver Request Accompanying New FOIA Request No. DOC-NOAA-2014-001694* (Sept. 30, 2014), available at: <https://nebula.wsimg.com/2b1651bcb6ed66d314bd552939b35b89?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹² *Id.*

¹³ See *DOC-NOAA Request for ITSSD FOIA Request Clarification Re: Request No. DOC-NOAA-2014-001694* (Sept. 30, 2014), available at: <https://nebula.wsimg.com/b975490b7cae26ae5075ec67e12b9eef?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁴ See *ITSSD Clarification of New FOIA Request No. DOC-NOAA-2014-001694* (Oct. 1, 2014), available at: <https://nebula.wsimg.com/43d251976355e191bb523611a8fd1cd2?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁵ See United States Department of Commerce National Oceanic and Atmospheric Administration, Office of the Chief Information Officer High Performance Computing and Communications, *Denial Re: FOIA Request No. DOC-NOAA-2014-001694* (Oct. 10, 2014), available at: <https://nebula.wsimg.com/31e7bfa1e15c1162c804285d7b5e8140?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁶ *Id.*, at p. 2.

¹⁷ See Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-001694 - Tranche/Cache of Clearly and Obviously Identified NOAA Files* (Oct. 27, 2014), available at: <https://nebula.wsimg.com/27e342084d64f57315a79f9a426c9800?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁸ See *DOC-NOAA Email Acceptance of ITSSD Amendment/Modification/Bifurcation of FOIA Request No. DOC-NOAA-2014-001694* (Nov. 7, 2014), available at: <https://nebula.wsimg.com/49d9ddec8309db3a37024d77c7b6d781?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁹ See Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-001694 - Tranche/Cache of Clearly and Obviously Identified NOAA Files* (Oct. 27, 2014), *supra*.

²⁰ See *DOC-NOAA Email Acceptance of ITSSD Amendment/Modification/Bifurcation of FOIA Request No. DOC-NOAA-2014-001694* (Nov. 7, 2014), *supra*.

²¹ See *Email Dated November 12, 2014 Transmitting New NOAA FOIA Office Undated, Unsigned and Letterhead-Free Fee Estimate* (Nov. 12, 2014), available at: <https://nebula.wsimg.com/789568e994112ab08c9be9ce348e5302?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²² See *DOC-NOAA Undated, Unsigned and Letterhead-Free FOIA Fee Estimate Transmitted via Email Dated November 12, 2014* (Nov. 12, 2014), available at: <https://nebula.wsimg.com/05f5d2f53b3f56b30fed851d96020157?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²³ See Institute for Trade, Standards and Sustainable Development, *ITSSD Reply to DOC-NOAA Undated, Unsigned and Letterhead-Free Fee Estimate Transmitted via Email Dated November 12, 2014* (Nov. 14, 2014), available at: <https://nebula.wsimg.com/03611f04fa470c17705a07ef2838bacf?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁴ See *DOC-NOAA Response via Email Dated November 21, 2014, to ITSSD Reply of November 14, 2014* (Nov. 21, 2014), available at:

<https://nebula.wsimg.com/30902cbb39699e770159161528c33833?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁵ See Institute for Trade, Standards and Sustainable Development, *ITSSD Reply of November 28, 2014, to DOC- NOAA Response via Email Dated November 21, 2014, Re: Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694* (Nov. 28, 2014), available at: <https://nebula.wsimg.com/a3a245a8380ed13a3ac68c8d42439f36?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁶ See 15 C.F.R. §4.7(b).

²⁷ See U.S. Department of Commerce, National Oceanic and Atmospheric Administration Office of the Chief Information Officer High Performance Computing and Communications, *Denial of ITSSD Fee Waiver Request on Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694* (Dec. 11, 2014), *supra* at p. 2.

²⁸ See U.S. Department of Commerce, National Oceanic and Atmospheric Administration Office of the Chief Information Officer, High Performance Computing and Communications, *Re: FOIA Request No. DOC-NOAA-2014-000714* (May 28, 2014), *supra* at pp. 1-2.

²⁹ See 15 C.F.R. §4.7(b)(2).

³⁰ *Id.*

³¹ See *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d 53, 55 (9th Cir. 1997) (reiterating that agency's letter “must be reasonably calculated to put the requester on notice” as to reasons for the fee waiver denial).

³² See *Shermco Industries, Inc. v. SEC. of US Air Force*, 452 F. Supp. 306, 317 (N.D. Tex. 1978), citing *Seafarers International Union AFL-CIO v. Baldovin*, 508 F.2d 125 (5th Cir. 1975), vacated on other grounds, 511 F.2d 1161 (5th Cir. 1975); *Washington Research Project Inc. v. HEW*, 164 U.S.App. 169, 504 F.2d 238, cert den'd, 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1974).

³³ See 5 U.S.C. §552(a)(6)(A)(i)

³⁴ See 5 U.S.C. §552(a)(6)(C)(i).

³⁵ See *Shermco Industries, Inc. v. Secretary of the United States Air Force*, 452 F. Supp. at 317.

³⁶ *Id.*

³⁷ *Id.*, at fn 7.

³⁸ *Id.*, citing U.S. Const. Amendment 14.

³⁹ See *Oglesby v. Dep't of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990) citing *Shermco Industries v. Secretary of the United States Air Force*, 452 F.Supp. 306 (N.D.Tex.1978), rev'd on other grounds, 613 F.2d 1314 (5th Cir.1980).

⁴⁰ See 5 U.S.C. § 552(a)(4)(A)(vii) (“(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo, provided that the court's review of the matter shall be limited to the record before the agency.”); See also *Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, slip op. 649, 668 (9th Cir. 1997) (“On judicial review, we cannot consider new reasons offered by the agency not raised in the denial letter”), citing *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 631 n. 31, 65 L. Ed. 1010, 100 S. Ct. 2844 (1980) (“The rule barring consideration of *post hoc* agency rationalizations operates where an agency has provided a particular justification for a determination at the time the determination is made, but provides a different justification for that same determination when it is later reviewed by another body”).

⁴¹ See *Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 (9th Cir. 2005) (“”); See *Friends of the Coast Fork v. U.S. Dept. of the Interior*, 110 F.3d 53, 55 (9th. Cir 1997) (“Our review is limited to the record before the agency, and this applies just as much to the reasons the agency offered for denial as it does to the evidence the agency offered, 5 U.S.C. §52(a)(4)(A)(vi); [*McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282 (9th Cir.1987)] MES, 835 F.2d at 1284. [...] Taken together, these principles lead us to the following conclusion: on judicial review, the agency must stand on whatever reasons for denial it gave in the administrative proceeding. If those reasons are inadequate, and if the requesters meet their burden, then a full fee waiver is in order.”) *Id.*

⁴² See *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam); *Schoenman v. FBI*, 604 F. Supp.2d 174, 188 (D.D.C. 2009) (citing, *inter alia*, *Forest Guardians*, 416 F.3d at 1177).

⁴³ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁴⁴ See, e.g., *Forest Guardians v. Department of Interior*, 416 F.3d 1173, 1177-78 (10th Cir. 2005); *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987).

⁴⁵ See *Institute for Wildlife Protection v. U.S. Fish and Wildlife Service*, 290 F.Supp.2d 1226, 1232 (2003).

⁴⁶ See *Judicial Watch, Inc.*, 326 F.3d at 1311. See also *McClellan Ecological Seepage Situation*, 835 F.2d at 1284.

⁴⁷ See *Damon Elliott v. National Archives and Records Administration*, 518 F. Supp. 2d 257, 259 (D.C.D.C. 2007), quoting *Valencia-Lucena v. United States Coast Guard*, 336 U.S. App. D.C. 386, 180 F. 3d 321, 325 (D.C. Cir. 1999), quoting *Truitt v. Dep't of State*, 283 U.S. App. D.C. 86, 897 F.2d 540, 542 (D.C. Cir. 1990). See also *Elisabeth Kidder v. Federal Bureau of Investigation*, 517 F. Supp. 2d 17, 22 (D.C.D.C. 2007) quoting same.

⁴⁸ See *Damon Elliott v. National Archives and Records Administration*, 518 F. Supp. 2d at 259, quoting *Oglesby v. United States Dep't of Army*, 287 U.S. App. D.C. 126, 920 F.2d 57, 68 (D.C. Cir. 1990) (citing *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). See also *Elisabeth Kidder v. Federal Bureau of Investigation*, 517 F. Supp. 2d at 22 citing *Campbell v. United States Dep't of Justice*, 334 U.S. App. D.C. 20, 164 F. 3d 20, 27 (D.C. Cir. 1998).

⁴⁹ See *Elisabeth Kidder v. Federal Bureau of Investigation*, 517 F. Supp. 2d at 22 citing *Steinberg v. United States Dep't of Justice*, 306 U.S. App. 240, 23 F.3d 548, 551 (D.C. Cir. 1994), citing *Weisberg v. United States Dep't of Justice*, 745 F.2d at 1485.

⁵⁰ See *Damon Elliott v. National Archives and Records Administration*, 518 F. Supp. 2d at 259, quoting *Iturralde v. Comptroller of the Currency*, 354 U.S. App. D.C. 230, 315 F. 3d 311, 313-314 (D.C. Cir. 2003) (citing *Valencia-Lucena*, 180 F. 3d at 326).

⁵¹ See *Damon Elliott v. National Archives and Records Administration*, 518 F. Supp. 2d at 259, quoting *Chamberlain v. United States Dep't of Justice*, 957 F. Supp. 292, 294 (D.D.C.) aff'd per curiam, 326 U.S. App. D.C. 337, 124 F.3d 1309 (D.C. Cir. 1997).

⁵² See *South Yuba River Citizens League and Friends of the River v. National Marine Fisheries Service*, 2008 U.S. Dist. LEXIS 107177 at 50-51 (E.D.Ca. 2008), citing *Meeropol v. Meese*, 252 U.S. App. D.C. 381, 790 F.2d 942, 953 (D.C. Cir. 1986).

⁵³ See *South Yuba River Citizens League and Friends of the River v. National Marine Fisheries Service*, 2008 U.S. Dist. LEXIS 107177 at 50-51 (E.D.Ca. 2008), citing *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995); *Founding Church of Scientology of Washington, D.C. v. Nat'l Sec. Agency*, 197 U.S. App. D.C. 305, 610 F.2d 824, 837 (D.C. Cir. 1979).

⁵⁴ See *South Yuba River Citizens League and Friends of the River v. National Marine Fisheries Service*, 2008 U.S. Dist. LEXIS 107177 at 50-51 (E.D.Ca. 2008), citing *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d at 1328 (9th Cir. 1995).

⁵⁵ See *South Yuba River Citizens League and Friends of the River v. National Marine Fisheries Service*, 2008 U.S. Dist. LEXIS 107177 at 50-51 (E.D.Ca. 2008), citing *McGehee, III v. Central Intelligence Agency*, 697 F.2d 1095, 1110 (D.C. Cir. 1983).

⁵⁶ See *DOC-NOAA Response via Email Dated November 21, 2014, to ITSSD Reply of November 14, 2014* (Nov. 21, 2014), *supra*.

⁵⁷ See *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 648 (D.C.Cir.1987).

⁵⁸ See *Forest Guardians v. Dept. of the Interior*, 416 F. 3d 1173 (10 Cir. 2005).

Potts, Kristina (Federal)

From: Potts, Kristina (Federal)
Sent: Tuesday, August 15, 2017 3:23 PM
To: Orr, Malcolm (Federal)
Cc: Bogomolny, Michael (Federal); Graff, Mark (Federal)
Subject: FW: Missing Kogan record
Attachments: ITSSD 1-7-15 Appeal of NOAA OCIO Fee Waiver Request Denial.pdf

Malcolm: Oh, ok, thanks for the insight!

NOA (b)(5)

Kristina E. Potts
Department of Commerce
Office of General Counsel
HCHB 5098
Email: Kristina.potts@doc.gov
Phone: 202-482-7863
lphon (b)(6)

From: Orr, Malcolm (Federal)
Sent: Tuesday, August 15, 2017 3:18 PM
To: Potts, Kristina (Federal) <Kristina.Potts@doc.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Cc: Graff, Mark (Federal) <Mark.Graff@noaa.gov>
Subject: RE: Missing Kogan record

Hi Kristina,

(b)(5)

Thanks,

Malcolm Orr
Senior Counsel
General Law Division
U.S. Department of Commerce
14th and Constitution Avenue, NW
Washington, D.C. 20230
202-322-2138 (office)
202-482-2888 (fax)
morr@doc.gov

From: Potts, Kristina (Federal)
Sent: Tuesday, August 15, 2017 2:42 PM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Cc: Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Orr, Malcolm (Federal) <MOrr@doc.gov>
Subject: RE: Missing Kogan record

Mik (b)(5)

. V/R,

Kristina E. Potts
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From: Bogomolny, Michael (Federal)
Sent: Tuesday, August 15, 2017 2:31 PM
To: Potts, Kristina (Federal) <Kristina.Potts@doc.gov>
Cc: Graff, Mark (Federal) <Mark.Graff@noaa.gov>
Subject: Re: Missing Kogan record

Kristina,

(b)(5)

-bogo

From: Potts, Kristina (Federal)
Sent: Tuesday, August 8, 2017 3:33 PM
To: Bogomolny, Michael (Federal)
Subject: RE: Missing Kogan record

Mik (b)(5)

. V/R,

FOIA Log

Status	Requester	File Number	Agency	Action Officer	Submitted	Closed	FOIA Request #	FOIA Appeal #	Comment
(b)(5)									

(b)(5)

(b)(5)

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-----Original Message-----

From: Potts, Kristina (Federal)
Sent: Wednesday, August 02, 2017 7:02 AM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Subject: FW: file for you

Mik (b)(5)
(b)(5)

(b)(5)

Kristina E. Potts
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Iphon (b)(6)

-----Original Message-----

From: Orr, Malcolm (Federal)
Sent: Tuesday, August 01, 2017 3:36 PM
To: Potts, Kristina (Federal) <Kristina.Potts@doc.gov>
Subject: RE: file for you

Hi Kristin (b)(5)
(b)(5). Thanks,

Malcolm Orr

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-----Original Message-----

From: Potts, Kristina (Federal)
Sent: Tuesday, August 01, 2017 2:30 PM
To: Orr, Malcolm (Federal) <MOrr@doc.gov>
Subject: FW: file for you

(b)(5)

(b)(5)

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Iphon (b)(6)

-----Original Message-----

From: Bogomolny, Michael (Federal)
Sent: Tuesday, July 18, 2017 6:39 PM
To: Potts, Kristina (Federal) <Kristina.Potts@doc.gov>
Subject: file for you

(b)(5)

-bogo



January 7, 2015

Office of Assistant General Counsel for Administration
U.S. Department of Commerce
Room 5898-C
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

Page | 1

Re: *FREEDOM OF INFORMATION ACT APPEAL*
AMENDED/MODIFIED/BIFURCATED FOIA REQUEST
NO. DOC-NOAA-2014-001694

Attention:

The nonprofit Institute for Trade, Standards and Sustainable Development (ITSSD) hereby submits the attached APPEAL of the Denial of Fee Waiver Request issued by the U.S. Department of Commerce National Oceanic and Atmospheric Administration Office of the Chief Information Officer, dated December 11, 2014.

Please acknowledge receipt of this APPEAL

We look forward to receiving your determination.

Very truly yours,

Lawrence A. Kogan

Lawrence Kogan
CEO
ITSSD

**FREEDOM OF INFORMATION ACT APPEAL
OF DENIAL OF ITSSD REQUEST FOR FEE WAIVER
CORRESPONDING TO
AMENDED/MODIFIED/BIFURCATED
FOIA REQUEST NO./# DOC-NOAA-2014-001694**

The nonprofit Institute for Trade, Standards and Sustainable Development (“ITSSD”) hereby appeals the December 11, 2014 denial¹ by the U.S. Department of Commerce National Oceanic and Atmospheric Administration Office of the Chief Information Officer (“DOC-NOAA-OCIO”) of ITSSD’s Request for Fee Waiver dated and filed on December 5, 2014.²

**I.
PROCEEDINGS BELOW**

This is a FOIA case with a long history of NOAA-OCIO obstructionism dating back to ITSSD’s first FOIA Fee Waiver Request filed in March 2014.^{3 4 5 6 7 8} The objective of the former request, like that of the present one, has been to secure disclosure of agency records of critical interest and importance to the American public. These FOIAs have sought disclosure of agency records substantiating NOAA’s compliance with its legal responsibilities under the Information Quality Act (“IQA”) and applicable IQA-implementing Office of Management and Budget (“OMB”) and NOAA peer review process and administrative review standards. NOAA had been obliged to ensure that the mostly third party peer reviews of ten (10) NOAA-developed highly influential scientific assessments used to support the Environmental Protection Agency’s 2009 Clean Air Act Section 202(a) Greenhouse Gas Endangerment Findings and subsequently triggered major emissions control regulations had been adequately validated prior to their public dissemination in conformance with the IQA’s, OMB’s and NOAA’s most rigorous and least discretionary peer review independence, conflict of interest, panel balance and administrative review standards applicable to HISAs.

On September 22, 2014, ITSSD filed with NOAA-OCIO its New FOIA Fee Waiver Request which was subsequently designated Request No. DOC-NOAA-2014-001694.⁹ On the same date, ITSSD filed its corresponding Fee Waiver Request.¹⁰

Thereafter, on September 30, 2014, ITSSD filed with NOAA-OCIO a supplement to its September 22, 2014 Fee Waiver Request.¹¹ It “provided additional material and relevant evidence of ITSSD’s satisfaction of NOAA’s six-factor fee waiver test of 15 C.F.R. §4.11(k)(1)-(3).”¹²

On September 30, 2014, NOAA-OCIO dispatched to ITSSD an oblique request for clarification of its New FOIA Request without identifying any specific item requiring clarification. Its restatement of 15 C.F.R. 4.4(c) strongly suggested that NOAA-OCIO did not believe the New FOIA Request overall “reasonably described [...] the requested records in enough detail to enable Department personnel to locate them with a reasonable amount of effort.”¹³ *Notwithstanding NOAA-OCIO’s failure to provide guidance concerning what details, in particular, were missing*, ITSSD responded, on October 1, 2014, by preparing and dispatching to NOAA-OCIO a good faith clarification of ITSSD’s New FOIA Request as NOAA-OCIO had requested.¹⁴

On October 10, 2014, NOAA-OCIO issued an adverse fee waiver determination in response to ITSSD's September 22, 2014 Fee Waiver Request. The NOAA-OCIO denial stated, *without explanation*, that ITSSD's "fee waiver justification was insufficient in detail to enable me to grant [its] fee waiver request. [...] NOAA is still without the clarity and information required to grant you a fee waiver."¹⁵ It also provided an initial FOIA fee estimate of \$7500 for search fees *unaccompanied by any explanation or substantiation concerning how the fee estimate had been derived*.¹⁶

NOAA-OCIO's October 10, 2014 fee waiver denial thereafter prompted a series of oral and written correspondences between ITSSD and NOAA-OCIO and NOAA-OAR representatives spanning from October 21, 2014 to November 7, 2014.^{17 18} These correspondences reveal there was a consensus of the Parties that ITSSD's New FOIA Request was too 'complex' and required simplification and narrowing of scope to facilitate expedited processing by NOAA-OCIO. They also confirm that NOAA-OCIO acknowledged and accepted ITSSD's filing of a simplified and more narrowly drafted Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694 ("AMB FOIA Request"), dated October 27, 2014.¹⁹

Unlike ITSSD's New FOIA Request, the AMB FOIA Request seeks disclosure of the following well-defined groups of publicly unavailable government contracts further identified by specific name and number. A summary description of each of these groups is provided below along with references to their location in the AMB FOIA Request:

1. Six (6) contracts issued by NOAA (or on NOAA's behalf) commissioning the National Research Council/National Academy of Sciences to undertake the peer review of seven (7) of the ten (10) listed NOAA-developed scientific assessments (*See* AMB FOIA Request p. 4);
2. Three (3) contracts issued by NOAA (alone or jointly with another federal agency) commissioning the National Research Council/National Academy of Sciences to develop three new climate science-related reports (*See* AMB FOIA Request p. 4);
3. Thirty-nine (39) grant contracts/awards identified by alpha-numeric reference NOAA had issued to seventeen (17) universities and nonprofit institutes during 2004-2010 (*See* AMB FOIA Request pp. 5-6); *and*
4. One (1) or more unidentified grant contract(s)/award(s) NOAA issued to Oregon State University's Cooperative Institute for Oceanographic Satellite Studies (CIOSS) during said period (*See* AMB FOIA Request p. 6).

In addition, the AMB FOIA Request also seeks disclosure of specific agency files concerning a handful of NOAA-established *ad hoc* federal advisory committees identified by specific name. A summary description of this group is set forth below along with a reference to its location in the AMB FOIA Request:

5. Selection criteria and identities of each member of five (5) listed NOAA-established federal advisory committees involved with the development and/or peer review of five (5) of the ten (10) listed NOAA-developed scientific assessments (*See Amended/Modified/Bifurcated FOIA Request p. 3*).

In its November 7, 2014 email correspondence to ITSSD, NOAA-OCIO/NOAA-OAR representative Bruce Gibbs simultaneously thanked ITSSD for its simplified and narrowed AMB FOIA Request, and noted how NOAA-OCIO was “in the process of evaluating it to determine how to proceed.”²⁰

Thereafter, in an undated, unsigned and letterhead-free email correspondence received by ITSSD on November 12, 2014,²¹ NOAA-OCIO representative Gerald Fox provided a new FOIA Fee Estimate “to search for responsive records” in the amount of \$4,000. The language used in this highly irregular unfinished correspondence reverted back to ITSSD’s New FOIA Request and ignored the reduced scope of the AMB FOIA Request.²² *This fee estimate, as well, contained no explanation or substantiation concerning how the fee estimate had been derived.*

ITSSD responded by written correspondence dated November 14, 2014, seeking substantiation and reconciliation of the two fee estimates NOAA-OCIO/NOAA-OAR representatives had proffered, and reiterating its previous description of the easily searchable “specifically identified” NOAA files for which disclosure had been sought in ITSSD’s AMB FOIA Request.²³ Unfortunately, upon receiving the NOAA-OCIO/NOAA/OAR representative’s November 21, 2014 email response to its correspondence, ITSSD immediately recognized that NOAA-OCIO’s prior tone of ostensible cooperation had, once again, transformed into obstructionism. Remarkably, said representative’s email stated the following:

“[W]e are awaiting your confirmation or denial to pay the fee required for us to search for these records. The estimated fee is *for search* and not duplication. Please let us know of your intention before November 28, 2014. Please remember you have requested a fair amount of data, *that’s still somewhat vague in some areas*--but we will try to help you to the best of our ability” (emphasis added).²⁴

ITSSD thereafter dispatched another written correspondence dated, November 28, 2014, requesting substantiation and/or explanation of the bases for the search fee estimates that NOAA-OCIO/NOAA-OAR representatives had previously provided, and apprising the agency that ITSSD would be filing a Fee Waiver Request corresponding to its AMB FOIA Request.²⁵

On December 5, 2014, ITSSD filed the Fee Waiver Request NOAA-OCIO’s December 11, 2014 denial of *which is the subject matter of this Appeal*. It explains in detail why disclosure of the records specifically identified in ITSSD’s AMB FOIA Request is in the public interest and satisfies the six-factor fee waiver test set forth within the applicable NOAA FOIA fee waiver regulations.

II. NOAA-OCIO’S DENIAL OF ITSSD’S AMENDED/MODIFIED/BIFURCATED FEE WAIVER REQUEST

Institute for Trade, Standards and Sustainable Development (ITSSD)
P.O. Box 223
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A. NOAA-OCIO's Denial of ITSSD's AMB Fee Waiver Request Was Not Reasonably Calculated to Put ITSSD on Notice as to the Deficiencies in its Case

The December 11, 2014 NOAA-OCIO correspondence drafted by the designated NOAA FOIA Officer clearly constitutes an adverse determination of a fee waiver request within the meaning of 15 C.F.R. §4.7(b).²⁶ NOAA-OCIO has denied ITSSD's request for a fee waiver, *without explanation*, on the grounds that “your fee waiver justification was insufficient in detail to enable me to grant your fee waiver request.”²⁷ NOAA-OCIO issued this denial notwithstanding ITSSD's preparation of a detailed annotated Fee Waiver Request that was *42-pages* in length.

As the history of this case shows (Part I above), this is certainly not the first time NOAA-OCIO has issued to ITSSD an adverse fee waiver determination without either citing a basis for such determination or stating a need for additional information or clarification. It employed precisely the same obtuse obstructionist language in its October 10, 2014 denial of the Fee Waiver Request ITSSD had previously filed on September 22, 2014, which had corresponded to ITSSD's New FOIA Request.

And, as the history of this case shows, such practice is *not* in line with prior agency practice relating to ITSSD's Original FOIA Request initially filed in March 2014 and subsequently clarified in April 2014. In May 2014, when NOAA-OCIO had denied ITSSD's clarified fee waiver request, it had provided the following bases:

“I determined that your fee waiver justification was insufficient in detail for the records listed above. The fee waiver request does not show that you would significantly advance the public understanding of a specific government operation or activity. You have not expressed a distribution plan with details about which websites will distribute the records, if any, to the general public or publication where your staff and Board of Advisor members have written commitments to publish the information that would then be accessible to the general public.”²⁸

In contrast to such past practice, NOAA-OCIO has failed to provide *any* bases for its most recent denials of ITSSD's Fee Waiver Requests corresponding, respectively, with its New FOIA Request filed in September 2014 and its AMB FOIA Request filed in October 2014 – both prepared in response to NOAA-OCIO requests for *further* clarification!

NOAA-OCIO did not indicate whether ITSSD's AMB Fee Waiver Request failed to show that the requested records concern “identifiable operations or activities of the federal government,” that they would be “meaningfully informative about government operations or activities,” or that “they would increase public understanding to ‘a significant extent.’” Furthermore, NOAA-OCIO did not indicate whether ITSSD's AMB Fee Waiver Request failed to show that it (including current staff and Board of Advisors members “have ‘expertise in the subject area’ or the ‘ability...to effectively convey information to the public.’” As a result, ITSSD remains unable to ascertain the nature of the deficiencies in its AMB Fee Waiver Request for purposes of correcting them.

NOAA-OCIO’s failure to cite in its recent denial letter relating to ITSSD’s AMB FOIA Request *any* particular element or point for which it seeks additional information or clarification, or *any* specific basis for reaching its determination, violates the agency’s legal obligation, consistent with 15 C.F.R. §4.7(b)(2),²⁹ which states that a “denial letter [...] shall include [...]a] brief statement of the reason(s) for the denial.”³⁰ In addition, such failure violates NOAA-OCIO’s obligation, pursuant to FOIA jurisprudence, to ensure that the denial letter was “reasonably calculated to put the requester on notice as to the deficiencies in the requester’s case.”³¹

Indeed, while NOAA-OCIO/NOAA-OAR has neglected to search for any of the agency records for which disclosure has been sought, as specifically identified in ITSSD’s AMB FOIA Request, it certainly has made haste in searching for new excuses to justify imposing unsubstantiated document search fees and its continued denials of ITSSD’s New and AMB Fee Waiver Requests!

B. The Failure of NOAA-OCIO to Include in its Denial of ITSSD’s AMB Fee Waiver Request Any Particular Reference or Basis Therefor Constitutes a Failure to Render a Timely “Determination” Within the Meaning of FOIA, Entitling ITSSD to a Waiver or Substantial Reduction in FOIA Search Fees and Excusing ITSSD From its Obligation to Exhaust its Administrative Remedies Under FOIA and Pursue This Appeal

FOIA jurisprudence establishes that, “[t]he burden of producing evidence and the burden of proof is on the agency to establish compliance with the FOIA time limitations and *determination* requirements” (emphasis added).³² 5 U.S.C. §552(a)(6)(A)(i) provides that,

“[e]ach agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall— (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such *determination* and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse *determination*” (emphasis added).³³

5 U.S.C. §552(a)(6)(C)(i) provides that,

“Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.”³⁴

FOIA jurisprudence indicates that NOAA’s failure to include in its denial letter any basis for its denial of ITSSD’s AMB Fee Waiver Request was tantamount to NOAA-OCIO’s issuance of a mere “acknowledgement” letter. Consequently, NOAA-OCIO had failed to render a “determination” with respect to said request, and thus, failed to respond thereto within the statutorily prescribed period mandated by FOIA and applicable agency FOIA regulations, thereby entitling ITSSD, at the very least, to a substantially reduced search fee or no search fee at all, and at most, a legally sanctioned excuse for having to pursue this Appeal.³⁵ An agency “determination” with respect to a fee waiver

request must include at least “a statement of why the agency believes that waiver or reduction of the fee is not in the public interest and does not benefit the general public.”³⁶ The rationale behind this rule of interpretation is as follows:

“It would be impossible for a requesting person to effectively appeal an agency decision through the administrative process with any hope of changing the agency's mind if the person were denied access to adequate information about the adverse decision. A person cannot effectively appeal a decision about the releasability of documents or the charging of fees if he is not informed of at least a list of the documents to which he was denied access, what fees he will be charged for releasable documents, and why those decisions were made.”³⁷

Moreover, the District of Columbia Circuit clearly recognizes that the “[d]enial of this information would in all likelihood be a violation of due process as well as [an] effective[] gutting [of] the reasons for applying the exhaustion doctrine in FOIA cases.”³⁸ “A response is sufficient for purposes of requiring an administrative appeal if it includes: the agency’s determination of whether or not to comply with the request [setting forth] the reasons for its decision...”³⁹

Finally, FOIA jurisprudence holds that an agency’s failure to include any such particular reference in a denial letter, which is treated as part of the administrative record, will preclude a court of law, on judicial review, from considering it anew.^{40 41} Indeed, the administrative record that exists before NOAA at the time of this administrative appeal is limited to the initial FOIA request, the agency’s response and any subsequent materials related to the administrative appeal.⁴²

C. NOAA-OCIO’s Denial of ITSSD’s Fee Waiver Request Contravenes the Intent of Congress’ FOIA Amendments

The FOIA provides that an agency “shall” waive or reduce its fees “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 the government and is not primarily in the commercial interest of the requester.”⁴³ Courts have held that FOIA’s fee waiver provision is to “be liberally construed in favor of waivers for *noncommercial* requesters” (emphasis added).⁴⁴ The District of Columbia Circuit Court of Appeals, in particular, has noted that,

“The legislative history discussed in *McClellan supra*, *National Security Archive v. U.S. Dept. of Defense*, 880 F.2d 1381 (D.C.Cir.1989), cert. denied, 494 U.S. 1029, 110 S.Ct. 1478, 108 L.Ed.2d 615 (1990), and other cases demonstrates that Congress intended independent researchers, journalists, and public interest watchdog groups to have inexpensive access to government records in order to provide the type of public disclosure believed essential to our society. Moreover, in the 1986 amendments to FOIA, Congress ensured that *when such requesters demonstrated a minimal showing of their legitimate intention to use the requested information* in a way that contributes to public understanding of the operations of government agencies, no fee attaches to their request” (emphasis added)⁴⁵

Furthermore, the D.C. Circuit has found that the objective of the fee-waiver was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.”⁴⁶

D. NOAA-OCIO’s Denial of ITSSD’s AMB Fee Waiver Request Coupled With its Unsubstantiated Estimates of Search Fee Costs Which Must be Prepaid Before a Search Will be Conducted Indicate that NOAA-OCIO Did Not Undertake A Good Faith Search of the Specifically Identified Agency Records Reasonably Described in ITSSD’s AMB FOIA Request

FOIA jurisprudence reflects that “[a]n agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was ‘reasonably calculated to uncover all relevant documents.’”⁴⁷ “The agency is obligated to ‘make a good faith effort to conduct a search for the requested records using methods which can be reasonably expected to produce the information requested.’”⁴⁸ “The agency bears the burden of showing that its search was calculated to uncover all relevant documents.”⁴⁹ In order for an agency to “meet its burden” to conduct a good faith search, it must “provid[e] an affidavit or declaration which sets forth ‘the search terms and the type of search performed, and aver[] that all files likely to contain responsive materials...were searched.’”⁵⁰ Once provided, such an affidavit or declaration “enjoy[s] a presumption of good faith.”⁵¹ An agency’s release of documents “in a piecemeal fashion tends to show the agency’s good faith attempt to discover responsive files and release them when found.”⁵² In the end, “[a]n agency has a duty to make reasonable efforts to satisfy FOIA requests.”⁵³ “In determining reasonableness, the court’s inquiry is not whether responsive documents may exist that were not provided to the requester, but whether the manner in which the search was conducted was adequate.”⁵⁴ “An agency’s practices may constitute a ‘withholding’ of documents under FOIA if the practice results in significant impairment of the requester’s ability to obtain certain types of documents.”⁵⁵

As noted above, NOAA-OCIO’s undated, unsigned and letter-head free correspondence transmitted via email to ITSSD on November 12, 2014, NOAA-OCIO set forth a fee estimate of approximately \$4,000 relating to search for the agency records specifically identified and reasonably described in ITSSD’s AMB FOIA Request. However, NOAA-OCIO neglected to provide substantiation or explanation of that search fee estimate, as its only response was to state in a subsequent November 21, 2014 correspondence that, “Our current estimate is that it will take 98 hours to search for the documents you’ve requested, using professional labor at an average rate of \$41/hour.”⁵⁶ NOAA-OCIO provided no support for this estimate, and no other information beyond this bald statement. It did not provide, for example, how such estimate related to any search terms it may have used or planned to use to arrive at this result, or to any description of the type of search it would had already performed or planned to perform. In other words, if did not conduct a preliminary search that was “reasonably calculated to uncover all relevant documents,” it could not have come up with a reasonable FOIA fee estimate. Nevertheless, NOAA-OCIO has insisted, pursuant to 15 C.F.R. §4.11(i)(2) that ITSSD agree to prepay its estimate before the agency proceeds to ‘act’ on its request. This is nothing more than a disguised bad faith effort to conduct a good faith search for requested records under FOIA.

E. Notwithstanding NOAA-OCIO’s Failure to Render a Timely ‘Determination’ With Respect to its Denial of ITSSD’s AMB Fee Waiver Request, ITSSD Elects to Pursue this Appeal on the Merits by Resting on the Statements of Fact and Law and the Analyses Contained Therein

ITSSD submits that the Fee Waiver Request it filed on December 5, 2014 sufficiently explains how the AMB FOIA Request satisfies each and every one of the requirements of 15 C.F.R. §4.11(k)(1)-(3).

First, the AMB FOIA Request seeks disclosure of reasonably described agency records, including those relating to specifically identified NRC/NAS peer review contracts, NRC/NAS climate study/report development contracts, NOAA climate science research-related grant-funded contracts issued to universities and nonprofits participating in NOAA’s Cooperative Institutes Program, and NOAA-established ad hoc federal advisory committees involved with the development and/or peer review of NOAA-developed climate science-related HISAs:

- A. the subject of which records concern “identifiable operations or activities of the Federal Government,” consistent with 15 C.F.R. §4.11(k)(2)(i), as described in Section II, Factor 1 of the AMB Fee Waiver Request;
- B. which records, if disclosed, would be “meaningfully informative” about these critically important “government operations or activities”, and consequently, “likely to contribute to the [public’s] understanding” of them, consistent with 15 C.F.R. §4.11(k)(2)(ii), as described in Section II, Factor 2 of the AMB Fee Waiver Request;
- C. which records, if disclosed, would contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester, taking into account the requester’s demonstrated ability and intention to effectively convey such information to the public, consistent with 15 C.F.R. §4.11(k)(2)(iii), as described in Section II, Factor 3 of the AMB Fee Waiver Request; *and*
- D. which, if disclosed are likely to contribute ‘significantly’ to public understanding of government operations or activities, consistent with 15 C.F.R. §4.11(k)(2)(iv), as described in Section II, Factor 4 of the AMB Fee Waiver Request.

Second, the Requester (ITSSD) seeking disclosure of the agency records reasonably described in the AMB FOIA Request (as summarized above) has sufficiently demonstrated that:

- A. it has no known or identifiable direct commercial interest that would be furthered by the requested disclosure of such records, consistent with 15 C.F.R. §4.11(k)(3)(i), as described in Section II, Factor 5 of the AMB Fee Waiver Request; *and*
- B. any potentially identifiable indirect commercial interest it ultimately may have in the disclosure of such records is not sufficiently great in magnitude in comparison with the

public interest in disclosure thereof, such that the disclosure of the requested records is “not primarily in the commercial interests of the requester,” consistent with 15 C.F.R. §4.11(k)(3)(ii), as described in Factor 6 of the AMB Fee Waiver Request.

III. CONCLUSION

ITSSD’s AMB Fee Waiver Request shows not only “a connection between the material sought and a matter of genuine public concern, but...also indicate[s] that a fee waiver or reduction will primarily benefit the public.”⁵⁷ In other words, ITSSD’s AMB Fee Waiver Request shows ITSSD has satisfactorily demonstrated its satisfaction of the six fee waiver factors set forth in 15 C.F.R. §4.11(k)(1)-(3).

NOAA Office of General Counsel should recall that courts have held that if it is a ‘close call’ as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non-commercial entity should be given the benefit of the doubt and be granted the fee waiver.⁵⁸ In consideration thereof, NOAA-OCIO’s denial of ITSSD’s request to have its fees waived was made in error and should be overturned.

ENDNOTES

¹ See U.S. Department of Commerce, National Oceanic and Atmospheric Administration Office of the Chief Information Officer High Performance Computing and Communications, *Denial of ITSSD Fee Waiver Request on Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694* (Dec. 11, 2014), available at: <https://nebula.wsimg.com/b9f484e2c03a5683085e8037aa75b443?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

² See Institute for Trade, Standards and Sustainable Development, *Request for Waiver of Fees With Respect to Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694* (Dec. 5, 2014), available at: <https://nebula.wsimg.com/22066faa4e5166f932dca392680c8334?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

³ See Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-000714* (filed March 26, 2014), available at: <https://nebula.wsimg.com/1ec660f37bd6e62a136dbf64b95ff247?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (This FOIA request was originally filed as seven separate FOIA requests with NOAA-HQ and six NOAA Collaboration Team offices, but was immediately consolidated by NOAA-HQ as of April 1, 2014).

⁴ See U.S. Department of Commerce, National Oceanic and Atmospheric Administration Office of the Chief Information Officer, High Performance Computing and Communications, *Re: FOIA Request No. DOC-NOAA-2014-000714* (April 1, 2014), available at:

<https://nebula.wsimg.com/37bd0311492047e8e8a9a6cf331122b0?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (indicating that NOAA’s National FOIA Office (Office of the Chief Information Officer High Performance Computing and Communications (“OCIO”)) denied ITSSD’s FOIA fee waiver request on the grounds that it did not sufficiently “explain in detail how disclosure of the records requested would satisfy all the requirements for a fee waiver,” and that NOAA-OCIO also had sought clarification of such request by April 22).

⁵ See Institute for Trade, Standards and Sustainable Development, *ITSSD FOIA Request Clarification - Consolidated FOIA Request No. DOC-NOAA-2014-000714* (May 5, 2014), available at: <https://nebula.wsimg.com/c25e625aa81981536c980ec0f3307791?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (containing ITSSD’s May 5, 2014 filing with NOAA-OCIO of a detailed annotated FOIA request clarification).

⁶ See Institute for Trade, Standards and Sustainable Development, *ITSSD FOIA Fee Waiver Request Clarification Consolidated FOIA Request No. DOC-NOAA-2014-000714* (May 5, 2014), available at: <https://nebula.wsimg.com/8a36cc18e5e7c578018f7a8cf851766d?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (containing ITSSD’s filing of an annotated clarified FOIA fee waiver request of the same date).

⁷ See U.S. Department of Commerce, National Oceanic and Atmospheric Administration Office of the Chief Information Officer, High Performance Computing and Communications, *Re: FOIA Request No. DOC-NOAA-2014-000714* (May 28, 2014), available at: <https://nebula.wsimg.com/8b680576f0c313e223b87bf7c85995fa?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1> (containing NOAA-OCIO’s denial of ITSSD’s clarified fee waiver request because it did “not show that [ITSSD] would significantly advance the public understanding of a specific government operation or activity [...] and had] not expressed a distribution plan with details about which websites will distribute the records, if any, to the general public or publication where [ITSSD] staff and Board of Advisor members have written commitments to publish the information that would then be accessible to the general public”).

⁸ On June 12, 2014, ITSSD participated in a conference phone call with a representative from NOAA-OCIO and a representative from NOAA’s Office of General Counsel (“NOAA-OGC”). The purpose of the call was to address NOAA apparent ‘confusion(s)’ concerning the scope and focus of current ITSSD FOIA Request No. NOAA-HQ-2014-000714, particularly, its relevance to the FOIA requests and clarifications ITSSD had then filed with the EPA. *During the call, these NOAA personnel indicated that NOAA would not respond to ITSSD’s FOIA request, even as clarified, and suggested that if ITSSD desired a response, at all, it would need to withdraw the current request and replace it with a newly filed FOIA request.* This conference call had been recorded in accordance with New Jersey state privacy laws.

⁹ See Institute for Trade, Standards and Sustainable Development, *Filing of New ITSSD FOIA Request [[FOIA Request No. DOC-NOAA-2014-001694]; Withdrawal of FOIA Request No. DOC-NOAA-2014-000714* (Sept. 22, 2014), available at:

<https://nebula.wsimg.com/86e0c3d9f0c18e77b33e25d935498bcc?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁰ See Institute for Trade, Standards and Sustainable Development, *Filing of New FOIA Fee Waiver Request [FOIA Request No. DOC-NOAA-2014-001694] to Accompany New FOIA Request; Withdrawal of Fee Waiver Request Relating to Withdrawn FOIA Request No. DOC-NOAA-2014-000714* (Sept. 22, 2014), available at: <https://nebula.wsimg.com/f05a58d9e07c072567b5ba64b612b984?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹¹ See *Supplement to New FOIA Fee Waiver Request Accompanying New FOIA Request No. DOC-NOAA-2014-001694* (Sept. 30, 2014), available at: <https://nebula.wsimg.com/2b1651bcb6ed66d314bd552939b35b89?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹² *Id.*

¹³ See *DOC-NOAA Request for ITSSD FOIA Request Clarification Re: Request No. DOC-NOAA-2014-001694* (Sept. 30, 2014), available at: <https://nebula.wsimg.com/b975490b7cae26ae5075ec67e12b9eef?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁴ See *ITSSD Clarification of New FOIA Request No. DOC-NOAA-2014-001694* (Oct. 1, 2014), available at: <https://nebula.wsimg.com/43d251976355e191bb523611a8fd1cd2?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁵ See United States Department of Commerce National Oceanic and Atmospheric Administration, Office of the Chief Information Officer High Performance Computing and Communications, *Denial Re: FOIA Request No. DOC-NOAA-2014-001694* (Oct. 10, 2014), available at: <https://nebula.wsimg.com/31e7bfa1e15c1162c804285d7b5e8140?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁶ *Id.*, at p. 2.

¹⁷ See Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-001694 - Tranche/Cache of Clearly and Obviously Identified NOAA Files* (Oct. 27, 2014), available at: <https://nebula.wsimg.com/27e342084d64f57315a79f9a426c9800?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁸ See *DOC-NOAA Email Acceptance of ITSSD Amendment/Modification/Bifurcation of FOIA Request No. DOC-NOAA-2014-001694* (Nov. 7, 2014), available at: <https://nebula.wsimg.com/49d9ddec8309db3a37024d77c7b6d781?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

¹⁹ See Institute for Trade, Standards and Sustainable Development, *FOIA Request No. DOC-NOAA-2014-001694 - Tranche/Cache of Clearly and Obviously Identified NOAA Files* (Oct. 27, 2014), *supra*.

²⁰ See *DOC-NOAA Email Acceptance of ITSSD Amendment/Modification/Bifurcation of FOIA Request No. DOC-NOAA-2014-001694* (Nov. 7, 2014), *supra*.

²¹ See *Email Dated November 12, 2014 Transmitting New NOAA FOIA Office Undated, Unsigned and Letterhead-Free Fee Estimate* (Nov. 12, 2014), available at: <https://nebula.wsimg.com/789568e994112ab08c9be9ce348e5302?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²² See *DOC-NOAA Undated, Unsigned and Letterhead-Free FOIA Fee Estimate Transmitted via Email Dated November 12, 2014* (Nov. 12, 2014), available at: <https://nebula.wsimg.com/05f5d2f53b3f56b30fed851d96020157?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²³ See Institute for Trade, Standards and Sustainable Development, *ITSSD Reply to DOC-NOAA Undated, Unsigned and Letterhead-Free Fee Estimate Transmitted via Email Dated November 12, 2014* (Nov. 14, 2014), available at: <https://nebula.wsimg.com/03611f04fa470c17705a07ef2838bacf?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁴ See *DOC-NOAA Response via Email Dated November 21, 2014, to ITSSD Reply of November 14, 2014* (Nov. 21, 2014), available at:

<https://nebula.wsimg.com/30902cbb39699e770159161528c33833?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁵ See Institute for Trade, Standards and Sustainable Development, *ITSSD Reply of November 28, 2014, to DOC- NOAA Response via Email Dated November 21, 2014, Re: Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694* (Nov. 28, 2014), available at: <https://nebula.wsimg.com/a3a245a8380ed13a3ac68c8d42439f36?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

²⁶ See 15 C.F.R. §4.7(b).

²⁷ See U.S. Department of Commerce, National Oceanic and Atmospheric Administration Office of the Chief Information Officer High Performance Computing and Communications, *Denial of ITSSD Fee Waiver Request on Amended/Modified/Bifurcated FOIA Request No. DOC-NOAA-2014-001694* (Dec. 11, 2014), *supra* at p. 2.

²⁸ See U.S. Department of Commerce, National Oceanic and Atmospheric Administration Office of the Chief Information Officer, High Performance Computing and Communications, *Re: FOIA Request No. DOC-NOAA-2014-000714* (May 28, 2014), *supra* at pp. 1-2.

²⁹ See 15 C.F.R. §4.7(b)(2).

³⁰ *Id.*

³¹ See *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d 53, 55 (9th Cir. 1997) (reiterating that agency's letter “must be reasonably calculated to put the requester on notice” as to reasons for the fee waiver denial).

³² See *Shermco Industries, Inc. v. SEC. of US Air Force*, 452 F. Supp. 306, 317 (N.D. Tex. 1978), citing *Seafarers International Union AFL-CIO v. Baldovin*, 508 F.2d 125 (5th Cir. 1975), vacated on other grounds, 511 F.2d 1161 (5th Cir. 1975); *Washington Research Project Inc. v. HEW*, 164 U.S.App. 169, 504 F.2d 238, cert den'd, 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1974).

³³ See 5 U.S.C. §552(a)(6)(A)(i)

³⁴ See 5 U.S.C. §552(a)(6)(C)(i).

³⁵ See *Shermco Industries, Inc. v. Secretary of the United States Air Force*, 452 F. Supp. at 317.

³⁶ *Id.*

³⁷ *Id.*, at fn 7.

³⁸ *Id.*, citing U.S. Const. Amendment 14.

³⁹ See *Oglesby v. Dep't of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990) citing *Shermco Industries v. Secretary of the United States Air Force*, 452 F.Supp. 306 (N.D.Tex.1978), rev'd on other grounds, 613 F.2d 1314 (5th Cir.1980).

⁴⁰ See 5 U.S.C. § 552(a)(4)(A)(vii) (“(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo, provided that the court's review of the matter shall be limited to the record before the agency.”); See also *Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, slip op. 649, 668 (9th Cir. 1997) (“On judicial review, we cannot consider new reasons offered by the agency not raised in the denial letter”), citing *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 631 n. 31, 65 L. Ed. 1010, 100 S. Ct. 2844 (1980) (“The rule barring consideration of *post hoc* agency rationalizations operates where an agency has provided a particular justification for a determination at the time the determination is made, but provides a different justification for that same determination when it is later reviewed by another body”).

⁴¹ See *Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 (9th Cir. 2005) (“” ; See *Friends of the Coast Fork v. U.S. Dept. of the Interior*, 110 F.3d 53, 55 (9th. Cir 1997) (“Our review is limited to the record before the agency, and this applies just as much to the reasons the agency offered for denial as it does to the evidence the agency offered, 5 U.S.C. §52(a)(4)(A)(vi); [*McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282 (9th Cir.1987)] MES, 835 F.2d at 1284. [...] Taken together, these principles lead us to the following conclusion: on judicial review, the agency must stand on whatever reasons for denial it gave in the administrative proceeding. If those reasons are inadequate, and if the requesters meet their burden, then a full fee waiver is in order.”) *Id.*

⁴² See *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam); *Schoenman v. FBI*, 604 F. Supp.2d 174, 188 (D.D.C. 2009) (citing, *inter alia*, *Forest Guardians*, 416 F.3d at 1177).

⁴³ See 5 U.S.C. § 552(a)(4)(A)(iii).

⁴⁴ See, e.g., *Forest Guardians v. Department of Interior*, 416 F.3d 1173, 1177-78 (10th Cir. 2005); *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987).

⁴⁵ See *Institute for Wildlife Protection v. U.S. Fish and Wildlife Service*, 290 F.Supp.2d 1226, 1232 (2003).

⁴⁶ See *Judicial Watch, Inc.*, 326 F.3d at 1311. See also *McClellan Ecological Seepage Situation*, 835 F.2d at 1284.

⁴⁷ See *Damon Elliott v. National Archives and Records Administration*, 518 F. Supp. 2d 257, 259 (D.C.D.C. 2007), quoting *Valencia-Lucena v. United States Coast Guard*, 336 U.S. App. D.C. 386, 180 F. 3d 321, 325 (D.C. Cir. 1999), quoting *Truitt v. Dep't of State*, 283 U.S. App. D.C. 86, 897 F.2d 540, 542 (D.C. Cir. 1990). See also *Elisabeth Kidder v. Federal Bureau of Investigation*, 517 F. Supp. 2d 17, 22 (D.C.D.C. 2007) quoting same.

⁴⁸ See *Damon Elliott v. National Archives and Records Administration*, 518 F. Supp. 2d at 259, quoting *Oglesby v. United States Dep't of Army*, 287 U.S. App. D.C. 126, 920 F.2d 57, 68 (D.C. Cir. 1990) (citing *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). See also *Elisabeth Kidder v. Federal Bureau of Investigation*, 517 F. Supp. 2d at 22 citing *Campbell v. United States Dep't of Justice*, 334 U.S. App. D.C. 20, 164 F. 3d 20, 27 (D.C. Cir. 1998).

⁴⁹ See *Elisabeth Kidder v. Federal Bureau of Investigation*, 517 F. Supp. 2d at 22 citing *Steinberg v. United States Dep't of Justice*, 306 U.S. App. 240, 23 F.3d 548, 551 (D.C. Cir. 1994), citing *Weisberg v. United States Dep't of Justice*, 745 F.2d at 1485.

⁵⁰ See *Damon Elliott v. National Archives and Records Administration*, 518 F. Supp. 2d at 259, quoting *Iturralde v. Comptroller of the Currency*, 354 U.S. App. D.C. 230, 315 F. 3d 311, 313-314 (D.C. Cir. 2003) (citing *Valencia-Lucena*, 180 F. 3d at 326).

⁵¹ See *Damon Elliott v. National Archives and Records Administration*, 518 F. Supp. 2d at 259, quoting *Chamberlain v. United States Dep't of Justice*, 957 F. Supp. 292, 294 (D.D.C.) aff'd per curiam, 326 U.S. App. D.C. 337, 124 F.3d 1309 (D.C. Cir. 1997).

⁵² See *South Yuba River Citizens League and Friends of the River v. National Marine Fisheries Service*, 2008 U.S. Dist. LEXIS 107177 at 50-51 (E.D.Ca. 2008), citing *Meeropol v. Meese*, 252 U.S. App. D.C. 381, 790 F.2d 942, 953 (D.C. Cir. 1986).

⁵³ See *South Yuba River Citizens League and Friends of the River v. National Marine Fisheries Service*, 2008 U.S. Dist. LEXIS 107177 at 50-51 (E.D.Ca. 2008), citing *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995); *Founding Church of Scientology of Washington, D.C. v. Nat'l Sec. Agency*, 197 U.S. App. D.C. 305, 610 F.2d 824, 837 (D.C. Cir. 1979).

⁵⁴ See *South Yuba River Citizens League and Friends of the River v. National Marine Fisheries Service*, 2008 U.S. Dist. LEXIS 107177 at 50-51 (E.D.Ca. 2008), citing *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d at 1328 (9th Cir. 1995).

⁵⁵ See *South Yuba River Citizens League and Friends of the River v. National Marine Fisheries Service*, 2008 U.S. Dist. LEXIS 107177 at 50-51 (E.D.Ca. 2008), citing *McGehee, III v. Central Intelligence Agency*, 697 F.2d 1095, 1110 (D.C. Cir. 1983).

⁵⁶ See *DOC-NOAA Response via Email Dated November 21, 2014, to ITSSD Reply of November 14, 2014* (Nov. 21, 2014), *supra*.

⁵⁷ See *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 648 (D.C.Cir.1987).

⁵⁸ See *Forest Guardians v. Dept. of the Interior*, 416 F. 3d 1173 (10 Cir. 2005).

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, August 15, 2017 3:32 PM
To: Robert Swisher - NOAA Federal
Cc: Lola Stith - NOAA Affiliate
Subject: Fwd: Proposed production schedule for Cause of Action v. NOAA
Attachments: ATT00001.htm; COA v NOAA 17-1329 answer - DOC edits.docx

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)

(b)(6) (C)

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----- Forwarded message -----

From: **Bogomolny, Michael (Federal)** <MBogomolny@doc.gov>
Date: Tue, Aug 15, 2017 at 3:06 PM
Subject: Re: Proposed production schedule for Cause of Action v. NOAA
To: "Kolsky, Joshua (USADC)" <Joshua.Kolsky@usdoj.gov>
Cc: "Nathanson, Stacey (Federal)" <Stacey.Nathanson@noaa.gov>, "Almeida, John (Federal)" <John.Almeida@noaa.gov>, "Graff, Mark (Federal)" <Mark.Graff@noaa.gov>

Josh,

(b)(5)

Sincerely,

bogo

From: Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov>
Sent: Monday, August 14, 2017 1:53 PM
To: Graff, Mark (Federal); Bogomolny, Michael (Federal)
Cc: Nathanson, Stacey (Federal); Almeida, John (Federal); Patterson, Amanda (Federal)
Subject: RE: Proposed production schedule for Cause of Action v. NOAA

(b)(5)

Thanks,

Josh

From: Mark Graff - NOAA Federal [<mailto:mark.graff@noaa.gov>]
Sent: Monday, August 14, 2017 1:41 PM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Cc: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>; Amanda Patterson - NOAA Federal <amanda.patterson@noaa.gov>
Subject: Re: Proposed production schedule for Cause of Action v. NOAA

Good Afternoon,

(b)(5)

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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On Mon, Aug 14, 2017 at 11:45 AM, Bogomolny, Michael (Federal) <MBogomolny@doc.gov> wrote:

Works for me.

-bogo

From: Kolsky, Joshua (USADC) [mailto:Joshua.Kolsky@usdoj.gov]
Sent: Monday, August 14, 2017 10:28 AM
To: Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>
Subject: RE: Proposed production schedule for Cause of Action v. NOAA

Fine with me.

From: Stacey Nathanson - NOAA Federal [mailto:stacey.nathanson@noaa.gov]
Sent: Monday, August 14, 2017 10:11 AM
To: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>; Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Subject: Re: Proposed production schedule for Cause of Action v. NOAA

Good morning --

Just confirming our call this afternoon. Can we start at 1:30 instead? Please let me know if that works for all. If it does, the call in number is [301-713-9666](tel:301-713-9666). No passcode needed. Thanks!

Stacey

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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On Tue, Aug 8, 2017 at 2:12 PM, Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov> wrote:

Fine with me.

From: Bogomolny, Michael (Federal) [<mailto:MBogomolny@doc.gov>]
Sent: Tuesday, August 8, 2017 1:21 PM
To: Almeida, John (Federal) <John.Almeida@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>
Subject: RE: Proposed production schedule for Cause of Action v. NOAA

For me as well.

From: John Almeida - NOAA Federal [<mailto:john.almeida@noaa.gov>]
Sent: Tuesday, August 08, 2017 1:10 PM
To: Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Subject: Re: Proposed production schedule for Cause of Action v. NOAA

Works for me.

On Tue, Aug 8, 2017 at 1:08 PM, Stacey Nathanson - NOAA Federal <stacey.nathanson@noaa.gov> wrote:

I propose we talk on Monday, August 14, early afternoon (b)(5) [REDACTED]
[REDACTED] Does 1 pm work for folks? Thanks!

Stacey

On Tuesday, August 8, 2017, Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov> wrote:

(b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

Thanks,

Josh

From: Stacey Nathanson - NOAA Federal [<mailto:stacey.nathanson@noaa.gov>]
Sent: Friday, August 4, 2017 11:32 PM
To: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>
Subject: Re: Proposed production schedule for Cause of Action v. NOAA

(b)(5)

[Redacted]

(b)(6)

Thanks!

Stacey

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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On Fri, Aug 4, 2017 at 6:11 PM, Kolsky, Joshua (USADC) <Joshua.Kolsky@usdoj.gov> wrote:

(b)(5)

(b)(5)

(b)(5)

From: Bogomolny, Michael (Federal) [<mailto:MBogomolny@doc.gov>]
Sent: Friday, August 4, 2017 3:50 PM
To: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Almeida, John (Federal) <John.Almeida@noaa.gov>
Subject: RE: Proposed production schedule for Cause of Action v. NOAA

Josh,

(b)(5) ?

Thanks,

bogo

From: Kolsky, Joshua (USADC) [<mailto:Joshua.Kolsky@usdoj.gov>]
Sent: Tuesday, August 01, 2017 3:27 PM
To: Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Almeida, John (Federal) <John.Almeida@noaa.gov>
Subject: RE: Proposed production schedule for Cause of Action v. NOAA

Thanks for the update (b)(5)

From: Stacey Nathanson - NOAA Federal [<mailto:stacey.nathanson@noaa.gov>]
Sent: Tuesday, August 1, 2017 9:51 AM
To: Kolsky, Joshua (USADC) <JKOLSKY@usa.doj.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; John Almeida - NOAA Federal <john.almeida@noaa.gov>
Subject: Proposed production schedule for Cause of Action v. NOAA

Good morning,

(b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

[Redacted] Please let me know if you have any questions on this matter.
Thanks!

Stacey

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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--

Stacey Nathanson

Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: [301-713-9673](tel:301-713-9673)
Email: Stacey.Nathanson@noaa.gov

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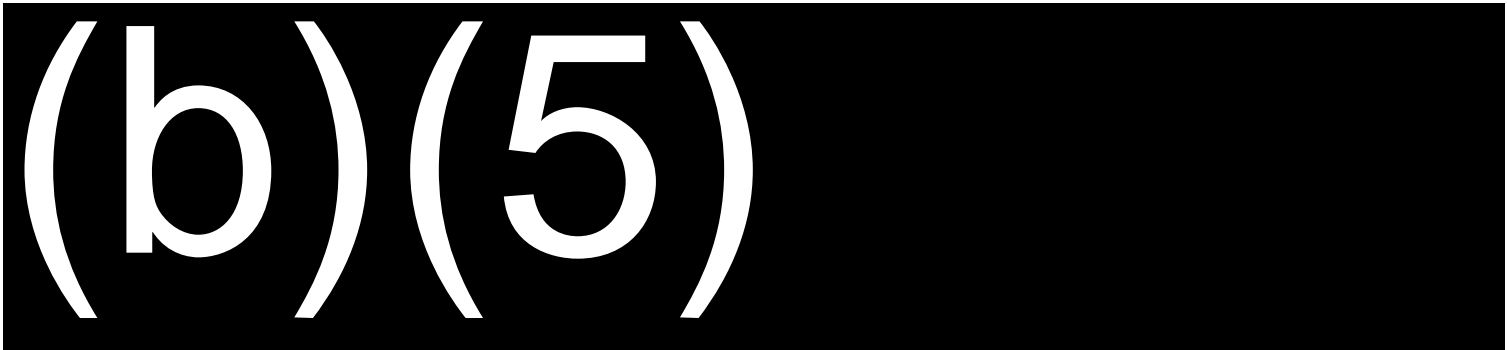
(b)(5)

(b)(5)

Ruth Ann Lowery - NOAA Federal

From: Ruth Ann Lowery - NOAA Federal
Sent: Wednesday, August 16, 2017 1:26 PM
To: Mark Graff - NOAA Federal
Cc: Stacey Nathanson
Subject: FW: New FOIA 2017-001701 (Consultation from FWS)
Attachments: 2017-001701 FOIA assgnment consultation.pdf; 2016.02.09 FWS Critical Habitat Rules FOIA Request.pdf; 17-001701 records_NOAA_22 pages.pdf

Mark,



RA

Ruth Ann Lowery, Attorney-Advisor
NOAA Office of General Counsel
Fisheries & Protected Resources Section
1315 East-West Highway, SSMC III, Room 15114
Silver Spring, MD 20910
(301)713-9671
Fax: (301) 713-0658

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From: Jennifer Schultz - NOAA Federal [mailto:jennifer.schultz@noaa.gov]
Sent: Wednesday, August 16, 2017 12:51 PM
To: Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>
Subject: Fwd: New FOIA 2017-001701 (Consultation from FWS)

Hi Ruth Ann,

(b)(5)

[Redacted]

(b)(5)

Jenny

Jennifer Schultz, Ph.D.

*Endangered Species Division
Office of Protected Resources
NOAA Fisheries
301-427-8443*

jennifer.schultz@noaa.gov
www.nmfs.noaa.gov



----- Forwarded message -----

From: **Peaches Hodge-Tonic - NOAA Federal** <peaches.hodge-tonic@noaa.gov>

Date: Wed, Aug 16, 2017 at 11:59 AM

Subject: New FOIA 2017-001701 (Consultation from FWS)

To: Angela Somma <angela.somma@noaa.gov>, Jennifer Schultz <jennifer.schultz@noaa.gov>

Cc: NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov>, Peaches Hodge-Tonic <peaches.hodge-tonic@noaa.gov>

Hi Angela and Jennifer

(b)(5)

Thanks, Peaches

--

***Peaches Tonic
Acting FOIA Coordinator
Office of Protected Resources
[301-427-8482](tel:301-427-8482)***

(b)(5)

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(b)(5)



February 9, 2016

VIA EMAIL ONLY

Attn: Eileen Harke, Records Manager & FOIA Coordinator
U.S. Fish and Wildlife Service
Branch of ES Litigation, Division of Conservation and Classification
5275 Leesburg Pike
Falls Church, VA 22041-3803
fwhq_foia@fws.gov

Re: Freedom of Information Act Request: Critical Habitat Rules

Dear Ms. Harke:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), from the Center for Biological Diversity (“Center”), a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process. Our educational and legal mission requires that we obtain agency records, through FOIA if necessary, so that we can inform our membership and the general public of information contained in those records relevant to the protection and restoration of natural ecosystems and imperiled species. See <http://www.biologicaldiversity.org>.

REQUESTED RECORDS

On behalf of the Center and consistent with the Center’s mission, I respectfully request the following records from the U.S. Fish and Wildlife Service (“Service”) related to the rulemaking and policy for designating critical habitat for endangered and threatened species under the Endangered Species Act (“ESA”):

Critical Habitat Rulemakings

1. The Decision File for: *Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat*, Docket No. FWS-R9-ES-2011-0072.
2. The Decision File for: *Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act*, Docket No. FWS-R9-ES-2011-0104-0026.

For purposes of this request, “Decision File” refers to the meaning given that term by the Department of Interior – *i.e.*, the “the contemporaneous record of the agency's decision-making process.” See DEP’T OF THE INTERIOR, STANDARDIZED GUIDANCE ON COMPILING A DECISION FILE AND AN ADMINISTRATIVE RECORD (July 27, 2006).

For purposes of this request, “records” is consistent with the meaning of the term under FOIA. This includes, but is not limited to, documents of any kind including electronic as well as paper documents, e-mails, writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), correspondence, letters, memoranda, reports, consultations, papers, studies, notes, field notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, data, data bases, drawings, surveys, graphs, charts, photographs, videos, meeting notes or minutes, electronic and magnetic recordings of meetings, maps, GIS layers, GPS, UTM, LiDAR, CDs, and any other compilations of data from which information can be obtained. All of the foregoing is included in this request if it is in the Service’s possession and control. If such records are no longer under the control of the Service but were at any time, please refer this request to the relevant federal agency or agencies.

This request is not meant to be exclusive of any other records that, although not specially requested, have a reasonable relationship to the subject matter of this request. 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.

Should you decide to invoke a FOIA exemption, please include in your full or partial denial letter sufficient information for us to appeal the denial. Please include a detailed ledger which includes:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the denial, including the identification of the category within the governing statutory provision under which the record (or portion thereof) was withheld and a full explanation of how each exemption fits 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 determine that portions of the records requested are exempt from disclosure, please segregate the exempt portions and mail the remaining records to my attention at the address below location within the statutory time limit.

FORMAT OF RECORDS

Under the FOIA, you are obligated to provide the 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.”).

The Center would like to receive all responsive records in an electronic PDF format that is text searchable/OCR formatted. Specifically, we ask that you provide the records as *separate* .pdf or other files – *i.e., not in “batched” form* – and either in: (1) a load-ready format with a CSV file index or excel spreadsheet; or if that is not possible (2) in PDF format and without the inclusion of any profiles, embedded files, or portfolios, all of which are not readily accessible with our record-review software; this is why we are requesting that you provide all records as PDFs (or Word documents) instead. We would appreciate the inclusion of an index in an Excel format.

RECORD DELIVERY

We appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i); 5 C.F.R. § 1303.10(c). Failure to comply within the statutory timeframe may result in the Center taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. You may email or mail copies of the requested records to:

Margaret E. Townsend
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211
mtownsend@biologicaldiversity.org

If you find that this request is unclear, or if the responsive records are voluminous, please call me at (971) 717-6409 to discuss the proper scope of this request.

REQUEST FOR FEE-WAIVER

The Center requests that you waive all fees in connection with this matter. As shown below, the Center meets the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the Department of Interior’s fee-waiver regulations at 43 C.F.R. § 2.19. *See Judicial Watch v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003).

In considering whether the Center meets the fee-waiver criteria, it is imperative that the Service remember that FOIA carries a presumption of disclosure and was designed specifically to allow non-profit, public-interest groups such as the Center access to government records without the payment of fees. As stated by one Senator, “agencies 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 Sen. Leahy). In interpreting this amendment, the Ninth Circuit has stated that the amended statute “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has likewise explicitly pointed out that the amendment’s main purpose was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” *Id.*

Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by “watchdog” organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As a District of Columbia Circuit Court has stated, this waiver provision was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,” in clear reference to requests from journalists, scholars, and, most importantly for our purposes, non-profit public-interest groups. *Better Gov’t Ass’n v. Department of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984).

- I. Disclosure of this information is in the public interest because it will significantly contribute to public understanding of the operations or activities of the government. This requested information will significantly contribute to public understanding of these issues.

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 Service’s regulations at 43 C.F.R. § 2.45(a) establish the same standard.

Thus, the Service 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. 43 C.F.R. § 2.48(a)(1) – (4). As shown below, the Center meets each of these factors.

- A. The subject of the request concerns “the operations and activities of the government.”

The subject matter of this request relates to the Service’s rulemaking and policy for the designation of critical habitat for species that are listed as endangered or threatened under the ESA. These actions are specific and identifiable activities of the government. *See Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.”) (Internal quotations omitted).

- B. The disclosure is “likely to contribute” to an understanding of government operations or activities.

The requested records will provide the Center with crucial insight on the Service’s rulemaking and policy for the designation of critical habitat for species that are listed as endangered or threatened under the ESA. The release of these records will contribute to better public understanding of Service activities and operations regarding this rule and policy. Numerous studies have demonstrated that there is broad public support for the protection of endangered

species and biodiversity conservation. The provided information will inform the public on the activities of the Service in relation to the conservation of this species. The public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, such as the survival and recovery of species, have been conducted. *See Judicial Watch*, 326 F.3d at 1314 (“[T]he American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not.”).

In *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1286, the court made clear that FOIA’s “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....” In this instance, all the requested records potentially provide new information about Service actions, especially regarding the protection of endangered species.

Moreover, the information will provide important oversight of the Service activities by revealing information on how the Service developed the new rules for designation of critical habitat for listed species. The information we seek is not available in other publicly available records. *See Western Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding.”); *see also Community Legal Services v. HUD*, 405 F.Supp.2d 553 (D. Pa. 2005) (“[T]he CLS request would likely shed light on information that is new to the interested public.”). Finally, this request will also shed light on whether the Service is appropriately implementing environmental laws, policies, and regulations.

C. The disclosure is likely to contribute significantly to public understanding of government operations or activities.

Public understanding of Service, other federal agencies’, and other parties’ development of new rules to govern the process by which the Service designates critical habitat for endangered and threatened species will significantly increase as a result of disclosure, because the requested information will help determine the activities and plans of the Service in regards to critical habitat designations under the ESA. Once the public is more aware of actions by the Service, the public will have a better understanding of critical habitat designations by the Service. Then the public can better gauge whether Service decisions and activities are appropriate or whether certain actions should be undertaken.

The records are also certain to shed light on the Service’s compliance with environmental law. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. The Center intends to fulfill its well-established function of public oversight of agency action. The Center is not requesting these records merely for their intrinsic informational value. It is irrelevant whether any portion of the Center’s request may currently be in the public domain, because the Center requests considerably more than any piece of information that may currently be available to other individuals. *Judicial Watch*, 326 F.3d at 1315.

In addition, the Center plans to take the information it learns from the disclosed records and educate the public about critical habitat designations, and also to educate the public about whether the Service's actions are appropriate in light of the known information and the law. The requested information will make public the information that the Service has and will rely on, regarding critical habitat designations. Disclosure of the requested records may provide information that will significantly enhance the public's understanding of the Service's legal obligations and its management of endangered and threatened species in general. Even if the records fail to reveal that certain actions need to be taken does not mean the records do not serve the public interest. See *Judicial Watch*, 326 F.3d at 1314.

II. Obtaining the information is of no commercial interest to the Center.

Access to government records through FOIA is essential to the Center's role of educating the general public. The Center, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

III. The Center has a recognized ability to disseminate this information broadly.

Public oversight and enhanced understanding of Service duties is necessary. The Center and its members' track record of active participation in oversight of governmental agency activities and its consistent contribution to the public's understanding of agency activities as compared to the level of public understanding prior to disclosure are well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons who are interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). The Center need not show how it intends to distribute the requested 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 the Center to show how it distributes information to the public generally. *Id.*

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the management activities of numerous government agencies since 1989, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center's fee waivers, agencies have recognized that (1) the Center's requested information contributes significantly to the public understanding of the operations or activities of the government, (2) the Center's requested information enhances the public's understanding to a greater degree than currently exists, (3) the Center possesses the expertise to explain the requested information to the public (e.g., the Center has several staff biologists, staff attorneys, and media specialists), (4) the Center possesses the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that the Center is an established expert in the field of imperiled species, biodiversity, and impacts on protected species. See <http://biologicaldiversity.org/news/breaking/index.html>.

The Center's work appears in more than 2,000 news stories online and in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, and *Los Angeles Times*. Many media outlets have reported on how the Service designates critical habitat for listed species, utilizing information obtained by the Center from federal agencies including the Service. Records produced by the Center on the status of imperiled species prepared in light of the requested information will be available on the Center's website, which is regularly used by students, journalists, other organizations, and members of the public to obtain information on the conservation and legal status of rare species, *see*: <http://www.biologicaldiversity.org/species/index.html>. The Center sends out more than 350 email newsletters and action alerts per year to more than 991,000 members and supporters. Three times a year, the Center sends printed newsletters to more than 50,000 members. More than 89,500 people have "liked" the Center on Facebook, and there are regular postings regarding regulation of activities affecting listed species. The Center also regularly tweets to more than 40,000 followers on Twitter.

In addition, our informational publications supply information not only to our membership, but also to the memberships of most other conservation organizations, locally as well as nationally. Our informational publications also contribute information to public media outlets. For example, information such as that presently requested is often disseminated through our e-mail biodiversity alerts, which are sent to over 400,000 people approximately once a week, and our web page, which is accessed more than 2.4 million times each month.

The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request. The records sought in this FOIA request will be used to determine the reasons for the contents of the new rule and policy, how the Service anticipates how critical habitat designations and applied will be made, and what actions the Service and other parties are taking regarding anticipated future activities. They will also be used to determine whether and how the Service is complying with and implementing its obligations under environmental laws.

Concurrent with any action which the Center may take after obtaining the requested records, the Center will publicize the reasons for the action and the underlying actions of FWS and/or other agencies that have prompted the action. This is certain to result in a significant increase in public understanding of government agency activity, and in particular of the Service's responsibilities. The Center has enforced or publicized agency compliance with the provisions of various environmental laws many times through information gained from FOIA requests like this one, and has also many times publicized the status of species and the conservation measures being taken on their behalf through information gained from records obtained under FOIA.

Information obtained through this request will likely be disseminated through all of these means. *See Forest Guardians v. DOI*, 416 F.3d 1173, 1180 (10th Cir. 2005) ("Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that

the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.”).

Please note that the request for a fee waiver should not be construed as an extension of time in which to reply to this FOIA request.

CONCLUSION

We look forward to your determination within 20 working days, as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i). Do not hesitate to contact me with any questions regarding this appeal; please contact me at (971) 717-6409 or foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below. If I am unavailable, you may attempt to reach Amy Atwood at (971) 717-6401 and atwood@biologicaldiversity.org.

Sincerely,

A handwritten signature in black ink that reads "Margaret E. Townsend". The signature is fluid and cursive, with a long horizontal stroke at the end.

Margaret E. Townsend
Open Government Staff Attorney
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
mtownsend@biologicaldiversity.org



Peaches Hodge-Tonic - NOAA Federal <peaches.hodge-tonic@noaa.gov>

FOIA Assignment for DOC-NOAA-2017-001701 for Consultation DOC-NOAA-2017-001701

1 message

foia@regulations.gov <foia@regulations.gov>

Tue, Aug 15, 2017 at 11:41 AM

To: "peaches.hodge-tonic@noaa.gov" <peaches.hodge-tonic@noaa.gov>

You have been assigned to the FOIA consultation - DOC-NOAA-2017-001701. Additional details for this item are as follows:

- Tracking Number: DOC-NOAA-2017-001701
- Requester: FWS
- Consultation Track: N/A
- Assigned By: Samuel B. Dixon
- Submitted Date: 08/14/2017
- Due Date: 08/30/2017
- Short Description: N/A
- Long Description: Please review the enclosed records, mark any proposed redactions, state the exemption(s) you would claim for each proposed redaction, and return the records, along with your proposed redactions to us, by August 30, 2017.

Symone Stone - NOAA Affiliate

From: Symone Stone - NOAA Affiliate
Sent: Wednesday, August 16, 2017 1:33 PM
To: Mark Graff - NOAA Federal
Subject: Fwd: Untimely response to FOIA request FOIA-2017-001326

Hi Mark,

Can you please go in and review this FOIA for interim release?

Symone

----- Forwarded message -----

From: **Symone Stone - NOAA Affiliate** <symone.stone@noaa.gov>
Date: Tue, Aug 15, 2017 at 2:40 PM
Subject: Re: Untimely response to FOIA request FOIA-2017-001326
To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Hi Lola,

(b)(5)

On Tue, Aug 15, 2017 at 9:56 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:
Ready.

On Tue, Aug 15, 2017 at 9:28 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:
Sorry Lola,

(b)(5)

On Tue, Aug 15, 2017 at 9:04 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Hun (b)(5)

(b)(5)

R/
Lola

On Tue, Aug 15, 2017 at 8:47 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:
Thank you Lola! Ready for your review.

On Tue, Aug 15, 2017 at 8:36 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:
Okay. (b)(5)

Thanks!

Lola

On Tue, Aug 15, 2017 at 8:32 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Good morning Symone (b)(5)

Lola

On Tue, Aug 15, 2017 at 8:19 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

----- Forwarded message -----

From: **Symone Stone - NOAA Affiliate** <symone.stone@noaa.gov>

Date: Mon, Aug 14, 2017 at 4:16 PM

Subject: Re: Untimely response to FOIA request FOIA-2017-001326

To: FOIA Office - NOAA Service Account <foia@noaa.gov>

FYI (b)(5)

On Mon, Aug 14, 2017 at 4:11 PM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Hi Lola,

(b)(5)

Symone

On Mon, Aug 14, 2017 at 10:49 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Yes!

On Mon, Aug 14, 2017 at 10:21 AM, FOIA Office - NOAA Service Account <foia@noaa.gov> wrote:

Hi Symone (b)(5)

Lola

On Mon, Aug 14, 2017 at 9:13 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Lola,

(b)(5)

(b)(5)

Symone

On Fri, Aug 11, 2017 at 11:03 AM, FOIA Office - NOAA Service Account <foia@noaa.gov> wrote:

Hi Symone (b)(5)

Lola

----- Forwarded message -----

From: **Hans Bader** <Hans.Bader@cei.org>

Date: Fri, Aug 11, 2017 at 10:43 AM

Subject: Untimely response to FOIA request FOIA-2017-001326

To: "foia@noaa.gov" <foia@noaa.gov>

Cc: "symone.stone@noaa.gov" <symone.stone@noaa.gov>, "lisa.love@noaa.gov" <lisa.love@noaa.gov>

A determination in response to the Competitive Enterprise Institute's FOIA request is long overdue. If we don't receive a determination in response to our request by August 24, and responsive records promptly thereafter, we will file a Freedom of Information Act lawsuit against NOAA.

FOIA sets a deadline of twenty working days for agencies to issue a determination in response to a FOIA request. 5 U.S.C. §552(a)(6)(A)(i). To comply with FOIA, the agency's determination must, within that 20-day period, "inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions," and actual production must follow promptly thereafter. (*See CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013)).

None of those things has happened with regard to our FOIA request.

That 20-day deadline has long passed, and passed months ago. Our FOIA request was filed on March 28 (although NOAA misplaced it and thus only logged it in on June 7, see <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28138349a>). NOAA's misplacing it for two months did not extend the time for issuing a determination, which was due in late April, 2017. That is made clear in a recent court ruling in one of our FOIA lawsuits, which found that an agency received our FOIA request when we emailed it to the agency, not when the agency's FOIA staffer retrieved it. *See Competitive Enterprise Institute v. EPA*, 232 F.Supp.3d 172, 182 (D.D.C. Feb. 8, 2017)).

Please give us the records we requested.

Thanks,

Hans Bader

Competitive Enterprise Institute

1310 L Street, NW, 7th Floor

Washington, D.C. 20006

From: foia@noaa.gov [mailto:foia@noaa.gov]

Sent: Wednesday, July 19, 2017 3:07 PM

To: Hans Bader <Hans.Bader@cei.org>

Subject: FOIA-2017-001326: In Progress

Dear Mr. Bader:

Your FOIA request has been routed to the correct NWS Office responsible for working on your request. The office is working as quickly as possible to respond.

Thank you for your patience,

Symone Stone

Administrative Analyst

NOAA/NWS

--

Symone Stone <symone.stone@noaa.gov>

Syneren Technologies Corporation

NOAA/National Weather Service

Office of the Chief Financial Officer

Management and Organization Division

Ph: [301-427-6936](tel:301-427-6936)

--

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--

Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c (b)(6) [REDACTED])
lola.m.stith@noaa.gov

--

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Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c (b)(6) [REDACTED])
lola.m.stith@noaa.gov

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Ph: [301-427-6936](tel:301-427-6936)

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, August 16, 2017 1:56 PM
To: Symone Stone - NOAA Affiliate
Subject: Re: Untimely response to FOIA request FOIA-2017-001326

I just approved it--no issues. Thanks!

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Wed, Aug 16, 2017 at 1:32 PM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Hi Mark,

Can you please go in and review this FOIA for interim release?

Symone

----- Forwarded message -----

From: Symone Stone - NOAA Affiliate <symone.stone@noaa.gov>
Date: Tue, Aug 15, 2017 at 2:40 PM
Subject: Re: Untimely response to FOIA request FOIA-2017-001326
To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Hi Lola,

(b)(5)

On Tue, Aug 15, 2017 at 9:56 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:
Ready.

On Tue, Aug 15, 2017 at 9:28 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:
Sorry Lola,

(b)(5)

On Tue, Aug 15, 2017 at 9:04 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Hun (b)(5) [REDACTED].

R/
Lola

On Tue, Aug 15, 2017 at 8:47 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Thank you Lola (b)(5) [REDACTED].

On Tue, Aug 15, 2017 at 8:36 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Okay (b)(5) [REDACTED].

Thanks!

Lola

On Tue, Aug 15, 2017 at 8:32 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Good morning Symone (b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Lola

On Tue, Aug 15, 2017 at 8:19 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

----- Forwarded message -----

From: **Symone Stone - NOAA Affiliate** <symone.stone@noaa.gov>
Date: Mon, Aug 14, 2017 at 4:16 PM
Subject: Re: Untimely response to FOIA request FOIA-2017-001326
To: FOIA Office - NOAA Service Account <foia@noaa.gov>

FYI (b)(5) [REDACTED]
[REDACTED]."

On Mon, Aug 14, 2017 at 4:11 PM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Hi Lola,

(b)(5) [REDACTED]
[REDACTED]

Symone

On Mon, Aug 14, 2017 at 10:49 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Yes!

On Mon, Aug 14, 2017 at 10:21 AM, FOIA Office - NOAA Service Account <foia@noaa.gov> wrote:

Hi Symone (b)(5)

[REDACTED]
[REDACTED]?

Lola

On Mon, Aug 14, 2017 at 9:13 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Lola,

(b)(5)
[REDACTED].

Symone

On Fri, Aug 11, 2017 at 11:03 AM, FOIA Office - NOAA Service Account <foia@noaa.gov> wrote:

Hi Symone (b)(5)

[REDACTED]
[REDACTED].

Lola

----- Forwarded message -----

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To: "foia@noaa.gov" <foia@noaa.gov>

Cc: "symone.stone@noaa.gov" <symone.stone@noaa.gov>, "lisa.love@noaa.gov" <lisa.love@noaa.gov>

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Thank you for your patience,

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Administrative Analyst

NOAA/NWS

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<Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>

Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

According to FOIAOnline, their request was as follows:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of any agency communications to, or from, Dr. John Bates regarding the 2015 Karl et al study in Science magazine (see <http://science.sciencemag.org/content/348/6242/1469>) from July 30, 2014 to February 4, 2017. I would like to receive the information in electronic form, preferably a searchable PDF or in XML format.

(b)(5)

-bogo

From: Davidson, Hillary (Federal)

Sent: Wednesday, August 16, 2017 2:01 PM

To: Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>

Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

?

From: Ruth Ann Lowery - NOAA Federal [<mailto:ruthann.lowery@noaa.gov>]

Sent: Wednesday, August 16, 2017 1:55 PM

To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>

Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

Ruth Ann Lowery, Attorney-Advisor

- kristen.l.gustafson@noaa.gov
- mbogomolny@doc.gov
- rod.vieira@noaa.gov
- h davidson@doc.gov
- roxie.allison-holman@noaa.gov
- stacey.nathanson@noaa.gov

Bogomolny, Michael (Federal)

From: Bogomolny, Michael (Federal)
Sent: Wednesday, August 16, 2017 2:08 PM
To: Davidson, Hillary (Federal); Lowery, Ruth Ann (Federal); Vieira, Rodney (Federal); Graff, Mark (Federal); Nathanson, Stacey (Federal); Myers, Jordan (Federal); Gustafson, Kristen (Federal); Allison-Holman, Roxie (Federal)
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Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

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Sent: Wednesday, August 16, 2017 1:55 PM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

(b)(5)

But perhaps others had a different understanding.

Ruth Ann Lowery, Attorney-Advisor
NOAA Office of General Counsel
Fisheries & Protected Resources Section
1315 East-West Highway, SSMC III, Room 15114
Silver Spring, MD 20910
(301)713-9671
Fax: (301) 713-0658

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><(((^>`.,.,.~`.,.>(((^>.,.,.~`.,.>(((^>

From: Bogomolny, Michael (Federal) [mailto:MBogomolny@doc.gov]
Sent: Wednesday, August 16, 2017 1:18 PM
To: Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

-bogo

From: Google Calendar [mailto:calendar-notification@google.com] **On Behalf Of** ruthann.lowery@noaa.gov
Sent: Wednesday, August 16, 2017 9:27 AM
To: Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Subject: [Update] Standing Call re: Judicial Watch 2017 FOIA

Hi, all. With both Kristen and Roxie probably not able to participate today (Kristen declined, and Roxie is on leave), it seems we may lack a critical mass for the standing call. Do others want to have a call anyway?

Thanks,
Ruth Ann

Standing Call re: Judicial Watch 2017 FOIA

(b)(6)

When Wed Aug 16, 2017 4pm – 5pm Eastern Time

Who

- ruthann.lowery@noaa.gov - organizer
- mark.graff@noaa.gov
- jmyers@doc.gov
- kristen.l.gustafson@noaa.gov
- mbogomolny@doc.gov
- rod.vieira@noaa.gov
- h davidson@doc.gov
- roxie.allison-holman@noaa.gov
- stacey.nathanson@noaa.gov

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor

NOAA Office of General Counsel

Fisheries & Protected Resources Section

1315 East-West Highway, SSMC III, Room 15114

Silver Spring, MD 20910

[\(301\)713-9671](tel:(301)713-9671)

Fax: [\(301\) 713-0658](tel:(301)713-0658)

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><(((e>`•.~•.~>(((e>•.~•.~>(((e>

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Sent: Wednesday, August 16, 2017 2:08 PM

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NOAA Office of General Counsel

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Fax: [\(301\) 713-0658](tel:(301)713-0658)

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><(((o>`.,.,.·'~`.,.,>(((o>.,.,.·'~`.,.,>(((o>

From: Bogomolny, Michael (Federal) [mailto:MBogomolny@doc.gov]

Sent: Wednesday, August 16, 2017 1:18 PM

To: Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>

Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)



-bogo

From: Google Calendar [<mailto:calendar-notification@google.com>] **On Behalf Of** ruthann.lowery@noaa.gov

Sent: Wednesday, August 16, 2017 9:27 AM

To: Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>

Subject: [Update] Standing Call re: Judicial Watch 2017 FOIA

Hi, all. With both Kristen and Roxie probably not able to participate today (Kristen declined, and Roxie is on leave), it seems we may lack a critical mass for the standing call. Do others want to have a call anyway?

Thanks,
Ruth Ann

Standing Call re: Judicial Watch 2017 FOIA

(b)(6)

When Wed Aug 16, 2017 4pm – 5pm Eastern Time

Who . ruthann.lowery@noaa.gov - organizer

. mark.graff@noaa.gov

. jmyers@doc.gov

. kristen.l.gustafson@noaa.gov

. mbogomolny@doc.gov

. rod.vieira@noaa.gov

. h davidson@doc.gov

. roxie.allison-holman@noaa.gov

. stacey.nathanson@noaa.gov

Bogomolny, Michael (Federal)

From: Bogomolny, Michael (Federal)
Sent: Wednesday, August 16, 2017 2:51 PM
To: Graff, Mark (Federal); Lowery, Ruth Ann (Federal)
Cc: Davidson, Hillary (Federal); Vieira, Rodney (Federal); Nathanson, Stacey (Federal); Myers, Jordan (Federal); Gustafson, Kristen (Federal); Allison-Holman, Roxie (Federal)
Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5) [Redacted]

[Redacted]

[Redacted]

-bogo

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Wednesday, August 16, 2017 2:20 PM
To: Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: Re: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5) [Redacted]

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)

(b)(6) [Redacted] (C)

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On Wed, Aug 16, 2017 at 2:16 PM, Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov> wrote:

(b)(5) [Redacted]

(b)(5)

[Redacted]

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor
NOAA Office of General Counsel
Fisheries & Protected Resources Section
1315 East-West Highway, SSMC III, Room 15114
Silver Spring, MD 20910
[\(301\)713-9671](tel:3017139671)
Fax: [\(301\) 713-0658](tel:3017130658)

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Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Gustafson, Kristen
(Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

According to FOIAOnline, their request was as follows:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of any agency communications to, or from, Dr. John Bates regarding the 2015 Karl et al study in Science magazine (see <http://science.sciencemag.org/content/348/6242/1469>) from July 30, 2014 to February 4, 2017. I would like to receive the information in electronic form, preferably a searchable PDF or in XML format.

(b)(5)

[Redacted]

To: Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

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Sent: Wednesday, August 16, 2017 9:27 AM
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Thanks,
Ruth Ann

Standing Call re: Judicial Watch 2017 FOIA

(b)(6)

When Wed Aug 16, 2017 4pm – 5pm Eastern Time

Who

- ruthann.lowery@noaa.gov - organizer
- mark.graff@noaa.gov
- jmyers@doc.gov
- kristen.l.gustafson@noaa.gov
- mbogomolny@doc.gov
- rod.vieira@noaa.gov
- h davidson@doc.gov
- roxie.allison-holman@noaa.gov
- stacey.nathanson@noaa.gov

Ruth Ann Lowery - NOAA Federal

From: Ruth Ann Lowery - NOAA Federal
Sent: Wednesday, August 16, 2017 2:53 PM
To: Bogomolny, Michael (Federal); Mark Graff - NOAA Federal
Cc: Davidson, Hillary (Federal); Rodney Vieira - NOAA Federal; Stacey Nathanson - NOAA Federal; Myers, Jordan (Federal); Kristen Gustafson - NOAA Federal; Roxie Allison-Holman - NOAA Federal
Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor
NOAA Office of General Counsel
Fisheries & Protected Resources Section
1315 East-West Highway, SSMC III, Room 15114
Silver Spring, MD 20910
(301)713-9671
Fax: (301) 713-0658

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Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

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Sent: Wednesday, August 16, 2017 2:20 PM

To: Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>

Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>;

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Subject: Re: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)

(b)(6) (C)

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On Wed, Aug 16, 2017 at 2:16 PM, Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov> wrote:

(b)(5)

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor
NOAA Office of General Counsel
Fisheries & Protected Resources Section
1315 East-West Highway, SSMC III, Room 15114
Silver Spring, MD 20910
[\(301\)713-9671](tel:(301)713-9671)
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Sent: Wednesday, August 16, 2017 2:08 PM
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Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

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(b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted].

-bogo

From: Davidson, Hillary (Federal)
Sent: Wednesday, August 16, 2017 2:01 PM
To: Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5) [Redacted]
[Redacted]?

From: Ruth Ann Lowery - NOAA Federal [mailto:ruthann.lowery@noaa.gov]
Sent: Wednesday, August 16, 2017 1:55 PM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>; Gustafson, Kristen

Hi, all. With both Kristen and Roxie probably not able to participate today (Kristen declined, and Roxie is on leave), it seems we may lack a critical mass for the standing call. Do others want to have a call anyway?

Thanks,
Ruth Ann

Standing Call re: Judicial Watch 2017 FOIA

(b)(6)

When Wed Aug 16, 2017 4pm – 5pm Eastern Time

Who

- ruthann.lowery@noaa.gov - organizer
- mark.graff@noaa.gov
- jmyers@doc.gov
- kristen.l.gustafson@noaa.gov
- mbogomolny@doc.gov
- rod.vieira@noaa.gov
- h davidson@doc.gov
- roxie.allison-holman@noaa.gov
- stacey.nathanson@noaa.gov

Symone Stone - NOAA Affiliate

From: Symone Stone - NOAA Affiliate
Sent: Wednesday, August 16, 2017 2:56 PM
To: Mark Graff - NOAA Federal
Subject: Re: Untimely response to FOIA request FOIA-2017-001326

Thank you (b)(5) [REDACTED]

[REDACTED].
Symone

On Wed, Aug 16, 2017 at 1:56 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:
I just approved it--no issues. Thanks!

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:(301)628-5658) (O)
(b)(6) [REDACTED] (C)

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On Wed, Aug 16, 2017 at 1:32 PM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:
Hi Mark,

Can you please go in and review this FOIA for interim release?

Symone

----- Forwarded message -----

From: Symone Stone - NOAA Affiliate <symone.stone@noaa.gov>
Date: Tue, Aug 15, 2017 at 2:40 PM
Subject: Re: Untimely response to FOIA request FOIA-2017-001326
To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Hi Lola,

(b)(5) [REDACTED].

On Tue, Aug 15, 2017 at 9:56 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:
Ready.

On Tue, Aug 15, 2017 at 9:28 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:
Sorry Lola,

(b)(5)

On Tue, Aug 15, 2017 at 9:04 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Hun (b)(5)

R/
Lola

On Tue, Aug 15, 2017 at 8:47 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Thank you Lola (b)(5)

On Tue, Aug 15, 2017 at 8:36 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

(b)(5) (b)(5)

Thanks!

Lola

On Tue, Aug 15, 2017 at 8:32 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Good morning Symone (b)(5)

Lola

On Tue, Aug 15, 2017 at 8:19 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

----- Forwarded message -----

From: **Symone Stone - NOAA Affiliate** <symone.stone@noaa.gov>

Date: Mon, Aug 14, 2017 at 4:16 PM

Subject: Re: Untimely response to FOIA request FOIA-2017-001326

To: FOIA Office - NOAA Service Account <foia@noaa.gov>

FYI (b)(5)

On Mon, Aug 14, 2017 at 4:11 PM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Hi Lola,

(b)(5)

Symone

On Mon, Aug 14, 2017 at 10:49 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Yes!

On Mon, Aug 14, 2017 at 10:21 AM, FOIA Office - NOAA Service Account <foia@noaa.gov> wrote:

Hi Symone (b)(5)

?

Lola

On Mon, Aug 14, 2017 at 9:13 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Lola,

(b)(5)

Symone

On Fri, Aug 11, 2017 at 11:03 AM, FOIA Office - NOAA Service Account <foia@noaa.gov> wrote:

Hi Symone (b)(5)

Lola

----- Forwarded message -----

From: **Hans Bader** <Hans.Bader@cei.org>

Date: Fri, Aug 11, 2017 at 10:43 AM

Subject: Untimely response to FOIA request FOIA-2017-001326

To: "foia@noaa.gov" <foia@noaa.gov>

Cc: "symone.stone@noaa.gov" <symone.stone@noaa.gov>, "lisa.love@noaa.gov" <lisa.love@noaa.gov>

A determination in response to the Competitive Enterprise Institute's FOIA request is long overdue. If we don't receive a determination in response to our request by August 24, and

responsive records promptly thereafter, we will file a Freedom of Information Act lawsuit against NOAA.

FOIA sets a deadline of twenty working days for agencies to issue a determination in response to a FOIA request. 5 U.S.C. §552(a)(6)(A)(i). To comply with FOIA, the agency's determination must, within that 20-day period, "inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions," and actual production must follow promptly thereafter. (*See CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013)).

None of those things has happened with regard to our FOIA request.

That 20-day deadline has long passed, and passed months ago. Our FOIA request was filed on March 28 (although NOAA misplaced it and thus only logged it in on June 7, see <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28138349a>). NOAA's misplacing it for two months did not extend the time for issuing a determination, which was due in late April, 2017. That is made clear in a recent court ruling in one of our FOIA lawsuits, which found that an agency received our FOIA request when we emailed it to the agency, not when the agency's FOIA staffer retrieved it. *See Competitive Enterprise Institute v. EPA*, 232 F.Supp.3d 172, 182 (D.D.C. Feb. 8, 2017)).

Please give us the records we requested.

Thanks,

Hans Bader

Competitive Enterprise Institute

1310 L Street, NW, 7th Floor

Washington, D.C. 20006

From: foia@noaa.gov [mailto:foia@noaa.gov]

Sent: Wednesday, July 19, 2017 3:07 PM

To: Hans Bader <Hans.Bader@cei.org>

Subject: FOIA-2017-001326: In Progress

Dear Mr. Bader:

Your FOIA request has been routed to the correct NWS Office responsible for working on your request. The office is working as quickly as possible to respond.

Thank you for your patience,

Symone Stone

Administrative Analyst

NOAA/NWS

--

Symone Stone <symone.stone@noaa.gov>
Syneren Technologies Corporation
NOAA/National Weather Service
Office of the Chief Financial Officer
Management and Organization Division
Ph: [301-427-6936](tel:301-427-6936)

--

Symone Stone <symone.stone@noaa.gov>
Syneren Technologies Corporation
NOAA/National Weather Service
Office of the Chief Financial Officer
Management and Organization Division
Ph: [301-427-6936](tel:301-427-6936)

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Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c (b)(6) [REDACTED])
lola.m.stith@noaa.gov

--

Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c (b)(6) [REDACTED])
lola.m.stith@noaa.gov

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Ruth Ann Lowery - NOAA Federal

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Sent: Wednesday, August 16, 2017 2:58 PM
To: Bogomolny, Michael (Federal); Mark Graff - NOAA Federal
Cc: Davidson, Hillary (Federal); Rodney Vieira - NOAA Federal; Stacey Nathanson - NOAA Federal; Myers, Jordan (Federal); Kristen Gustafson - NOAA Federal; Roxie Allison-Holman - NOAA Federal
Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

Ruth Ann Lowery, Attorney-Advisor
NOAA Office of General Counsel
Fisheries & Protected Resources Section
1315 East-West Highway, SSMC III, Room 15114
Silver Spring, MD 20910
(301)713-9671
Fax: (301) 713-0658

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<<(((^>`.,.,.~`.,.,>(((^>.,.,.~`.,.,>(((^>

From: Bogomolny, Michael (Federal) [mailto:MBogomolny@doc.gov]
Sent: Wednesday, August 16, 2017 2:51 PM
To: Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>
Cc: Davidson, Hillary (Federal) <HDavidson@doc.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

-bogo

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Wednesday, August 16, 2017 2:20 PM
To: Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>

Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>;
Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>;
Myers, Jordan (Federal) <jmyers@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-
Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: Re: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)

(b)(6) (C)

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On Wed, Aug 16, 2017 at 2:16 PM, Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov> wrote:

(b)(5)

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor
NOAA Office of General Counsel
Fisheries & Protected Resources Section
1315 East-West Highway, SSMC III, Room 15114
Silver Spring, MD 20910
[\(301\)713-9671](tel:(301)713-9671)
Fax: [\(301\) 713-0658](tel:(301)713-0658)

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Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

Ruth Ann Lowery, Attorney-Advisor
NOAA Office of General Counsel
Fisheries & Protected Resources Section
1315 East-West Highway, SSMC III, Room 15114
Silver Spring, MD 20910
[\(301\)713-9671](tel:3017139671)
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<(((^>`.,.,.~.,.>(((^>.,.,.~.,.>(((^>.,.,.~.,.>(((^>

From: Bogomolny, Michael (Federal) [mailto:MBogomolny@doc.gov]
Sent: Wednesday, August 16, 2017 1:18 PM
To: Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

-bogo

From: Google Calendar [mailto:calendar-notification@google.com] **On Behalf Of** ruthann.lowery@noaa.gov
Sent: Wednesday, August 16, 2017 9:27 AM
To: Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Subject: [Update] Standing Call re: Judicial Watch 2017 FOIA

Hi, all. With both Kristen and Roxie probably not able to participate today (Kristen declined, and Roxie is on

leave), it seems we may lack a critical mass for the standing call. Do others want to have a call anyway?

Thanks,
Ruth Ann

Standing Call re: Judicial Watch 2017 FOIA

(b)(6)

When Wed Aug 16, 2017 4pm – 5pm Eastern Time

- Who
- ruthann.lowery@noaa.gov - organizer
 - mark.graff@noaa.gov
 - jmyers@doc.gov
 - kristen.l.gustafson@noaa.gov
 - mbogomolny@doc.gov
 - rod.vieira@noaa.gov
 - h davidson@doc.gov
 - roxie.allison-holman@noaa.gov
 - stacey.nathanson@noaa.gov

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, August 16, 2017 3:03 PM
To: Symone Stone - NOAA Affiliate
Subject: Re: Untimely response to FOIA request FOIA-2017-001326

(b)(5)

[REDACTED]

[REDACTED]

[REDACTED].

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Wed, Aug 16, 2017 at 2:56 PM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Thank you (b)(5)

[REDACTED]

[REDACTED].

Symone

On Wed, Aug 16, 2017 at 1:56 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

(b)(5) Thanks!

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) (C)

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On Wed, Aug 16, 2017 at 1:32 PM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Hi Mark,

(b)(5) ?

Symone

----- Forwarded message -----

From: **Symone Stone - NOAA Affiliate** <symone.stone@noaa.gov>

Date: Tue, Aug 15, 2017 at 2:40 PM

Subject: Re: Untimely response to FOIA request FOIA-2017-001326

To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Hi Lola,

(b)(5)

On Tue, Aug 15, 2017 at 9:56 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:
Ready.

On Tue, Aug 15, 2017 at 9:28 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:
Sorry Lola,

(b)(5)

On Tue, Aug 15, 2017 at 9:04 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:
Hi Hun (b)(5)

R/
Lola

On Tue, Aug 15, 2017 at 8:47 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:
Thank you Lola (b)(5)

On Tue, Aug 15, 2017 at 8:36 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:
(b)(5)

Thanks!

Lola

On Tue, Aug 15, 2017 at 8:32 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:
Good morning Symone (b)(5)

Lola

On Tue, Aug 15, 2017 at 8:19 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

----- Forwarded message -----

From: **Symone Stone - NOAA Affiliate** <symone.stone@noaa.gov>

Date: Mon, Aug 14, 2017 at 4:16 PM

Subject: Re: Untimely response to FOIA request FOIA-2017-001326

To: FOIA Office - NOAA Service Account <foia@noaa.gov>

FYI (b)(5)

On Mon, Aug 14, 2017 at 4:11 PM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Hi Lola,

(b)(5)

Symone

On Mon, Aug 14, 2017 at 10:49 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Yes!

On Mon, Aug 14, 2017 at 10:21 AM, FOIA Office - NOAA Service Account <foia@noaa.gov> wrote:

Hi Symone (b)(5)

Lola

On Mon, Aug 14, 2017 at 9:13 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Lola,

(b)(5)

Symone

On Fri, Aug 11, 2017 at 11:03 AM, FOIA Office - NOAA Service Account <foia@noaa.gov> wrote:

Hi Symone (b)(5)

(b)(5)

Lola

----- Forwarded message -----

From: **Hans Bader** <Hans.Bader@cei.org>

Date: Fri, Aug 11, 2017 at 10:43 AM

Subject: Untimely response to FOIA request FOIA-2017-001326

To: "foia@noaa.gov" <foia@noaa.gov>

Cc: "symone.stone@noaa.gov" <symone.stone@noaa.gov>, "lisa.love@noaa.gov" <lisa.love@noaa.gov>

A determination in response to the Competitive Enterprise Institute's FOIA request is long overdue. If we don't receive a determination in response to our request by August 24, and responsive records promptly thereafter, we will file a Freedom of Information Act lawsuit against NOAA.

FOIA sets a deadline of twenty working days for agencies to issue a determination in response to a FOIA request. 5 U.S.C. §552(a)(6)(A)(i). To comply with FOIA, the agency's determination must, within that 20-day period, "inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions," and actual production must follow promptly thereafter. (See *CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013)).

None of those things has happened with regard to our FOIA request.

That 20-day deadline has long passed, and passed months ago. Our FOIA request was filed on March 28 (although NOAA misplaced it and thus only logged it in on June 7, see <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28138349a>). NOAA's misplacing it for two months did not extend the time for issuing a determination, which was due in late April, 2017. That is made clear in a recent court ruling in one of our FOIA lawsuits, which found that an agency received our FOIA request when we emailed it to the agency, not when the agency's FOIA staffer retrieved it. See *Competitive Enterprise Institute v. EPA*, 232 F.Supp.3d 172, 182 (D.D.C. Feb. 8, 2017)).

Please give us the records we requested.

Thanks,

Hans Bader

Competitive Enterprise Institute

1310 L Street, NW, 7th Floor

Washington, D.C. 20006

From: foia@noaa.gov [mailto:foia@noaa.gov]

Sent: Wednesday, July 19, 2017 3:07 PM

To: Hans Bader <Hans.Bader@cei.org>

Subject: FOIA-2017-001326: In Progress

Dear Mr. Bader:

Your FOIA request has been routed to the correct NWS Office responsible for working on your request. The office is working as quickly as possible to respond.

Thank you for your patience,

Symone Stone

Administrative Analyst

NOAA/NWS

--

Symone Stone <symone.stone@noaa.gov>

Syneren Technologies Corporation

NOAA/National Weather Service

Office of the Chief Financial Officer

Management and Organization Division

Ph: [301-427-6936](tel:301-427-6936)

--

Symone Stone <symone.stone@noaa.gov>
Syneren Technologies Corporation
NOAA/National Weather Service
Office of the Chief Financial Officer
Management and Organization Division
Ph: [301-427-6936](tel:301-427-6936)

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Syneren Technologies Corporation
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Management and Organization Division
Ph: [301-427-6936](tel:301-427-6936)

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

lola.m.stith@noaa.gov

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

lola.m.stith@noaa.gov

--

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Lola Stith

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NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

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Ph: [301-427-6936](tel:301-427-6936)

Davidson, Hillary (Federal)

From: Davidson, Hillary (Federal)
Sent: Wednesday, August 16, 2017 3:06 PM
To: Lowery, Ruth Ann (Federal); Bogomolny, Michael (Federal); Graff, Mark (Federal)
Cc: Vieira, Rodney (Federal); Nathanson, Stacey (Federal); Myers, Jordan (Federal); Gustafson, Kristen (Federal); Allison-Holman, Roxie (Federal)
Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

From: Ruth Ann Lowery - NOAA Federal [mailto:ruthann.lowery@noaa.gov]
Sent: Wednesday, August 16, 2017 2:58 PM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>
Cc: Davidson, Hillary (Federal) <HDavidson@doc.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

Ruth Ann Lowery, Attorney-Advisor
NOAA Office of General Counsel
Fisheries & Protected Resources Section
1315 East-West Highway, SSMC III, Room 15114
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From: Bogomolny, Michael (Federal) [mailto:MBogomolny@doc.gov]
Sent: Wednesday, August 16, 2017 2:51 PM
To: Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>
Cc: Davidson, Hillary (Federal) <HDavidson@doc.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

(b)(5) [Redacted]

[Redacted]

-bogo

From: Mark Graff - NOAA Federal [<mailto:mark.graff@noaa.gov>]
Sent: Wednesday, August 16, 2017 2:20 PM
To: Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>
Cc: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>;
Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>;
Myers, Jordan (Federal) <jmyers@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-
Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: Re: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5) [Redacted]

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)

(b)(6) [Redacted] (C)

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On Wed, Aug 16, 2017 at 2:16 PM, Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov> wrote:

(b)(5) [Redacted]

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor
NOAA Office of General Counsel
Fisheries & Protected Resources Section
1315 East-West Highway, SSMC III, Room 15114
Silver Spring, MD 20910
[\(301\)713-9671](tel:(301)713-9671)
Fax: [\(301\) 713-0658](tel:(301)713-0658)

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><(((°>`.,.,.~.,.,><(((°>.,.,.~.,.,><(((°>.

From: Bogomolny, Michael (Federal) [mailto:MBogomolny@doc.gov]
Sent: Wednesday, August 16, 2017 2:08 PM
To: Davidson, Hillary (Federal) <HDavidson@doc.gov>; Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

According to FOIAOnline, their request was as follows:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of any agency communications to, or from, Dr. John Bates regarding the 2015 Karl et al study in Science magazine (see <http://science.sciencemag.org/content/348/6242/1469>) from July 30, 2014 to February 4, 2017. I would like to receive the information in electronic form, preferably a searchable PDF or in XML format.

(b)(5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

-bogo

From: Davidson, Hillary (Federal)
Sent: Wednesday, August 16, 2017 2:01 PM
To: Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

[REDACTED] ?

From: Ruth Ann Lowery - NOAA Federal [<mailto:ruthann.lowery@noaa.gov>]

Sent: Wednesday, August 16, 2017 1:55 PM

To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>

Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

[REDACTED]

Ruth Ann Lowery, Attorney-Advisor
NOAA Office of General Counsel
Fisheries & Protected Resources Section
1315 East-West Highway, SSMC III, Room 15114
Silver Spring, MD 20910
[\(301\)713-9671](tel:3017139671)
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From: Bogomolny, Michael (Federal) [<mailto:MBogomolny@doc.gov>]

Sent: Wednesday, August 16, 2017 1:18 PM

To: Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>

Subject: RE: [Update] Standing Call re: Judicial Watch 2017 FOIA

(b)(5)

[REDACTED]

-bogo

From: Google Calendar [<mailto:calendar-notification@google.com>] **On Behalf Of** ruthann.lowery@noaa.gov

Sent: Wednesday, August 16, 2017 9:27 AM

To: Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Nathanson, Stacey (Federal) <Stacey.Nathanson@noaa.gov>; Lowery, Ruth Ann (Federal) <RuthAnn.Lowery@noaa.gov>; Myers, Jordan (Federal) <jmyers@doc.gov>; Davidson, Hillary (Federal) <HDavidson@doc.gov>; Gustafson, Kristen (Federal) <Kristen.L.Gustafson@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>

Subject: [Update] Standing Call re: Judicial Watch 2017 FOIA

Hi, all. With both Kristen and Roxie probably not able to participate today (Kristen declined, and Roxie is on leave), it seems we may lack a critical mass for the standing call. Do others want to have a call anyway?

Thanks,
Ruth Ann

Standing Call re: Judicial Watch 2017 FOIA

(b)(6)

When Wed Aug 16, 2017 4pm – 5pm Eastern Time

Who

- ruthann.lowery@noaa.gov - organizer
- mark.graff@noaa.gov
- jmyers@doc.gov
- kristen.l.gustafson@noaa.gov
- mbogomolny@doc.gov
- rod.vieira@noaa.gov
- hdavidson@doc.gov
- roxie.allison-holman@noaa.gov
- stacey.nathanson@noaa.gov

Symone Stone - NOAA Affiliate

From: Symone Stone - NOAA Affiliate
Sent: Wednesday, August 16, 2017 3:10 PM
To: Mark Graff - NOAA Federal
Subject: Re: Untimely response to FOIA request FOIA-2017-001326

Great, thank you!

On Wed, Aug 16, 2017 at 3:02 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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On Wed, Aug 16, 2017 at 2:56 PM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Thank you (b)(5)

Symone

On Wed, Aug 16, 2017 at 1:56 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

(b)(5). Thanks!

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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On Wed, Aug 16, 2017 at 1:32 PM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:
Hi Mark,

(b)(5) ?

Symone

----- Forwarded message -----

From: **Symone Stone - NOAA Affiliate** <symone.stone@noaa.gov>

Date: Tue, Aug 15, 2017 at 2:40 PM

Subject: Re: Untimely response to FOIA request FOIA-2017-001326

To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Hi Lola,

(b)(5)

On Tue, Aug 15, 2017 at 9:56 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

(b)(5).

On Tue, Aug 15, 2017 at 9:28 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Sorry Lola,

(b)(5)

(b)(5)

On Tue, Aug 15, 2017 at 9:04 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Hun (b)(5)

R/

Lola

On Tue, Aug 15, 2017 at 8:47 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov>

wrote:

Thank you Lola (b)(5).

On Tue, Aug 15, 2017 at 8:36 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

(b)(5).

Thanks!

Lola

On Tue, Aug 15, 2017 at 8:32 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Good morning Symone (b)(5)

(b)(5)

(b)(5)

(b)(5)

[REDACTED] ?

Lola

On Tue, Aug 15, 2017 at 8:19 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

----- Forwarded message -----

From: **Symone Stone - NOAA Affiliate** <symone.stone@noaa.gov>

Date: Mon, Aug 14, 2017 at 4:16 PM

Subject: Re: Untimely response to FOIA request FOIA-2017-001326

To: FOIA Office - NOAA Service Account <foia@noaa.gov>

FYI (b)(5)

[REDACTED]."

On Mon, Aug 14, 2017 at 4:11 PM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Hi Lola,

(b)(5)

[REDACTED].

Symone

On Mon, Aug 14, 2017 at 10:49 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Yes!

On Mon, Aug 14, 2017 at 10:21 AM, FOIA Office - NOAA Service Account <foia@noaa.gov> wrote:

Hi Symone (b)(5)

[REDACTED]

[REDACTED]

[REDACTED] ?

Lola

On Mon, Aug 14, 2017 at 9:13 AM, Symone Stone - NOAA Affiliate <symone.stone@noaa.gov> wrote:

Lola,

(b)(5)

[REDACTED]

[REDACTED].

Symone

On Fri, Aug 11, 2017 at 11:03 AM, FOIA Office - NOAA Service Account <foia@noaa.gov> wrote:

Hi Symone (b)(5)

[REDACTED]

Lola

----- Forwarded message -----

From: **Hans Bader** <Hans.Bader@cei.org>

Date: Fri, Aug 11, 2017 at 10:43 AM

Subject: Untimely response to FOIA request FOIA-2017-001326

To: "foia@noaa.gov" <foia@noaa.gov>

Cc: "symone.stone@noaa.gov" <symone.stone@noaa.gov>, "lisa.love@noaa.gov" <lisa.love@noaa.gov>

A determination in response to the Competitive Enterprise Institute's FOIA request is long overdue. If we don't receive a determination in response to our request by August 24, and responsive records promptly thereafter, we will file a Freedom of Information Act lawsuit against NOAA.

FOIA sets a deadline of twenty working days for agencies to issue a determination in response to a FOIA request. 5 U.S.C. §552(a)(6)(A)(i). To comply with FOIA, the agency's determination must, within that 20-day period, "inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions," and actual production must follow promptly thereafter. (See *CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013)).

None of those things has happened with regard to our FOIA request.

That 20-day deadline has long passed, and passed months ago. Our FOIA request was filed on March 28 (although NOAA misplaced it and thus only logged it in on June 7, see <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28138349a>). NOAA's misplacing it for two months did not extend the time for issuing a determination, which was due in late April, 2017. That is made clear in a recent court ruling in one of our FOIA lawsuits, which found that an agency received our FOIA request when we emailed it to the agency, not when the agency's FOIA staffer retrieved it. See *Competitive Enterprise Institute v. EPA*, 232 F.Supp.3d 172, 182 (D.D.C. Feb. 8, 2017)).

Please give us the records we requested.

Thanks,

Hans Bader

Competitive Enterprise Institute

1310 L Street, NW, 7th Floor

Washington, D.C. 20006

From: foia@noaa.gov [mailto:foia@noaa.gov]

Sent: Wednesday, July 19, 2017 3:07 PM

To: Hans Bader <Hans.Bader@cei.org>

Subject: FOIA-2017-001326: In Progress

Dear Mr. Bader:

Your FOIA request has been routed to the correct NWS Office responsible for working on your request. The office is working as quickly as possible to respond.

Thank you for your patience,

Symone Stone

Administrative Analyst

NOAA/NWS

--

Symone Stone <symone.stone@noaa.gov>

Syneren Technologies Corporation

NOAA/National Weather Service

Office of the Chief Financial Officer

Management and Organization Division

Ph: [301-427-6936](tel:301-427-6936)

--

Symone Stone <symone.stone@noaa.gov>
Syneren Technologies Corporation
NOAA/National Weather Service
Office of the Chief Financial Officer
Management and Organization Division
Ph: [301-427-6936](tel:301-427-6936)

--

Symone Stone <symone.stone@noaa.gov>
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--

Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c (b)(6) [REDACTED])
lola.m.stith@noaa.gov

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Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c (b)(6) [REDACTED])
lola.m.stith@noaa.gov

--

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Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c (b)(6) [REDACTED])
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Syneren Technologies Corporation
NOAA/National Weather Service
Office of the Chief Financial Officer
Management and Organization Division
Ph: [301-427-6936](tel:301-427-6936)

Lola Stith - NOAA Affiliate

From: Lola Stith - NOAA Affiliate
Sent: Wednesday, August 16, 2017 3:31 PM
To: Annie Thomson - NOAA Federal; Mark Graff - NOAA Affiliate
Subject: Re: FOIA Request

Hi Annie - I'm looping in Mark.

(b)(5)

Mark - Please chime in. I defer to your final guidance.

The requester (DOC-NOAA-2017-001487) is seeking a copy of *Title: Proceedings of the thirteenth Interagency Conference on Weather Modification, October 12-15, 1971, Skyland, Virginia* First Author: *Interagency Conference on Weather Modification (13th : 1971 : Skyland, Va.)* Publisher: *U.S. Dept. of Commerce, National Oceanic and Atmospheric Administration* Pub date:[1971?] NOAA Central Library Call number: *QC926.6 .I5 1971.*

R./
Lola

On Tue, Aug 15, 2017 at 11:07 AM, Annie Thomson - NOAA Federal <annie.thomson@noaa.gov> wrote:

Lola

(b)(5)

Thanks,

Annie

----- Forwarded message -----

From: Library Reference - NOAA Service Account <library.reference@noaa.gov>

Date: Mon, Jul 24, 2017 at 3:46 PM

Subject: Re: FOIA Request

To: John Greenewald <john@greenewald.com>

Cc: Annie Thomson - NOAA Federal <annie.thomson@noaa.gov>

Hi John,

Thank you for the reply. Unfortunately the item is over 400 pages so scanning the book will take some time. Is there a certain section of the book you are looking for or do you want the entire thing? I have attached a copy of the table of contents for your reference.

Best,
Stephen

Reference Desk

NOAA Central Library
1315 East West Highway
SSMC3, 2nd Floor
Silver Spring, MD 20910 USA [301-713-2600, ext. 157](tel:301-713-2600)
Visit our [new Library website](#) and [Institutional Repository](#)

On Mon, Jul 24, 2017 at 12:38 PM, John Greenewald <john@greenewald.com> wrote:

Hello Stephen,

Thank you for your response. I will be honest and say that is not entirely feasible. Is there any way to just make a copy? How many pages is it?

Sincerely,

John Greenewald, Jr.

Owner/Founder

The Black Vault

<http://www.theblackvault.com>

Toll Free: [\(800\) 456-2228](tel:800-456-2228)

International: [1 \(818\) 655-0474](tel:1-818-655-0474)

Fax: [\(818\) 659-7688](tel:818-659-7688)

Mailing Address:

The Black Vault
27305 W. Live Oak Rd., Suite 1203
Castaic, CA 91384-4520

From: Library Reference - NOAA Service Account [mailto:library.reference@noaa.gov]

Sent: Thursday, July 20, 2017 6:35 AM

To: john@greenewald.com

Cc: Annie Thomson - NOAA Federal

Subject: FOIA Request

Hi John,

Thank you for submitting a Freedom of Information Act Request to the NOAA Central Library. I have checked our collection, and we do have a copy of the *Proceedings of the Thirteenth Inter agency*

Conference on Weather Modification. **However, we do not have an electronic copy available as requested.**

In order to lend the physical copy of the item you would need to request the book via Inter-Library Loan at your local library. The service is free of charge for most libraries and the book will arrive within 10 business days of the library making the request.

If this is not a feasible option, please let me know and we can look into other options. Thank you again and please let me know if you have any questions.

Best,

Stephen

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Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c) (b)(6)

lola.m.stith@noaa.gov

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, August 16, 2017 3:41 PM
To: Lola Stith - NOAA Affiliate
Cc: Annie Thomson - NOAA Federal
Subject: Re: FOIA Request

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)

(b)(6) (C)

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R./
Lola

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Lola

(b)(5)

Annie

----- Forwarded message -----

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Stephen

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--
Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

lola.m.stith@noaa.gov

Ellen Sebastian - NOAA Federal

From: Ellen Sebastian - NOAA Federal
Sent: Thursday, August 17, 2017 8:25 AM
To: Lola Stith - NOAA Affiliate; Graff, Mark
Cc: James Bruschi - NOAA Affiliate; Jim Balsiger; Ray Howard; Lauren Smoker; Samuel Dixon - NOAA Affiliate
Subject: Fwd: FOIA request

NOAA FOIA, can you please advise on status? Any help on this would be appreciated. Thanks!

----- Forwarded message -----

From: Richard Steiner <richard.g.steiner@gmail.com>
Date: Thursday, August 17, 2017
Subject: FOIA request
To: james.balsiger@noaa.gov, FOIA@noaa.gov, Ellen Sebastian - NOAA Federal <ellen.sebastian@noaa.gov>
Cc: Chris Oliver <chris.oliver@noaa.gov>

Dear NMFS/NOAA Colleagues,

I would appreciate your confirmation of receipt of this FOIA request, sent Aug. 1, 2017, and your estimated date that you will produce the responsive documents. Thanks in advance.

Rick Steiner
Anchorage

On Tue, Aug 1, 2017 at 8:53 AM, Richard Steiner <richard.g.steiner@gmail.com> wrote:

August 1, 2017

Dr. James Balsiger

NOAA Fisheries

Alaska Region

Juneau, AK (via email)

RE: FOIA REQUEST

Dear Dr. Balsiger:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, I request a copy of all records (documents, emails, records of meetings and/or phone conversations, etc.) over the past year (since August 1, 2016), that discuss the following two issues:

1. Any proposed change, relaxation, or elimination of existing marine species or habitat protections in federal waters off Alaska. Alaska federal marine protections subject to this request include, but are not limited to, the following:

Aleutian Islands Coral Habitat Protection Areas;

Aleutian Islands Habitat Conservation Area;

Bowers Ridge Habitat Conservation Zone;

Alaska Seamount Habitat Protection Areas;

Bering Sea Habitat Conservation Area;

Nunivak Island, Etolin Strait, Kuskokwim Bay Habitat Conservation Area;

Walrus Islands federal closures;

Gulf of Alaska Slope Habitat Conservation Area;

Crab, halibut, herring, and salmon "savings areas";

Any/all marine mammal conservation measures, including Steller sea lion critical habitat, North Pacific Right Whale critical habitat,

southwestern sea otter critical habitat, etc.;

Any/all seabird conservation measures;

Any/all proposed or existing ESA listings;

Scallop Conservation Areas;

Fisheries by-catch reduction programs;

Skate egg concentration Habitat Areas of Particular Concern;

Pribilof Island Habitat Conservation Area;

Non-pelagic (bottom) trawl closures;

Nearshore Bristol Bay Trawl Closure;

U.S. Arctic fishery closure (on federal waters in the Arctic Management Area).

2. Any proposed alteration or suspension of marine environmental research programs conducted in Alaska federal waters. This is to include any/all research into the effects of climate change, contaminants, or oil spills in Alaska's federal waters.

In a January 21, 2009 memo, the President declared the following policy for the Executive Branch:

“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, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve... All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.”

For any documents or portions of documents for which you block release due to specific exemption(s) from the requirements of the Freedom of Information Act, please provide an index itemizing and describing the documents or portions of documents withheld. The index should, pursuant to the holding of Vaughn v. Rosen (484 F.2d 820 [D.C. Cir. 1973] cert. denied, 415 U.S. 977 [1974]), provide a detailed justification for claiming a particular exemption that explains why each such exemption applies to the document or portion of a document withheld.

I requests that all fees be waived because “disclosure of the information is in the public interest . . . and is not primarily in the commercial interest of the requestor” (5 U.S.C. 552 (a) (4)(A)):

1. The records concern the operations or activities of the Government.

The FOIA request is, by its terms, limited to identifiable activities of the National Marine Fisheries Service (NMFS) and/or the North Pacific Fishery Management Council.

2. The disclosure of the requested records is likely to contribute to public understanding of these operations or activities.

The requested material concerns the existing regime for protection of federal offshore marine ecosystems off Alaska, which is a high priority for the American public., and core mission of NMFS.

3. The release of requested records will contribute significantly to public understanding of the governmental activities.

Given recent Presidential executive orders to review and eliminate regulations across the federal government, and to reduce agency science and environmental programs, there is public concern that some of the Alaska marine protections may be at risk of alteration or elimination. The requested records will enhance public understanding of whether and how NMFS intends to maintain current marine protections off Alaska. The disclosure of the requested information will offer the general public a clear picture of the rigor, prudence and efficacy of NMFS actions and policies on these important public policy issues. I intend to provide the requested information to the general public through release to the news media nationally and in-state.

4. Disclosure would not serve a commercial interest of the requestor.

Disclosure is in no way connected with any commercial interest of the requestor in that the requestor has no commercial interest in this issue.

If you have any questions about this FOIA request, please contact me at [907-360-4503](tel:907-360-4503); or richard.g.steiner@gmail.com. I look forward to receiving the agency's final response (electronically) within 20 working days.

Respectfully,

Rick Steiner, Professor
666, 9138 Arlon St. A3
Anchorage, AK 99507
www.oasis-earth.com
[907-360-4503](tel:907-360-4503)

cc. Chris Oliver, Assistant Administrator for NOAA Fisheries

--

Rick Steiner
Oasis Earth
Anchorage, Alaska
www.oasis-earth.com
907-360-4503

--

Ellen Sebastian
FOIA & Records Coordinator
Information Services Division
NOAA Fisheries, Alaska Region
(907) 586-7152

Nourish and sustain your sense of joy.

Susan Beresford - NOAA Federal

From: Susan Beresford - NOAA Federal
Sent: Wednesday, January 11, 2017 1:56 PM
To: Mark Graff - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Arlyn Penaranda - NOAA Federal
Subject: ACTION REQUESTED: FAL for DOC-NOAA-2017-000334.
Attachments: DOC-NOAA-2017-000334 draft FAL response letter for Graff.docx

Hi Mark,

(b)(5)

.

A copy of this document is in FOIAonline.

Thanks for your time.

Susie.

--

Susan S. Beresford
Paralegal
Enforcement Section
NOAA Office of the General Counsel
U.S. Department of Commerce
1315 East-West Highway
SSMC3, Room 15829
Silver Spring, MD 20910
(301) 427-8285 Office
(301) 427-2211 Fax

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(b)(5)

(b)(5)

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, January 11, 2017 3:19 PM
To: Susan Beresford - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Arlyn Penaranda - NOAA Federal
Subject: Re: ACTION REQUESTED: FAL for DOC-NOAA-2017-000334.
Attachments: DOC-NOAA-2017-000334 draft FAL response letter for Graff mhg.docx.pdf

Hi Susie--

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Wed, Jan 11, 2017 at 1:55 PM, Susan Beresford - NOAA Federal <susan.s.beresford@noaa.gov> wrote:

Hi Mark,

(b)(5)

A copy of this document is in FOIAonline.

Thanks for your time.

Susie.

--

Susan S. Beresford
Paralegal
Enforcement Section
NOAA Office of the General Counsel
U.S. Department of Commerce
1315 East-West Highway
SSMC3, Room 15829
Silver Spring, MD 20910
[\(301\) 427-8285](tel:(301)427-8285) Office
[\(301\) 427-2211](tel:(301)427-2211) Fax

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U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

Via FOIAonline

January 11, 2017

Thomas Knudson
Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, CA 94608

Re: FOIA Request DOC-NOAA-2017-000334

Dear Mr. Knudson:

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on December 22, 2016, in which you requested:

Copies of the following: 1.) NMFS NOVA #SW0902995 Malesa \$5,000 2010
2.) NMFS Written Warning #NE0702929 Rose Marie 2010 3.) NMFS NOVA
#NE0801030 American Dream \$11,000 2010 4.) NMFS NOVA #0805007
Princess Laura \$20,500 2010.

We have located 12 pages of documents responsive to your request. Ten of these pages are being released to you in their entirety.

We are also releasing 2 pages of documents responsive to your request that are partially redacted under exemption 5 U.S.C. 552(b)(6) and 5 U.S.C. 552(b)(7)(C), which prohibits from disclosure of records: information that, if disclosed, would invade another individual's personal privacy; and information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy, respectively.

You have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:

Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, by facsimile (fax) to [202-482-2552](tel:202-482-2552), or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

For your appeal to be complete, it must include the following items:

- a copy of the original request,
- our response to your request,
- a statement explaining why the withheld records should be made available, and why the denial of the records was in error.
- “Freedom of Information Act Appeal” must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

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Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

Email: ogis@nara.gov
Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence please contact Susan S. Beresford at susan.s.beresford@noaa.gov, or by phone at (301) 427-8285, or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

**GRAFF.MARK.HYR
UM.1514447892**

Digitally signed by
GRAFF.MARK.HYRUM.1514447892
DN: c=US, o=U.S. Government, ou=DoD,
ou=PKI, ou=OTHER,
cn=GRAFF.MARK.HYRUM.1514447892
Date: 2017.01.11 15:09:02 -05'00'

Mark H. Graff
FOIA Officer/Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration

Al Stein

From: Al Stein
Sent: Wednesday, January 11, 2017 4:40 PM
To: Samuel Dixon; foia@noaa.gov; Mark Graff - NOAA Federal
Subject: Re: Final Disposition, Request DOC-NOAA-2016-000439
Attachments: DOC-NOAA-2016-000439 Signed Partial Grant FAL.pdf; ATT00002.html

Sam/Mark

Could you please email me the PDF containing the additional 25 records released today, as my account expired.

Thanks very much

Alan

On Jan 11, 2017, at 6:24 AM, foia@noaa.gov wrote:

DOC-NOAA-2016-000439 has been processed with the following final disposition: Partial grant/partial denial.

Records were released to the public as a result of this request. You may retrieve these records immediately using the following link: [View Records](#). Over the next 2 hours, these records are also being added to FOIAonline's search pages, further enabling you to retrieve these documents associated with your FOIA request at any time.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

Alan Stein
14301 Hanson Circle
Mendocino CA, 95460

JAN 09 2017

Re: FOIA Request DOC-NOAA-2016-000439

Dear Mr. Stein:

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on 01/11/2016, in which you requested:

1. The National Marine Fisheries Service Determination under 16 USC 1861 of a commercial fishery failure, between 2008-9, on the Yukon River. (Unchanged)

(The records may be in the Office of the Secretary or under Secretary, Office of Grants in Juneau or Silver Spring, or Pacific States Marine Fishery Commission).

2. NMFS' or NOAA's records relating to this grant that are based on rely on the authority of the Interjurisdictional Fisheries Act 16 USC 4104 sections 308 (b) and (d) and the MSA 16 USC 1861 Sections 312 (a) and 315.

3. The official number of the NOAA Fisheries Disaster Relief Grant/Award or other designation intended to relieve the fishermen; and the grant application, proposal and spending plan submitted to NOAA. (Unchanged)

4. Records from the period between January 1, 2009 to December 5, 2014 between either the Secretary of Commerce or the Under Secretary of Commerce for NOAA and anyone in the Office of U. S. Senator Lisa Murkowski, including her fisheries aide Arne Fuglvog, having to do with or describing
a. the need for this grant money, the grant application, the proposal, and the spending plan, including how many fishermen will be covered by this grant
b. the amount of relief needed
c. meetings or schedules to discuss this grant or its appropriation from Congress
d. trips to Alaska or coordination with any of the Yukon River fishermen
e. issues surrounding distribution of this grant
f. or any other issue concerning this grant

(The records may be in Office of Secretary or Under Secretary, Office of Grants in Juneau, or Silver Spring, or Pacific States Marine Fishery Commission or the Office of Legislative Affairs).

5. Records between anyone in Senator Lisa Murkowski's office, including Arne Fuglvog, and anyone in PSMFC, (including but not limited to Randy Fisher,



Susan Anderson, Pam Kahut, Rick Masters, and Michael Arredondo) concerning or describing

- a. the need or scope for this grant/award money, including how many fishermen stakeholder will be covered by this grant*
- b. the amount of relief needed*
- c. meetings or schedules to discuss the nature, amount, or scope of this grant or its appropriation from Congress*
- d. trips to Alaska or coordination with any of the Yukon River fishermen or organizations representing them*
- e. issues surrounding distribution of this grant*

(The records may be in Office of Secretary or Under Secretary, Office of Grants in Juneau, or Silver Spring, or Pacific States Marine Fishery Commission or the Office of Legislative Affairs).

6. Records NOAA got and required from PSMFC concerning the grant/award agreement re all financial audits and findings and performance monitoring reports submitted to NOAA and, in addition, the records for each of the below items as defined and found under (Title 2: Grants and Agreements PART 200—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS <http://www.ecfr.gov/cgibin/retrieveECFR?gp=&SID=d5fd89557a4143654e4d3fea89abb260&mc=true&n=pt2.1.200>)

- a. Financial Audits and Findings whether monthly, quarterly, or yearly*
- b. Monitoring and Performance Reports (both on OMB approved performance forms and any other format) whether annual and quarterly or monthly to assure compliance with applicable Federal requirements and performance expectations to cover each function of the grant and stating
 - i. what goals were accomplished quantitatively and how,*
 - ii. overruns for costs,*
 - iii. significant developments, delays*
 - iv. favorable or unfavorable developments**
- c. The Budget submitted for payouts to fishermen and for fishing gear including any subsequent amendments*
- d. The Capital Expenditures made and recorded with supporting documentation of purchases*
- e. The Closeout(s) of the project and subsequent amendments*
- f. Records describing the Cognizant agency for audit and the Cognizant agency for indirect costs*
- g. Contracts negotiated and signed for materials or services*
- h. Cooperative audit resolutions taken*
- i. Corrective actions taken*
- j. Cost allocation plans*
- k. Disallowed costs*
- l. Expenditures as found in subparagraphs of section 200.34*
- m. The Federal Audit Clearinghouse designated*
- n. The signed Federal award instrument that set forth terms and conditions including the date of signing*
- o. The Federal program number assigned in the CFDA*
- p. Documents Showing who the Oversight agency for audit is*

- q. Documents Showing Project and Questioned cost.
- r. Documents showing Any Sub awards made
- s. Documents showing What instrument was made for the award
- t. Documents showing All the Federal award information as required under Section 200.210
- u. Documents showing The Federal Award Performance Goals
- v. Documents showing Revision of budget and program plans

(Unchanged. The terms used to describe documents are terms of art in the grant world).

(The records may be in the Pacific States Marine Fishery Commission or any of the grants office or Office of General Counsel).

7. Records showing the number of fishermen who received direct payments and records that show individual payments amounts for all recipients (without revealing, by redaction, of any personal details about the identity, location, age or name of the individuals.

(Unchanged. I want records mentioning the total number of fishermen who got money or goods from the grant. If no such record exists, I want the records (checks, electronic transfer, bank statements) disbursing the money and goods to each fishermen with the name and personal information of that fishermen redacted.)

8. Records reflecting communication between Commissioners or with any of the Commissioners of the PSMFC and the agency about the need for the award or grant, its scope, its implementation, or its closeout. (Unchanged)

9. Records showing how much of the award the PSMFC retained for any administration of the award or any other reason. (Unchanged)

10. Records containing communications between Pete Jones (and anyone else in NOAA Alaska) and any of the following persons or entities concerning the need for the grant, meetings about the grant, problems in administration of the grant, and closing of the grant (Unchanged)

- a. John Oliver in NOAA
- b. Senator Lisa Murkowski and any of her staff members, including Arne Fuglvog
- c. Jim Balsiger in NOAA
- d. Anyone in the Offices of General Council in NOAA
- e. Anyone in the Office of the Under Secretary of Commerce for NOAA
- f. Any Alaska based fishing groups
- g. Anyone in the Executive Branch of the State of Alaska, including, for instance, the Office of the Governor and the Departments of Commerce and Fish and Game, Department of Community and Regional Affairs etc. concerning
- i. why the grant was going to PSMFC rather than to the Alaska Dpts. Of Commerce or Community and Regional Affairs as had always happened in the past or
- ii. any other topic concerning the grant sic NOAA Spokesperson quote in <http://peninsulaclarion.com/news/2014-03-11-2>
- h. Anyone in the Pacific States Marine Fisheries Commission, including its staff and Commissioners.

This is the final release of records responsive to your request. We have located 25 additional responsive records. 13 of these records are being released to you in their entirety.

We are also releasing 12 records responsive to your request that are partially redacted under exemption 5 U.S.C. § 552 (b)(5) which exempts from disclosure inter-agency or intra-agency memorandums or letters.

You have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:

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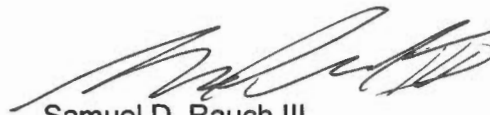
8601 Adelphi Road
College Park, MD 20740-6001

Email: ogis@nara.gov

Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence please contact Samuel Dixon at samuel.dixon@noaa.gov or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

A handwritten signature in black ink, appearing to read "Samuel D. Rauch III". The signature is fluid and cursive, with a long horizontal stroke at the beginning.

Samuel D. Rauch III,
Deputy Assistant Administrator
for Regulatory Programs

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, January 11, 2017 5:08 PM
To: Al Stein
Cc: Samuel Dixon; foia@noaa.gov; Lola Stith - NOAA Affiliate
Subject: Re: Final Disposition, Request DOC-NOAA-2016-000439
Attachments: DOC-NOAA-2016-000439 Signed Partial Grant FAL (1).pdf

Hello Al,

The records are released across many different pdf files, all of which are included in the final disclosure. The following link should direct you to the now-publicly accessible records in pdf, even without logging into your account: <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d280acb248>. Additionally, I am enclosing a pdf of the FAL for your reference. Very best regards,

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Wed, Jan 11, 2017 at 4:39 PM, Al Stein <bugadi@comcast.net> wrote:

Sam/Mark

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Thanks very much

Alan

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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

Alan Stein
14301 Hanson Circle
Mendocino CA, 95460

JAN 09 2017

Re: FOIA Request DOC-NOAA-2016-000439

Dear Mr. Stein:

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2. NMFS' or NOAA's records relating to this grant that are based on rely on the authority of the Interjurisdictional Fisheries Act 16 USC 4104 sections 308 (b) and (d) and the MSA 16 USC 1861 Sections 312 (a) and 315.

3. The official number of the NOAA Fisheries Disaster Relief Grant/Award or other designation intended to relieve the fishermen; and the grant application, proposal and spending plan submitted to NOAA. (Unchanged)

4. Records from the period between January 1, 2009 to December 5, 2014 between either the Secretary of Commerce or the Under Secretary of Commerce for NOAA and anyone in the Office of U. S. Senator Lisa Murkowski, including her fisheries aide Arne Fuglvog, having to do with or describing
a. the need for this grant money, the grant application, the proposal, and the spending plan, including how many fishermen will be covered by this grant
b. the amount of relief needed
c. meetings or schedules to discuss this grant or its appropriation from Congress
d. trips to Alaska or coordination with any of the Yukon River fishermen
e. issues surrounding distribution of this grant
f. or any other issue concerning this grant

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Susan Anderson, Pam Kahut, Rick Masters, and Michael Arredondo) concerning or describing

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- i. Corrective actions taken*
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- d. Anyone in the Offices of General Council in NOAA
- e. Anyone in the Office of the Under Secretary of Commerce for NOAA
- f. Any Alaska based fishing groups
- g. Anyone in the Executive Branch of the State of Alaska, including, for instance, the Office of the Governor and the Departments of Commerce and Fish and Game, Department of Community and Regional Affairs etc. concerning
- i. why the grant was going to PSMFC rather than to the Alaska Dpts. Of Commerce or Community and Regional Affairs as had always happened in the past or
- ii. any other topic concerning the grant sic NOAA Spokesperson quote in <http://peninsulaclarion.com/news/2014-03-11-2>
- h. Anyone in the Pacific States Marine Fisheries Commission, including its staff and Commissioners.

This is the final release of records responsive to your request. We have located 25 additional responsive records. 13 of these records are being released to you in their entirety.

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U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

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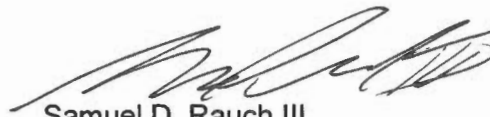
8601 Adelphi Road
College Park, MD 20740-6001

Email: ogis@nara.gov

Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence please contact Samuel Dixon at samuel.dixon@noaa.gov or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

A handwritten signature in black ink, appearing to read "Samuel D. Rauch III". The signature is fluid and cursive, with a long horizontal stroke at the beginning.

Samuel D. Rauch III,
Deputy Assistant Administrator
for Regulatory Programs

Al Stein

From: Al Stein
Sent: Wednesday, January 11, 2017 5:15 PM
To: Mark Graff - NOAA Federal
Cc: Samuel Dixon; foia@noaa.gov; Lola Stith - NOAA Affiliate
Subject: Re: Final Disposition, Request DOC-NOAA-2016-000439
Attachments: DOC-NOAA-2016-000439 Signed Partial Grant FAL (1).pdf; ATT00002.html

The link you provided did get me into the docs.

It says 32 docs

The zip files for April were already released? i.e.
UR 76 Docs zip,
RR_b4_6Docs_RR_b5_3 Docs zip

Much appreciation.

Alan

32 records found, displaying all records.

1

Download	Title	Type	Size (MB)	Release Date	Released With
<input type="checkbox"/>	OS R_ PW b5 dp_ NOAA portions document 1	PDF	0.22	01/11/2017	Request
<input type="checkbox"/>	AGO_NA10NMF4520479_RR	PDF	0.84	07/28/2016	Request
<input type="checkbox"/>	Doc 1 - Release to Requester	PDF	0.06	01/11/2017	Request
<input type="checkbox"/>	Doc 2 - Release to Requester	PDF	0.10	01/11/2017	Request
<input type="checkbox"/>	RR_b4_6 Docs_ RR_b5_3 Docs.zip	ZIP	0.88	04/01/2016	Request
<input type="checkbox"/>	OS R_ PW b5 dp_ NOAA portions document 2(1)	PDF	0.14	01/11/2017	Request
<input type="checkbox"/>	OS R_ PW b5 dp_ NOAA portions document 2	PDF	0.01	01/11/2017	Request
<input type="checkbox"/>	OS R_ PW b5 dp_ NOAA portions document 3	PDF	0.30	01/11/2017	Request
<input type="checkbox"/>	OS R_ PW b5 dp_ NOAA portions document 4_Redacted	PDF	0.22	01/11/2017	Request
<input type="checkbox"/>	OS R_ PW b5 dp_ NOAA portions document 5	PDF	0.09	01/11/2017	Request
<input type="checkbox"/>	OS R_ PW b5 dp_ NOAA portions document 6	PDF	0.21	01/11/2017	Request

<input type="checkbox"/>	<i>OS R_ PW b5 dp_ NOAA portions document 7_Redacted</i>	PDF		0.27	01/11/2017	Request
<input type="checkbox"/>	<i>OS R_ PW b5 dp_ NOAA portions document 8</i>	PDF		0.19	01/11/2017	Request
<input type="checkbox"/>	<i>OS R_ PW b5 dp_ NOAA portions document 9</i>	PDF		0.44	01/11/2017	Request
<input type="checkbox"/>	<i>OS R_ PW b5 dp_ NOAA portions document 10_Redacted</i>	PDF		0.12	01/11/2017	Request
<input type="checkbox"/>	<i>OS R_ PW b5 dp_ NOAA portions document 11_Redacted</i>	PDF		0.18	01/11/2017	Request
<input type="checkbox"/>	<i>document 1 originated in NOAA not OS</i>	PDF		0.07	01/11/2017	Request
<input type="checkbox"/>	<i>document 2 originated in NOAA not OS</i>	PDF		0.06	01/11/2017	Request
<input type="checkbox"/>	<i>document 3 originated in NOAA not OS</i>	PDF		0.18	01/11/2017	Request
<input type="checkbox"/>	<i>document 4 originated in NOAA not OS</i>	PDF		0.18	01/11/2017	Request
<input type="checkbox"/>	<i>document 5 originated in NOAA not OS</i>	PDF		0.18	01/11/2017	Request
<input type="checkbox"/>	<i>document 6 originated in NOAA not OS</i>	PDF		0.17	01/11/2017	Request
<input type="checkbox"/>	<i>document 7 originated in NOAA not OS</i>	PDF		0.17	01/11/2017	Request
<input type="checkbox"/>	<i>document 8 originated in NOAA not OS</i>	PDF		0.13	01/11/2017	Request
<input type="checkbox"/>	<i>document 9 originated in NOAA not OS</i>	PDF		0.10	01/11/2017	Request
<input type="checkbox"/>	<i>document 10 originated in NOAA not OS</i>	PDF		0.13	01/11/2017	Request
<input type="checkbox"/>	<i>document 11 originated in NOAA not OS</i>	PDF		0.11	01/11/2017	Request
<input type="checkbox"/>	<i>OS release and portion(s) originating at NOAA -- Need NOAA review document 1</i>	PDF		0.08	01/11/2017	Request
<input type="checkbox"/>	<i>OS release and portion(s) originating at NOAA -- Need NOAA review document 2</i>	PDF		0.04	01/11/2017	Request
<input type="checkbox"/>	<i>OS Release document 1</i>	PDF		0.08	01/11/2017	Request
<input type="checkbox"/>	<i>OS Release document 2</i>	PDF		0.08	01/11/2017	Request



On Jan 11, 2017, at 2:07 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Hello Al,

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[https://foiaonline.regulations.gov/foia/action/public/view/request?](https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d280acb248)

[objectId=090004d280acb248](https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d280acb248). Additionally, I am enclosing a pdf of the FAL for your reference.

Very best regards,

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

(301) 628-5658 (O)

(b)(6) (C)

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On Wed, Jan 11, 2017 at 4:39 PM, Al Stein <bugadi@comcast.net> wrote:

Sam/Mark

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Thanks very much

Alan

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Partial grant/partial denial.

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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

Alan Stein
14301 Hanson Circle
Mendocino CA, 95460

JAN 09 2017

Re: FOIA Request DOC-NOAA-2016-000439

Dear Mr. Stein:

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on 01/11/2016, in which you requested:

1. The National Marine Fisheries Service Determination under 16 USC 1861 of a commercial fishery failure, between 2008-9, on the Yukon River. (Unchanged)

(The records may be in the Office of the Secretary or under Secretary, Office of Grants in Juneau or Silver Spring, or Pacific States Marine Fishery Commission).

2. NMFS' or NOAA's records relating to this grant that are based on rely on the authority of the Interjurisdictional Fisheries Act 16 USC 4104 sections 308 (b) and (d) and the MSA 16 USC 1861 Sections 312 (a) and 315.

3. The official number of the NOAA Fisheries Disaster Relief Grant/Award or other designation intended to relieve the fishermen; and the grant application, proposal and spending plan submitted to NOAA. (Unchanged)

4. Records from the period between January 1, 2009 to December 5, 2014 between either the Secretary of Commerce or the Under Secretary of Commerce for NOAA and anyone in the Office of U. S. Senator Lisa Murkowski, including her fisheries aide Arne Fuglvog, having to do with or describing
a. the need for this grant money, the grant application, the proposal, and the spending plan, including how many fishermen will be covered by this grant
b. the amount of relief needed
c. meetings or schedules to discuss this grant or its appropriation from Congress
d. trips to Alaska or coordination with any of the Yukon River fishermen
e. issues surrounding distribution of this grant
f. or any other issue concerning this grant

(The records may be in Office of Secretary or Under Secretary, Office of Grants in Juneau, or Silver Spring, or Pacific States Marine Fishery Commission or the Office of Legislative Affairs).

5. Records between anyone in Senator Lisa Murkowski's office, including Arne Fuglvog, and anyone in PSMFC, (including but not limited to Randy Fisher,



Susan Anderson, Pam Kahut, Rick Masters, and Michael Arredondo) concerning or describing

- a. the need or scope for this grant/award money, including how many fishermen stakeholder will be covered by this grant*
- b. the amount of relief needed*
- c. meetings or schedules to discuss the nature, amount, or scope of this grant or its appropriation from Congress*
- d. trips to Alaska or coordination with any of the Yukon River fishermen or organizations representing them*
- e. issues surrounding distribution of this grant*

(The records may be in Office of Secretary or Under Secretary, Office of Grants in Juneau, or Silver Spring, or Pacific States Marine Fishery Commission or the Office of Legislative Affairs).

6. Records NOAA got and required from PSMFC concerning the grant/award agreement re all financial audits and findings and performance monitoring reports submitted to NOAA and, in addition, the records for each of the below items as defined and found under (Title 2: Grants and Agreements PART 200—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS <http://www.ecfr.gov/cgibin/retrieveECFR?gp=&SID=d5fd89557a4143654e4d3fea89abb260&mc=true&n=pt2.1.200>)

- a. Financial Audits and Findings whether monthly, quarterly, or yearly*
- b. Monitoring and Performance Reports (both on OMB approved performance forms and any other format) whether annual and quarterly or monthly to assure compliance with applicable Federal requirements and performance expectations to cover each function of the grant and stating
 - i. what goals were accomplished quantitatively and how,*
 - ii. overruns for costs,*
 - iii. significant developments, delays*
 - iv. favorable or unfavorable developments**
- c. The Budget submitted for payouts to fishermen and for fishing gear including any subsequent amendments*
- d. The Capital Expenditures made and recorded with supporting documentation of purchases*
- e. The Closeout(s) of the project and subsequent amendments*
- f. Records describing the Cognizant agency for audit and the Cognizant agency for indirect costs*
- g. Contracts negotiated and signed for materials or services*
- h. Cooperative audit resolutions taken*
- i. Corrective actions taken*
- j. Cost allocation plans*
- k. Disallowed costs*
- l. Expenditures as found in subparagraphs of section 200.34*
- m. The Federal Audit Clearinghouse designated*
- n. The signed Federal award instrument that set forth terms and conditions including the date of signing*
- o. The Federal program number assigned in the CFDA*
- p. Documents Showing who the Oversight agency for audit is*

- q. Documents Showing Project and Questioned cost.
- r. Documents showing Any Sub awards made
- s. Documents showing What instrument was made for the award
- t. Documents showing All the Federal award information as required under Section 200.210
- u. Documents showing The Federal Award Performance Goals
- v. Documents showing Revision of budget and program plans

(Unchanged. The terms used to describe documents are terms of art in the grant world).

(The records may be in the Pacific States Marine Fishery Commission or any of the grants office or Office of General Counsel).

7. Records showing the number of fishermen who received direct payments and records that show individual payments amounts for all recipients (without revealing, by redaction, of any personal details about the identity, location, age or name of the individuals.

(Unchanged. I want records mentioning the total number of fishermen who got money or goods from the grant. If no such record exists, I want the records (checks, electronic transfer, bank statements) disbursing the money and goods to each fishermen with the name and personal information of that fishermen redacted.)

8. Records reflecting communication between Commissioners or with any of the Commissioners of the PSMFC and the agency about the need for the award or grant, its scope, its implementation, or its closeout. (Unchanged)

9. Records showing how much of the award the PSMFC retained for any administration of the award or any other reason. (Unchanged)

10. Records containing communications between Pete Jones (and anyone else in NOAA Alaska) and any of the following persons or entities concerning the need for the grant, meetings about the grant, problems in administration of the grant, and closing of the grant (Unchanged)

- a. John Oliver in NOAA
- b. Senator Lisa Murkowski and any of her staff members, including Arne Fuglvog
- c. Jim Balsiger in NOAA
- d. Anyone in the Offices of General Council in NOAA
- e. Anyone in the Office of the Under Secretary of Commerce for NOAA
- f. Any Alaska based fishing groups
- g. Anyone in the Executive Branch of the State of Alaska, including, for instance, the Office of the Governor and the Departments of Commerce and Fish and Game, Department of Community and Regional Affairs etc. concerning
- i. why the grant was going to PSMFC rather than to the Alaska Dpts. Of Commerce or Community and Regional Affairs as had always happened in the past or
- ii. any other topic concerning the grant sic NOAA Spokesperson quote in <http://peninsulaclarion.com/news/2014-03-11-2>
- h. Anyone in the Pacific States Marine Fisheries Commission, including its staff and Commissioners.

This is the final release of records responsive to your request. We have located 25 additional responsive records. 13 of these records are being released to you in their entirety.

We are also releasing 12 records responsive to your request that are partially redacted under exemption 5 U.S.C. § 552 (b)(5) which exempts from disclosure inter-agency or intra-agency memorandums or letters.

You have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:

Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, by facsimile (fax) to 202-482-2552, or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

For your appeal to be complete, it must include the following items:

- a copy of the original request,
- our response to your request,
- a statement explaining why the withheld records should be made available, and why the denial of the records was in error.
- "Freedom of Information Act Appeal" must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

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National Archives and Records Administration
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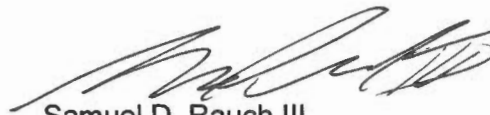
8601 Adelphi Road
College Park, MD 20740-6001

Email: ogis@nara.gov

Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence please contact Samuel Dixon at samuel.dixon@noaa.gov or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Rauch III', written in a cursive style.

Samuel D. Rauch III,
Deputy Assistant Administrator
for Regulatory Programs

Al Stein

From: Al Stein
Sent: Wednesday, January 11, 2017 5:30 PM
To: Mark Graff - NOAA Federal; Samuel Dixon
Subject: problem Final Disposition, Request DOC-NOAA-2016-000439
Attachments: DOC-NOAA-2016-000439 Signed Partial Grant FAL (1).pdf; ATT00002.html

Mark

I could not open the following after downloading

Adobe Acrobat Reader DC could not open '**OS R_ PW b5 dp_ NOAA portions document 2.pdf**' because it is either not a supported file type or because the file has been damaged (for example, it was sent as an email attachment and wasn't correctly decoded).

Could you send the above file separately by email and/or check to see if it was properly loaded onto FOIA ONLINE?

Alan

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Very best regards,

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

Alan Stein
14301 Hanson Circle
Mendocino CA, 95460

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Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, by facsimile (fax) to [202-482-2552](tel:202-482-2552), or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

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Office of Government Information Services
National Archives and Records Administration
Room 2510

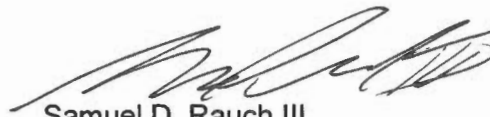
8601 Adelphi Road
College Park, MD 20740-6001

Email: ogis@nara.gov

Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence please contact Samuel Dixon at samuel.dixon@noaa.gov or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Rauch III", written in a cursive style.

Samuel D. Rauch III,
Deputy Assistant Administrator
for Regulatory Programs

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Thursday, January 12, 2017 7:05 AM
To: Samuel Dixon - NOAA Affiliate
Subject: Fwd: problem Final Disposition, Request DOC-NOAA-2016-000439
Attachments: DOC-NOAA-2016-000439 Signed Partial Grant FAL (1).pdf

Hey Sam--

I'm having the same issue. Do you have the original redacted pdf you can email?

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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----- Forwarded message -----

From: Al Stein <bugadi@comcast.net>
Date: Wed, Jan 11, 2017 at 5:29 PM
Subject: problem Final Disposition, Request DOC-NOAA-2016-000439
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>, Samuel Dixon <samuel.dixon@noaa.gov>

Mark

I could not open the following after downloading

Adobe Acrobat Reader DC could not open 'OS R_ PW b5 dp_ NOAA portions document 2.pdf' because it is either not a supported file type or because the file has been damaged (for example, it was sent as an email attachment and wasn't correctly decoded).

Could you send the above file separately by email and/or check to see if it was properly loaded onto FOIA ONLINE?

Alan

On Jan 11, 2017, at 2:07 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Hello Al,

The records are released across many different pdf files, all of which are included in the final

disclosure. The following link should direct you to the now-publicly accessible records in pdf, even without logging into your account: <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d280acb248>. Additionally, I am enclosing a pdf of the FAL for your reference. Very best regards,

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:(301)628-5658) (O)
(b)(6) (C)

Confidentiality Notice: This e-mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.

On Wed, Jan 11, 2017 at 4:39 PM, Al Stein <bugadi@comcast.net> wrote:

Sam/Mark

Could you please email me the PDF containing the additional 25 records released today, as my account expired.

Thanks very much

Alan

On Jan 11, 2017, at 6:24 AM, foia@noaa.gov wrote:

DOC-NOAA-2016-000439 has been processed with the following final disposition:
Partial grant/partial denial.

Records were released to the public as a result of this request. You may retrieve these records immediately using the following link: [View Records](#). Over the next 2 hours, these records are also being added to FOIAonline's search pages, further enabling you to retrieve these documents associated with your FOIA request at any time.



Alan Stein
14301 Hanson Circle
Mendocino CA, 95460

JAN 09 2017

Re: FOIA Request DOC-NOAA-2016-000439

Dear Mr. Stein:

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on 01/11/2016, in which you requested:

1. The National Marine Fisheries Service Determination under 16 USC 1861 of a commercial fishery failure, between 2008-9, on the Yukon River. (Unchanged)

(The records may be in the Office of the Secretary or under Secretary, Office of Grants in Juneau or Silver Spring, or Pacific States Marine Fishery Commission).

2. NMFS' or NOAA's records relating to this grant that are based on rely on the authority of the Interjurisdictional Fisheries Act 16 USC 4104 sections 308 (b) and (d) and the MSA 16 USC 1861 Sections 312 (a) and 315.

3. The official number of the NOAA Fisheries Disaster Relief Grant/Award or other designation intended to relieve the fishermen; and the grant application, proposal and spending plan submitted to NOAA. (Unchanged)

4. Records from the period between January 1, 2009 to December 5, 2014 between either the Secretary of Commerce or the Under Secretary of Commerce for NOAA and anyone in the Office of U. S. Senator Lisa Murkowski, including her fisheries aide Arne Fuglvog, having to do with or describing
a. the need for this grant money, the grant application, the proposal, and the spending plan, including how many fishermen will be covered by this grant
b. the amount of relief needed
c. meetings or schedules to discuss this grant or its appropriation from Congress
d. trips to Alaska or coordination with any of the Yukon River fishermen
e. issues surrounding distribution of this grant
f. or any other issue concerning this grant

(The records may be in Office of Secretary or Under Secretary, Office of Grants in Juneau, or Silver Spring, or Pacific States Marine Fishery Commission or the Office of Legislative Affairs).

5. Records between anyone in Senator Lisa Murkowski's office, including Arne Fuglvog, and anyone in PSMFC, (including but not limited to Randy Fisher,

Susan Anderson, Pam Kahut, Rick Masters, and Michael Arredondo) concerning or describing

- a. the need or scope for this grant/award money, including how many fishermen stakeholder will be covered by this grant*
- b. the amount of relief needed*
- c. meetings or schedules to discuss the nature, amount, or scope of this grant or its appropriation from Congress*
- d. trips to Alaska or coordination with any of the Yukon River fishermen or organizations representing them*
- e. issues surrounding distribution of this grant*

(The records may be in Office of Secretary or Under Secretary, Office of Grants in Juneau, or Silver Spring, or Pacific States Marine Fishery Commission or the Office of Legislative Affairs).

6. Records NOAA got and required from PSMFC concerning the grant/award agreement re all financial audits and findings and performance monitoring reports submitted to NOAA and, in addition, the records for each of the below items as defined and found under (Title 2: Grants and Agreements PART 200—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS <http://www.ecfr.gov/cgibin/retrieveECFR?gp=&SID=d5fd89557a4143654e4d3fea89abb260&mc=true&n=pt2.1.200>)

- a. Financial Audits and Findings whether monthly, quarterly, or yearly*
- b. Monitoring and Performance Reports (both on OMB approved performance forms and any other format) whether annual and quarterly or monthly to assure compliance with applicable Federal requirements and performance expectations to cover each function of the grant and stating
 - i. what goals were accomplished quantitatively and how,*
 - ii. overruns for costs,*
 - iii. significant developments, delays*
 - iv. favorable or unfavorable developments**
- c. The Budget submitted for payouts to fishermen and for fishing gear including any subsequent amendments*
- d. The Capital Expenditures made and recorded with supporting documentation of purchases*
- e. The Closeout(s) of the project and subsequent amendments*
- f. Records describing the Cognizant agency for audit and the Cognizant agency for indirect costs*
- g. Contracts negotiated and signed for materials or services*
- h. Cooperative audit resolutions taken*
- i. Corrective actions taken*
- j. Cost allocation plans*
- k. Disallowed costs*
- l. Expenditures as found in subparagraphs of section 200.34*
- m. The Federal Audit Clearinghouse designated*
- n. The signed Federal award instrument that set forth terms and conditions including the date of signing*
- o. The Federal program number assigned in the CFDA*
- p. Documents Showing who the Oversight agency for audit is*

- q. Documents Showing Project and Questioned cost.
- r. Documents showing Any Sub awards made
- s. Documents showing What instrument was made for the award
- t. Documents showing All the Federal award information as required under Section 200.210
- u. Documents showing The Federal Award Performance Goals
- v. Documents showing Revision of budget and program plans

(Unchanged. The terms used to describe documents are terms of art in the grant world).

(The records may be in the Pacific States Marine Fishery Commission or any of the grants office or Office of General Counsel).

7. Records showing the number of fishermen who received direct payments and records that show individual payments amounts for all recipients (without revealing, by redaction, of any personal details about the identity, location, age or name of the individuals.

(Unchanged. I want records mentioning the total number of fishermen who got money or goods from the grant. If no such record exists, I want the records (checks, electronic transfer, bank statements) disbursing the money and goods to each fishermen with the name and personal information of that fishermen redacted.)

8. Records reflecting communication between Commissioners or with any of the Commissioners of the PSMFC and the agency about the need for the award or grant, its scope, its implementation, or its closeout. (Unchanged)

9. Records showing how much of the award the PSMFC retained for any administration of the award or any other reason. (Unchanged)

10. Records containing communications between Pete Jones (and anyone else in NOAA Alaska) and any of the following persons or entities concerning the need for the grant, meetings about the grant, problems in administration of the grant, and closing of the grant (Unchanged)

- a. John Oliver in NOAA
- b. Senator Lisa Murkowski and any of her staff members, including Arne Fuglvog
- c. Jim Balsiger in NOAA
- d. Anyone in the Offices of General Council in NOAA
- e. Anyone in the Office of the Under Secretary of Commerce for NOAA
- f. Any Alaska based fishing groups
- g. Anyone in the Executive Branch of the State of Alaska, including, for instance, the Office of the Governor and the Departments of Commerce and Fish and Game, Department of Community and Regional Affairs etc. concerning
- i. why the grant was going to PSMFC rather than to the Alaska Dpts. Of Commerce or Community and Regional Affairs as had always happened in the past or
- ii. any other topic concerning the grant sic NOAA Spokesperson quote in <http://peninsulaclarion.com/news/2014-03-11-2>
- h. Anyone in the Pacific States Marine Fisheries Commission, including its staff and Commissioners.

This is the final release of records responsive to your request. We have located 25 additional responsive records. 13 of these records are being released to you in their entirety.

We are also releasing 12 records responsive to your request that are partially redacted under exemption 5 U.S.C. § 552 (b)(5) which exempts from disclosure inter-agency or intra-agency memorandums or letters.

You have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:

Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, by facsimile (fax) to [202-482-2552](tel:202-482-2552), or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

For your appeal to be complete, it must include the following items:

- a copy of the original request,
- our response to your request,
- a statement explaining why the withheld records should be made available, and why the denial of the records was in error.
- "Freedom of Information Act Appeal" must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510

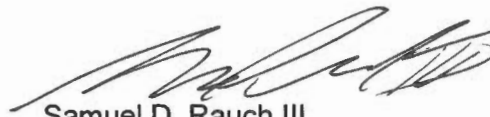
8601 Adelphi Road
College Park, MD 20740-6001

Email: ogis@nara.gov

Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence please contact Samuel Dixon at samuel.dixon@noaa.gov or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Rauch III', written in a cursive style.

Samuel D. Rauch III,
Deputy Assistant Administrator
for Regulatory Programs

Beverly Smith - NOAA Federal

From: Beverly Smith - NOAA Federal
Sent: Thursday, January 12, 2017 5:17 PM
To: Mark Graff - NOAA Federal; Lola Stith - NOAA Affiliate
Cc: Beverly Smith
Subject: Fwd: FOIA #DOC-NOAA-2016-001126; SER16-042 - MONSELL - FOIA APPEAL DISPOSITION LETTER
Attachments: DOC-NOAA-2016-001126 Final Disposition.pdf

For your FOIA file is the attached DOC OGC October 20, 2016, final disposition letter regarding the Monsell appeal. Please close the FOIA appeal.

Bev.

----- Forwarded message -----

From: Ron Aldrich - NOAA Affiliate <ron.aldrich@noaa.gov>
Date: Thu, Jan 12, 2017 at 3:43 PM
Subject: FOIA #DOC-NOAA-2016-001126; SER16-042 - MONSELL - FOIA APPEAL DISPOSITION LETTER
To: Linda Atwell <linda.atwell@noaa.gov>, Stephen Chappell - NOAA Federal <stephen.chappell@noaa.gov>
Cc: _NMFS SERO FOIA1 <nmfs.sero.foia1@noaa.gov>, Beverly Smith <beverly.smith@noaa.gov>, Ron Aldrich <ron.aldrich@noaa.gov>, Shelley Sotir - NOAA Federal <shelley.sotir@noaa.gov>, "bellinda.jones-thomas" <bellinda.jones-thomas@noaa.gov>, Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>, Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>

Please find attached your file copy of FOIA appeal disposition letter for FOIA request # DOC-NOAA-[2016-001126](#) from Ms. Kristen Monsell.

Thanks,

--
Ron Aldrich
Contractor, Jamison Professional Service, Inc.
FOIA Clerk, for National Marine Fisheries Service
Southeast Regional Office
263 13th Avenue South
St. Petersburg, FL 33701
Office - [\(727\) 551-5700](tel:7275515700)

--
Beverly J. Smith
FOIA Coordinator
Southeast Region
NOAA's National Marine Fisheries Service

727-551-5762

OCT 20 2016



UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel

Washington, D.C. 20230

Kristen Monsell, Esq.
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, California 94162

Re: Appeal # DOC-OS-2016-001385
Request # DOC-NOAA-2016-001126

Dear Ms. Monsell:

This responds to the above-referenced administrative appeal under the Freedom of Information Act (FOIA) that you filed on July 1, 2016. As set forth below, your appeal is granted in part and the Department of Commerce hereby releases two records that are not subject to any FOIA exemption. The Department continues to withhold three records in their entirety under FOIA Exemption 5, based on the deliberative process privilege.

On October 10, 2014, you filed a FOIA request with the Department of the Interior (DOI). Part of that request sought records from the Bureau of Ocean Energy Management (BOEM) related to any analysis or consultations under the Endangered Species Act in connection with any proposal to engage in fracking in the Gulf of Mexico Outer Continental Shelf region.

BOEM's search identified 87 pages of materials that originated with the National Oceanic and Atmospheric Administration (NOAA). On April 26, 2016, consistent with DOI's FOIA-implementing regulations at 43 C.F.R. § 2.13(d), BOEM referred those records to NOAA for review and direct response to you.

NOAA's National Marine Fisheries Service (NMFS) reviewed the materials that BOEM had referred. On June 2, 2016, NOAA withheld all 87 pages in full as follows:

FOIA Exemption 5 – 79 pages

- interagency memorandum – three pages
- draft Biological Opinion Outline - Background/Description of the Proposed Action – three pages
- draft segment of a Biological Opinion – 73 pages

Non-responsive materials – 8 pages

- two blank matrix sheets for other agencies to provide comments to NMFS, four pages each.

We are releasing the two blank matrix sheets because they are not covered by any exemption under the FOIA. However, we are withholding the interagency memorandum and the two draft documents under FOIA Exemption 5, based on the deliberative process privilege.

Discussion

Exemption 5 protects from disclosure interagency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency. 5 U.S.C. § 552(b)(5).

The exemption's threshold requirement is that the records be interagency or intra-agency memorandums or letters. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001). This is the case here. One record is a three-page memorandum from NOAA's Assistant Regional Administrator for Protected Resources to two officials in the Department of the Interior (one in BOEM and the other in BSEE). The memorandum includes a courtesy copy address to a NOAA official in the Protected Resources office. The other records include a draft three-page summary of a Biological Opinion and a 73-page copy of a part of the draft Biological Opinion. These two records were drafted by NOAA personnel and submitted as attachments to the memorandum. There is nothing to indicate that any of the records had been shared outside the Government. Therefore, the threshold requirement has been met and the analysis shifts to whether the records fall under a discovery privilege. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

The deliberative process privilege is incorporated into FOIA Exemption 5 and protects predecisional information that is "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). It covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Carter v. Dep't of Commerce*, 307 F.3d 1084, 1089 (9th Cir. 2002) (quoting *Klamath*, 532 U.S. at 8).

Information withheld under the privilege must be both pre-decisional ("antecedent to the adoption of an agency policy") and deliberative ("a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters"). *Jordan v. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978). "[P]redecisional" information is "prepared in order to assist an agency decision-maker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft*, 421 U.S. 168, 184 (1975). Predecisional information is part of the deliberative process when its "disclosure . . . would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine [its] ability to perform its functions." *Dudman Communications Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987).

The records are predecisional.

NMFS's final decision in this matter would be the issuance of a final biological opinion that would inform DOI's approval of oil and gas leases in the Gulf of Mexico. The memorandum from NMFS to two DOI officials (one in BOEM and the other in BSEE) predates that decision and seeks additional information for and technical review of a draft opinion and summary. The two draft records attached to the memorandum are inherently predecisional because they antedate the agency's final decision on the approved version. See *Nat'l Wildlife Fed'n v. Forest Svc.* 861 F. 2d 1114, 1120-21 (9th Cir. 1988) (recognizing that draft Forest Plans and environmental impact statements prepared by agency officials during formulation of agency

policies were predecisional and that, once in final form, they would be made available to the public).

The records are deliberative.

The memorandum from NMFS to DOI was deliberative because it posed questions that identified additional information that would be required for NMFS to reach a final decision. As set forth in *Nat'l Wildlife*, documents that contained "opinions, recommendations, and queries aimed at improving" forest plans and were deliberative and did not represent "final, binding agency policy." 861 F.2d at 1123 (emphasis added).

The two drafts are inherently deliberative. Drafts have been protected in a number of contexts. See *Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987) and *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (draft historical manuscripts); *Hooker v. Dep't of Health and Human Svcs.*, 887 F. Supp. 2d 40, 59 (D.D.C. 2012) (draft scientific paper); *Pub. Emps. for Env'tl. Responsibility v. Off. of Science and Technology Policy*, 881 F. Supp. 2d 8, 17 (D.D.C. 2012) (draft comments on an interagency effort); *Nat'l Sec. Archive v. CIA*, 859 F. Supp. 2d 65, 70-72 (D.D.C. 2012) (draft agency history which was not included in final published version); *Antonelli v. BOP*, 623 F. Supp. 2d 55, 59 (D.D.C. 2009) (draft of administrative adjudication); *Pub. Emps. for Env'tl. Responsibility v. Bloch*, 532 F. Supp. 2d 19, 22 (D.D.C. 2008) (draft position descriptions).

Factual information is part of the deliberative process.

Your contention that the drafts contain factual information that cannot be withheld is not correct. Courts have recognized that a rigid distinction between factual and deliberative information cannot always be drawn, and that factual material could fall under the privilege if the manner of selecting or presenting the facts would reveal the deliberative process, or if the facts are inextricably intertwined with the policymaking process. See *Hamilton Sec. Group, Inc. v. HUD*, 106 F. Supp. 2d 23, 30 (D.D.C. 2000). ("To the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5" (quoting *Petroleum Inf. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992))).

For example, in *Montrose Chemical Corp. v. Train*, 491 F.2d 63, (D.C. Cir. 1974), the court found that case summaries prepared to assist the Environmental Protection Agency (EPA) Administrator in making a decision were deliberative and could be withheld in full, even though they included factual information. This is because disclosure of the summaries would have revealed what factual information was "cited, discarded, compared, evaluated, and analyzed to assist the Administrator in formulating his decision". *Id.* at 68. The court further noted that the EPA Administrator's final decision had been made public and "the world was not left in doubt as to the factual basis or the reasoning behind the final product." *Id.*

The D.C. Circuit later distinguished its holding in *Montrose*, and it is this subsequent case that you urge should control here. In *Playboy Enterprises v. Dep't of Justice*, 677 F.2d 931 (D.C. Cir. 1982), the Senate Judiciary Committee had directed the Department of Justice (DOJ) to conduct an investigation and prepare a report on the FBI's supervision of a particular

confidential informant. The DOJ Office of Professional Responsibility conducted the investigation and prepared a summary report of the investigation for the Attorney General to inform him of the results of the investigation and of the information that would be provided to the Senate Committee. The court contrasted the two cases as follows:

This case must be distinguished from the *Montrose Chemical* case. In that case summaries were prepared for the sole purpose of assisting the Administrator to make a complex decision in an adjudicatory proceeding. Disclosure of the summaries would have permitted inquiry into the mental processes of the Administrator by revealing what materials he considered significant in reaching a proper decision, and how he evaluated those materials. The [report at issue in *Playboy Enterprises*] on the other hand was prepared only to inform the Attorney General of facts which he would in turn would make available to members of Congress.

Playboy Enterprises, 677 F. 2d at 936.

The three documents at issue here can be compared more favorably to the case summaries in *Montrose* than to the report of facts in *Playboy Enterprises*. The memorandum from NMFS to the two DOI officials does not provide facts but, instead, summarizes what categories of additional facts NMFS requires to make a decision. The drafts identify facts that the drafters have included but which may or may not be the basis for NMFS's final decision. Moreover, a comparison of the drafts to the final product that NMFS will issue would reveal what was cited or discarded by the agency's decision maker. This is precisely the kind of information that was protected in *Montrose* (see 491 F. 2d at 68). It is not like the factual report in *Playboy Enterprises* which presented to the Attorney General information that was to be reported to Congress.

You also contend that this case should be governed by the holding in *Assembly of the State of California v. Dep't of Commerce*, 968 F.2d 916 (9th Cir. 1992). There, the 9th Circuit held that numerical data in the form of adjusted Census figures that ultimately were not issued by the Department was "purely factual and in no way divulges the reasoning process through which the data was derived or in any way explains any recommendation or decision not to adjust the census." 968 F.2d at 922. Such information is similar to that at issue in the *Playboy Enterprises* case where the data, once disclosed, would provide no insight into the agency's internal reasoning. The court in *Assembly* cited *Nat'l Wildlife Fed'n* in acknowledging that the appropriate inquiry is "whether revealing the information exposes the deliberative process." 968 F. 2d at 921 (quoting 861 F.2d at 1119). Therefore, we distinguish between the facts presented in *Assembly* (raw adjusted population data) and the factual information embedded in the draft materials at issue here which would reveal the drafter's initial thoughts on what should – but may not ultimately - furnish the basis for the agency's final decision on the biological opinion.

The drafts would not automatically be disclosed through the agency's administrative record.

You also contend that NMFS must provide copies of the drafts because the agency would be required to include them in the agency's administrative record under the Administrative Procedure Act (5 U.S.C. § 551). This is unpersuasive.

The Northern District of California has recognized that

some agency documents, such as purely internal deliberative materials, may be protected from inclusion in the administrative record, but Defendants must make a specific showing establishing the application of a privilege for each document that it contends that it may withhold based on privilege. In keeping with this rule, courts in this district have required parties withholding documents on the basis of the deliberative process privilege to, at a minimum, substantiate those claims in a privilege log.

Gill v. Dep't of Justice, 2015 WL 9258075 (N.D. Ca., December 18, 2015) at * 7 (internal citations omitted). Thus, although this court requires predecisional deliberative records to be accounted for in a privilege log, it does not require that the records be disclosed.

The records would not be available to a party in litigation.

You also contend that Exemption 5 should not apply because you would be able to obtain the records through discovery. This argument is also unpersuasive.

Discovery in a civil case is under Federal Rule of Civil Procedure (FRCP) 26, which provides generally, that:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

FRCP Rule 26(b)(1).

Thus, litigants may object to disclosure of records subject to a discovery request by asserting privileges. In discovery, the deliberative process privilege is qualified and can be overcome by a showing of need. See *In re Sealed Case*, 121 F. 3d 729, 737 (D.C. Cir. 1997). However, this qualification of the privilege is not an issue in FOIA cases because the particular purpose for which a requestor seeks information is not relevant in determining whether FOIA requires disclosure. In this regard, the Supreme Court has ruled that:

[t]he ability of a private litigant to override a privilege claim set up by the Government, with respect to an otherwise disclosable document, may itself turn on the extent of the litigant's need in the context of the facts of his particular case; or on the nature of the case. However, it is not sensible to construe the [FOIA] to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling. Indeed, the House Report says that Exemption 5 was intended to permit disclosure of those intra-agency memoranda which would 'routinely be disclosed' in private litigation, . . . and we accept this as the law.

Sears, Roebuck & Co., 421 U.S. at 149. It follows logically that, a record that would be disclosed only after a judge ruled that an asserted privilege had been overcome by a showing of need would not be “routinely disclosed” in discovery.

No parts of the records may be segregated for release.

There are no parts of the records which may be segregated for release to you. The D.C. Circuit has recognized that there may be circumstances where this is not possible and that “non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions.” *Mead Data Central v. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). This has been recognized in the Ninth Circuit. *See Nat’l Wildlife Fed’n v. Forest Svc.*, 861 F. 2d 1114, 1119 (9th Cir., 1988) (“Where either the disclosure of the manner of selecting or presenting facts would expose the deliberative process, or where facts are “inextricably intertwined” with ‘policy-making processes,’ the material is exempt.”). Thus, it would not be necessary for an agency to release what “would be an essentially meaningless set of words and phrases.” *Mead*, at 261.

This would be the case with the memorandum at issue here which includes the NMFS official’s queries to DOI, and assessments of what additional information would be required before NMFS could make a final decision on the biological opinion. No part of this record, other than meaningless words and phrases, would not be deliberative.

With respect to the two draft records at issue here, such records do not contain reasonably segregable material and can be properly withheld in their entirety. *See e.g., Charles v. Off’c of the Armed Forces Medical Examiner*, 979 F. Supp. 2d 35, 46 (D.D.C. 2013) (involving preliminary draft autopsy reports). The court reasoned that

even though preliminary drafts may indeed contain “factual” information, the ultimate decision to include or exclude facts and information in the final product reflects the deliberations of agency decisionmakers, which would be improperly exposed upon comparison of the preliminary and final versions. Thus, it is well established that draft documents containing factual information can be considered non-segregable for FOIA purposes and can be properly withheld in full where revelation of the facts themselves, or more specifically, what the final author decided and selected as pertinent facts or information, would expose the deliberative process.

Id. at 43 (internal cites and quotation marks omitted).

In this case, a comparison of NMFS’s final decision (once it is issued) and the draft version would necessarily reveal NOAA’s internal deliberations on the content of the draft outline and biological opinion.

This is a final decision of the Department of Commerce. You have the right to obtain judicial review as provided for in 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in black ink that reads "Heather Sigrist Book". The signature is written in a cursive, slightly slanted style.

Heather Sigrist Book
Acting Assistant General Counsel for
Litigation, Employment & Oversight

Enclosures

Ana Liza Malabanan - NOAA Federal

From: Ana Liza Malabanan - NOAA Federal
Sent: Thursday, January 12, 2017 5:45 PM
To: Mark Graff - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Samuel Dixon - NOAA Affiliate; Steven Goodman - NOAA Federal; Shawn Martin; Doug Chow; Laurie Beale - NOAA Federal
Subject: Request for Approval for Offline Close Out for FOIA DOC-NOAA-2016-001479 (FEMA)
Attachments: DOC-NOAA-2016-001479 Signed Partial Grant FAL.pdf

Hi Mark,

(b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

Thank you.

Ana Liza

--
Ana Liza S. Malabanan
Freedom of Information Act (FOIA) Coordinator
Information Services and Management Branch
Operations, Management & Information Division
NOAA Fisheries West Coast Region
U.S. Department of Commerce
Office: [562-980-4008](tel:562-980-4008)





UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

Christopher Hudak, Esq.
Environmental Advocates
5135 Anza Street
San Francisco, CA 94121

JAN 12 2017

Re: FOIA Request DOC-NOAA-2016-001479

Dear Mr. Hudak:

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on July 21, 2016, in which you requested:

1. Any reports, memoranda, correspondence, or other documents (including electronic mail messages) concerning any Endangered Species Act ("ESA") section 7 consultations (16 U.S.C. § 1536) that have been initiated or proposed, including Biological Opinions, Biological Assessments, or informal consultations, pertaining to the implementation of the National Flood Insurance Program ("NFIP") by the Federal Emergency Management Agency ("FEMA") at the California statewide level or relating to any of the following California counties and/or towns/cities/unincorporated territories therein: Humboldt, Santa Cruz, Monterey, Ventura, Santa Barbara, San Luis Obispo, San Mateo, Marin, and Sonoma Counties.

2. Any reports, memoranda, correspondence, or other documents (including electronic mail messages) concerning any ESA section 10 permits that have been applied for or issued, pertaining to the implementation of the NFIP in California at any location within any of the following California counties and/or towns/cities/unincorporated territories therein Humboldt, Santa Cruz, Monterey, Ventura, Santa Barbara, San Luis Obispo, San Mateo, Marin, and Sonoma Counties.

3. Any reports, memoranda, correspondence, or other documents (including electronic mail messages) submitted to NMFS by FEMA, U.S. Fish and Wildlife Service ("USFWS"), the California Department of Fish and Wildlife, or any other State or Federal agency or department pertaining to how implementation of the NFIP in California may affect species listed as threatened or endangered under the federal Encangered Species Act ("ESA") or critical habitat for such species located within the following California counties: Humboldt, Santa Cruz, Monterey, Ventura, Santa Barbara, San Luis Obispo, San Mateo, Marin, and Sonoma Counties.



4. Any reports, memoranda, correspondence to or from NMFS, or other documents (including Biological Opinions, Biological Assessments, informal consultation letters and other correspondence, or electronic mail messages) concerning or pertaining to any ESA section 7 consultations (either formal or informal) that have been initiated, proposed, or considered for any national level draft or final rule(s) related to the NFIP, in what may be known by NMFS, FEMA, or USFWS personnel as "draft rule/rulemaking regarding updates to the National Flood Insurance Program to facilitate improved Endangered Species Act compliance," "new proposed minimum floodplain management criteria," "proposed ESA-related performance standard," or some related variation thereof.

On August 16, 2016, you agreed to narrow the scope of point 4 of your request, which pertains to materials related to national level National Flood Insurance Program ("NFIP") ESA section 7 consultations, as follows:

(1) We agree to exclude from point 4 of our pending request any materials that pertain specifically to the NMFS Biological Opinion on the NFIP in Oregon, the final version of which was issued April 14, 2016.

(2) We agree to narrow the timeframe of point 4 of our pending request to 2013-present. We did not specifically discuss on our call yesterday when in 2013 would be the cut-off date, but we agree to the earliest date in 2013 for which NMFS has searchable electronic records.

We have located 6,066 documents responsive to your request. Our three interim releases dated September 22, 2016, September 30, 2016, and November 22, 2016, provided you with a total of 3,220 documents. We have identified an additional 1,340 documents that are releasable in their entirety.

A total of 43 documents responsive to your request are exempt from mandatory public disclosure, and are being withheld entirely under FOIA Exemption 5, 5 U.S.C. § 552(b) (5). The fully withheld records consist of opinions, recommendations, and other reflections of staff thinking integral to pre-decisional, deliberative process and/or contain attorney client privileged information.

We are also releasing 675 documents responsive to your request that are partially redacted under FOIA Exemption 5, 5 U.S.C. § 552(b) (5) and (b)(6). The redacted portion of the records consist of opinions, recommendations, and other reflections of staff thinking integral to pre-decisional, deliberative process. The portion redacted under Exemption (b)(6) consists of personal telephone numbers. This information is exempt from release under FOIA Exemption 6, 5 U.S.C. § 552(b) (6), because the individuals' right to privacy outweighs the general public's interest in release of personally identifying information.

During our search for records responsive to your request, we identified 788 documents that contain information that originated with other Federal agencies. We referred 689 documents to the Federal Emergency Management Agency (FEMA Disclosure Branch email at fema-foia@dhs.gov or by phone 202-646-3323), 90 documents to the U.S. Fish and Wildlife Service (FWS Region 1 FOIA Coordinator via email John_DeClerck@fws.gov or via telephone 503-231-2072), and 9 documents to the Army Corps of Engineers (South Pacific Division via email foia-spd@usace.army.mil or telephone 415-503-6635) for a release determination/direct response to you.

You have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:

Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, by facsimile (fax) to ~~202-482-2552~~, or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

For your appeal to be complete, it must include the following items:

- a copy of the original request,
- our response to your request,
- a statement explaining why the withheld records should be made available, and why the denial of the records was in error.
- "Freedom of Information Act Appeal" must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration

Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

Email: ogis@nara.gov

Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence please contact Ana Liza Malabanan, FOIA Coordinator, at ana.liza.malabanan@noaa.gov or by phone at (562) 980-4008, or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

A handwritten signature in black ink, appearing to read "Samuel D. Rauch III". The signature is fluid and cursive, with a long horizontal stroke at the end.

Samuel D. Rauch III,
Deputy Assistant Administrator
for Regulatory Programs

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Thursday, August 17, 2017 8:33 AM
To: Lola Stith - NOAA Affiliate
Subject: Fwd: FOIA request

Was this entered into FOIAOnline? If so, can you confirm to Ellen?

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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----- Forwarded message -----

From: Ellen Sebastian - NOAA Federal <ellen.sebastian@noaa.gov>
Date: Thu, Aug 17, 2017 at 8:24 AM
Subject: Fwd: FOIA request
To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, "Graff, Mark" <Mark.Graff@noaa.gov>
Cc: James Bruschi - NOAA Affiliate <james.bruschi@noaa.gov>, Jim Balsiger <jim.balsiger@noaa.gov>, Ray Howard <ray.howard@noaa.gov>, Lauren Smoker <Lauren.Smoker@noaa.gov>, Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>

NOAA FOIA, can you please advise on status? Any help on this would be appreciated. Thanks!

----- Forwarded message -----

From: Richard Steiner <richard.g.steiner@gmail.com>
Date: Thursday, August 17, 2017
Subject: FOIA request
To: james.balsiger@noaa.gov, FOIA@noaa.gov, Ellen Sebastian - NOAA Federal <ellen.sebastian@noaa.gov>
Cc: Chris Oliver <chris.oliver@noaa.gov>

Dear NMFS/NOAA Colleagues,

I would appreciate your confirmation of receipt of this FOIA request, sent Aug. 1, 2017, and your estimated date that you will produce the responsive documents. Thanks in advance.

Rick Steiner

Anchorage

On Tue, Aug 1, 2017 at 8:53 AM, Richard Steiner <richard.g.steiner@gmail.com> wrote:

August 1, 2017

Dr. James Balsiger

NOAA Fisheries

Alaska Region

Juneau, AK (via email)

RE: FOIA REQUEST

Dear Dr. Balsiger:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, I request a copy of all records (documents, emails, records of meetings and/or phone conversations, etc.) over the past year (since August 1, 2016), that discuss the following two issues:

1. Any proposed change, relaxation, or elimination of existing marine species or habitat protections in federal waters off Alaska. Alaska federal marine protections subject to this request include, but are not limited to, the following:

Aleutian Islands Coral Habitat Protection Areas;

Aleutian Islands Habitat Conservation Area;

Bowers Ridge Habitat Conservation Zone;

Alaska Seamount Habitat Protection Areas;

Bering Sea Habitat Conservation Area;

Nunivak Island, Etolin Strait, Kuskokwim Bay Habitat Conservation Area;

Walrus Islands federal closures;

Gulf of Alaska Slope Habitat Conservation Area;

Crab, halibut, herring, and salmon “savings areas”;

Any/all marine mammal conservation measures, including Steller sea lion critical habitat, North Pacific Right Whale critical habitat,

southwestern sea otter critical habitat, etc.;

Any/all seabird conservation measures;

Any/all proposed or existing ESA listings;

Scallop Conservation Areas;

Fisheries by-catch reduction programs;

Skate egg concentration Habitat Areas of Particular Concern;

Pribilof Island Habitat Conservation Area;

Non-pelagic (bottom) trawl closures;

Nearshore Bristol Bay Trawl Closure;

U.S. Arctic fishery closure (on federal waters in the Arctic Management Area).

2. Any proposed alteration or suspension of marine environmental research programs conducted in Alaska federal waters. This is to include any/all research into the effects of climate change, contaminants, or oil spills in Alaska's federal waters.

In a January 21, 2009 memo, the President declared the following policy for the Executive Branch:

“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, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve... All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.”

For any documents or portions of documents for which you block release due to specific exemption(s) from the requirements of the Freedom of Information Act, please provide an index itemizing and describing the documents or portions of documents withheld. The index should, pursuant to the holding of Vaughn v. Rosen (484 F.2d 820 [D.C. Cir. 1973] cert. denied, 415 U.S.

977 [1974]), provide a detailed justification for claiming a particular exemption that explains why each such exemption applies to the document or portion of a document withheld.

I requests that all fees be waived because “disclosure of the information is in the public interest . . . and is not primarily in the commercial interest of the requestor” (5 U.S.C. 552 (a) (4)(A)):

1. The records concern the operations or activities of the Government.

The FOIA request is, by its terms, limited to identifiable activities of the National Marine Fisheries Service (NMFS) and/or the North Pacific Fishery Management Council.

2. The disclosure of the requested records is likely to contribute to public understanding of these operations or activities.

The requested material concerns the existing regime for protection of federal offshore marine ecosystems off Alaska, which is a high priority for the American public., and core mission of NMFS.

3. The release of requested records will contribute significantly to public understanding of the governmental activities.

Given recent Presidential executive orders to review and eliminate regulations across the federal government, and to reduce agency science and environmental programs, there is public concern that some of the Alaska marine protections may be at risk of alteration or elimination. The requested records will enhance public understanding of whether and how NMFS intends to maintain current marine protections off Alaska. The disclosure of the requested information will offer the general public a clear picture of the rigor, prudence and efficacy of NMFS actions and policies on these important public policy issues. I intend to provide the requested information to the general public through release to the news media nationally and in-state.

4. Disclosure would not serve a commercial interest of the requestor.

Disclosure is in no way connected with any commercial interest of the requestor in that the requestor has no commercial interest in this issue.

If you have any questions about this FOIA request, please contact me at [907-360-4503](tel:907-360-4503); or richard.g.steiner@gmail.com. I look forward to receiving the agency’s final response (electronically) within 20 working days.

Respectfully,

Rick Steiner, Professor
666, 9138 Arlon St. A3
Anchorage, AK 99507
www.oasis-earth.com
[907-360-4503](tel:907-360-4503)

cc. Chris Oliver, Assistant Administrator for NOAA Fisheries

--

Rick Steiner
Oasis Earth
Anchorage, Alaska
www.oasis-earth.com
[907-360-4503](tel:907-360-4503)

--

Ellen Sebastian
FOIA & Records Coordinator
Information Services Division
NOAA Fisheries, Alaska Region
[\(907\) 586-7152](tel:907-586-7152)

Nourish and sustain your sense of joy.

Lola Stith - NOAA Affiliate

From: Lola Stith - NOAA Affiliate
Sent: Thursday, August 17, 2017 11:36 AM
To: Ellen Sebastian - NOAA Federal
Cc: Graff, Mark; James Bruschi - NOAA Affiliate; Jim Balsiger; Ray Howard; Lauren Smoker; Samuel Dixon - NOAA Affiliate
Subject: Re: FOIA request

Hi Ellen - It's in FO (DOC-NOAA-2017-001710) and will be assigned out today.

Lola

On Thu, Aug 17, 2017 at 8:24 AM, Ellen Sebastian - NOAA Federal <ellen.sebastian@noaa.gov> wrote:
NOAA FOIA, can you please advise on status? Any help on this would be appreciated. Thanks!

----- Forwarded message -----

From: **Richard Steiner** <richard.g.steiner@gmail.com>
Date: Thursday, August 17, 2017
Subject: FOIA request
To: james.balsiger@noaa.gov, FOIA@noaa.gov, Ellen Sebastian - NOAA Federal <ellen.sebastian@noaa.gov>
Cc: Chris Oliver <chris.oliver@noaa.gov>

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Anchorage

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August 1, 2017

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Alaska Region
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Walrus Islands federal closures;

Gulf of Alaska Slope Habitat Conservation Area;

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Any/all proposed or existing ESA listings;

Scallop Conservation Areas;

Fisheries by-catch reduction programs;

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ecosystems off Alaska, which is a high priority for the American public., and core mission of NMFS.

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If you have any questions about this FOIA request, please contact me at [907-360-4503](tel:907-360-4503); or richard.g.steiner@gmail.com. I look forward to receiving the agency's final response (electronically) within 20 working days.

Respectfully,

Rick Steiner, Professor
666, 9138 Arlon St. A3
Anchorage, AK 99507
www.oasis-earth.com
[907-360-4503](tel:907-360-4503)

cc. Chris Oliver, Assistant Administrator for NOAA Fisheries

--

Rick Steiner
Oasis Earth
Anchorage, Alaska
www.oasis-earth.com
[907-360-4503](tel:907-360-4503)

--

Ellen Sebastian
FOIA & Records Coordinator
Information Services Division
NOAA Fisheries, Alaska Region
[\(907\) 586-7152](tel:(907)586-7152)

Nourish and sustain your sense of joy.

--

Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c (b)(6) [REDACTED])
lola.m.stith@noaa.gov

Jean Apedo - NOAA Federal

From: Jean Apedo - NOAA Federal
Sent: Friday, August 18, 2017 12:01 PM
To: Mark.Graff@noaa.gov; Sarah.Brabson@noaa.gov
Subject: FW: Signed PTA for NOAA1200
Attachments: NOAA1200 SSP Appx G PTA 2017-08_signedKRM.PDF

Hello Mark and Sarah,
Can I have your assistance with Doug's concerns?
Above is the initial document I sent him on Wednesday.
Thank you.

From: Douglas Perry - NOAA Federal [mailto:douglas.a.perry@noaa.gov]
Sent: Friday, August 18, 2017 11:56 AM
To: Jean Apedo - NOAA Federal
Cc: Thomas Grigsby - NOAA Affiliate; Kelissa McIntyre - NOAA Federal; Ann Madden - NOAA Federal; Mark Graff - NOAA Federal; Sarah Brabson
Subject: Re: Signed PTA for NOAA1200

Jean,

(b)(5)
[Redacted]

[Redacted]. Let's chat with Mark and Sarah next week.

On Fri, Aug 18, 2017 at 11:37 AM, Douglas Perry - NOAA Federal <douglas.a.perry@noaa.gov> wrote:
Jean,

(b)(5)
[Redacted]
[Redacted] ?

On Wed, Aug 16, 2017 at 2:10 PM, Jean Apedo - NOAA Federal <jean.apedo@noaa.gov> wrote:
Doug,
Please find attached to this email NOAA1200 PTA for your review and signature.
Thank you.

From: Kelissa McIntyre - NOAA Federal [mailto:kelissa.mcintyre@noaa.gov]
Sent: Wednesday, August 16, 2017 11:38 AM
To: Jean Apedo - NOAA Federal
Cc: Thomas Grigsby - NOAA Affiliate
Subject: Signed PTA for NOAA1200

Hi Jean,

Please sign and forward to the next person in line to sign. We are catching up on our required system documentation and apologize for the delay.

Thanks,

Kelissa

Kelissa McIntyre
OCIO - Compliance Assessment & Monitoring
National Oceanic & Atmospheric Administration
United States Department of Commerce
Office: [301-628-5665](tel:301-628-5665)
Cell: [240-676-3242](tel:240-676-3242)
Email: kelissa.mcintyre@noaa.gov

--

Doug

Douglas A. Perry

Deputy Chief Information Officer
National Oceanic and Atmospheric Administration

Office: [\(301\) 713-9600](tel:301-713-9600)

www.noaa.gov

The contents of this message are mine personally and do not necessarily reflect any position of NOAA.

--

Doug

Douglas A. Perry

Deputy Chief Information Officer
National Oceanic and Atmospheric Administration

Office: (301) 713-9600

www.noaa.gov

The contents of this message are mine personally and do not necessarily reflect any position of NOAA.

(b)(5)

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(b)(5)

Lola Stith - NOAA Affiliate

From: Lola Stith - NOAA Affiliate
Sent: Monday, August 21, 2017 10:25 AM
To: Mark Graff - NOAA Federal
Cc: Ana Liza Malabanan - NOAA Federal
Subject: Re: FOIA DOC-NOAA-2017-001380
Attachments: Requesters Response - Re_ Fee Category Determination.pdf

The attached was uploaded into Supporting Files section of the FO request.

Lola

On Mon, Aug 21, 2017 at 10:11 AM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) (C)

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On Fri, Aug 18, 2017 at 7:43 PM, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov> wrote:

Hi Mark,

Just checking on the status of the fee category decision for this FOIA request.

Please advise.

Thanks!

Ana Liza

----- Forwarded message -----

From: Stephanie Johnson - NOAA Federal <stephanie.johnson@noaa.gov>
Date: Thu, Aug 17, 2017 at 6:08 PM
Subject: Re: FOIA DOC-NOAA-2017-001380

To: Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov>

Ana Liza -

(b)(5)
[Redacted]
[Redacted]
[Redacted]

On Thu, Jul 20, 2017 at 1:17 PM, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov> wrote:

FYI. Still on hold.

----- Forwarded message -----

From: **Ana Liza Malabanan - NOAA Federal** <ana.liza.malabanan@noaa.gov>
Date: Thu, Jul 20, 2017 at 1:15 PM
Subject: Re: FOIA DOC-NOAA-2017-001380
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, FOIA Office <foia@noaa.gov>, Shawn Martin <shawn.martin@noaa.gov>, Doug Chow <doug.chow@noaa.gov>, Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>

Okay, got it. Thanks!

On Thu, Jul 20, 2017 at 1:11 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

(b)(5)
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted] ?

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

Confidentiality Notice: This e-mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.

On Thu, Jul 20, 2017 at 3:09 PM, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov> wrote:

Hi Mark and Lola,

(b)(5)

Please advise.....should I hold off sending the revised fee estimate?

Thanks!

Ana Liza

----- Forwarded message -----

From: **Lola Stith - NOAA Affiliate** <lola.m.stith@noaa.gov>

Date: Fri, Jul 7, 2017 at 10:52 AM

Subject: Re: FOIA DOC-NOAA-2017-001380

To: Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov>

Cc: Doug Chow <doug.chow@noaa.gov>, Shawn Martin <shawn.martin@noaa.gov>

Hi Ana Liza (b)(5)

R/
Lola

On Friday, July 7, 2017, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov> wrote:

Hi Lola,

I didn't get a chance to ask you while we were on the phone (b)(5)

Thanks!

Ana Liza

----- Forwarded message -----

From: **Ana Liza Malabanan - NOAA Federal** <ana.liza.malabanan@noaa.gov>

Date: Mon, Jun 19, 2017 at 2:54 PM

Subject: Fwd: FOIA DOC-NOAA-2017-001380

To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, FOIA Office <foia@noaa.gov>

(b)(5)

Please advise. Thanks!

Ana Liza

----- Forwarded message -----

From: **Tom McDonald** <tmcDonald@cascadialaw.com>

Date: Sun, Jun 18, 2017 at 2:08 PM

Subject: Re: FOIA DOC-NOAA-2017-001380

To: Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov>

Cc: Eleanor Nickelson <enickelson@cascadialaw.com>

Hi Ana Liza,

Thank you for the confirmation. I would like you to reconsider our category of commercial. I am making this request on behalf of Western Washing Agriculture, which is a 501(c)5 company.

<http://westag.org>

Also, in regard to the second part of the request, we want to limit our request to documents relating to regulatory matters regarding permitting and regulatory action under the Clean Water Act, including 33 U.S.C. sections 1341 and 1344 (section 404), and related documents regarding consultation under the Endangered Species Act, the National Environmental Policy Act and the the Resource Conservation and Recovery Act.

Please confirm.

Thank you.

Tom McDonald

On Jun 16, 2017, at 3:31 PM, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov> wrote:

Good afternoon,

Per our telephone conversation, I transmitted the attached letter to you via FOIAonline but am also sending you a direct email to ensure your receipt.

Regards,

Ana Liza

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6)

lola.m.stith@noaa.gov

--

Ana Liza S. Malabanan

Freedom of Information Act (FOIA) Coordinator

Information Services and Management Branch

Operations, Management & Information Division

NOAA Fisheries West Coast Region

U.S. Department of Commerce

Office: [562-980-4008](tel:562-980-4008)



--

Stephanie V. Johnson

Attorney-Advisor

NOAA Office of General Counsel

Phone - [206-526-6515](tel:206-526-6515)

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--

Ana Liza S. Malabanan

Freedom of Information Act (FOIA) Coordinator

Information Services and Management Branch
Operations, Management & Information Division
NOAA Fisheries West Coast Region
U.S. Department of Commerce
Office: [562-980-4008](tel:562-980-4008)



--

Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
((b)(6))
lola.m.stith@noaa.gov



Re: Fee Category Determination

1 message

Tom McDonald <tmcdonald@cascadialaw.com>
To: "foia@noaa.gov" <foia@noaa.gov>

Thu, Aug 3, 2017 at 6:05 PM

Hello Mr. Graf,

Thank you for your message. We appreciate you considering waiver of fees and recategorizing this under "all other requestors" per 15 C.F.R. 4.11

I have an attorney client relationship with Western Washington Agriculture (WWA) simply an advisor. I am not representing WWA in any litigation. My expertise is in water resource planning. As I mentioned in my earlier email, I have been engaged for many years by Western Washington Agriculture to provide legal guidance on various matters regarding the membership districts' maintenance activities and administrative process.

The requested records are not to further WWA's commercial, trade, or profit interests. This is not the purpose of the WWA. It is a nonprofit that provides guidance to the districts, keeps them informed and educated on relevant matters, and assists where possible in communicating with local, state and federal agencies. The records are only being used for informational purposes, specifically to maintain full knowledge of local, state and federal permitting and regulatory activities regarding the districts' activities. The records will contribute to WWA's and the districts' understanding of the activities of the Government in regard to the districts' operations, and will therefore provide WWA with better knowledge in assisting WWA. The reason for document request is not for a commercial interest--WWA is not a commercial entity and is only wanting agency information have knowledge of the agencies records to allow WWA to operate as legally and effectively. Much of my work is pro bono because of WWA's limited financial capacity.

I hope this is of assistance in considering a reduction and waiver of fees.

Sincerely

Tom McDonald
Cascadia Law Group PLLC
(360) 786-5039

On Aug 3, 2017, at 1:31 PM, foia@noaa.gov wrote:

08/03/2017 04:24 PM
FOIA Request: DOC-NOAA-2017-001380

You indicated that you represent a 501(c)(5) company, and as such, should not be categorized as a commercial requester. However, in order to determine if fees should properly be assessed, Please outline the nature of the relationship, and if you are acting in an attorney client relationship, the qualifications of your client for the fee category that Western Washing Agriculture would qualify for. Your request will be tolled pending your response.

Mark Graff

NOAA FOIA Officer

Bogomolny, Michael (Federal)

From: Bogomolny, Michael (Federal)
Sent: Monday, August 21, 2017 1:31 PM
To: Hernandez, Beverly (Contractor); Graff, Mark (Federal)
Cc: Potts, Kristina (Federal)
Subject: Gaffney request (Stop Geoengineering Minnesota) DOC-NOAA-2016-000790
Attachments: Gaffney DOC-OS-2017-001467 memo.docx; Gaffney DOC-OS-2017-001467 letter.docx

Bev and Mark,

(b)(5)

Thanks,
bogo

Michael Bogomolny
Acting Chief, Information Law Division
mbogomolny@doc.gov (202) 482-0703
United States Department of Commerce
Office of the General Counsel

(b)(5)

(b)(5)



UNITED STATES DEPARTMENT OF COMMERCE
Office of the Assistant General Counsel for
Employment, Litigation, and Information
Washington, DC 20230

Memorandum

To: Brian D. DiGiacomo
Assistant General Counsel
for Employment, Litigation, and Information

Through: Michael Bogomolny
Acting Chief, Information Law Division

From: Kristina E. Potts
FOIA, Information Law Division

Date: July 21, 2017

Re: FOIA Appeal of Brian Gaffney, Stop Geoengineering Minnesota
Request No. DOC-NOAA-2016-000790
Appeal No. DOC-OS-2017-001467

(b) (5)

(b) (5)

FOIA Office - NOAA Service Account

From: FOIA Office - NOAA Service Account
Sent: Monday, August 21, 2017 2:41 PM
To: Mark Graff - NOAA Federal
Subject: Fwd: DOC-OS-2017-001150

Hi Mark (b)(5)

?

Lola

----- Forwarded message -----

From: James LeDuc - NOAA Federal <james.leduc@noaa.gov>
Date: Thu, Aug 17, 2017 at 11:56 AM
Subject: DOC-OS-2017-001150
To: FOIA Office - NOAA Service Account <foia@noaa.gov>
Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Mark Graff - NOAA Federal <mark.graff@noaa.gov>, Devin Brakob - NOAA Federal <devin.r.brakob@noaa.gov>

(b)(5)

?

This is a request under the Freedom of Information Act, 5 U.S.C. § 552 et. seq. The materials requested relate to presidential designations of national monuments. As such, I request all records relating to, or consisting of, communications — in any format — generated or received by the Department of Commerce related to: a. Any public communication to the Department of Commerce and/or its Bureaus on or since January 20, 2017 requesting a review of the national monuments identified in President Trump's Executive Order dated April 26, 2017. A list of the monuments at issue is found in the DOI fact sheet on the Executive Order. That memo can be found here. <https://morningconsult.com/wp-content/uploads/2017/05/Executive-Order-Fact-Sheet-Reviewing-Abuses-of-the-Antiquities-Act-of-19....pdf> b. Any Department of Commerce data or studies on the impacts to local, regional, and national economies produced by the monuments at issue. These requests are not meant to be exclusive of any other records that, although not specifically requested, have a reasonable relationship to the subject matter of this request. If you or your office has destroyed or determines to withhold any documents 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.

Jim LeDuc

NOAA HCHB Room 58020

Office [202-482-0965](tel:202-482-0965)

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Monday, August 21, 2017 3:29 PM
To: James LeDuc - NOAA Federal
Cc: Lola Stith - NOAA Affiliate
Subject: Fwd: DOC-OS-2017-001150

Hi Jim,

(b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ?

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) [REDACTED] (C)

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----- Forwarded message -----
From: FOIA Office - NOAA Service Account <foia@noaa.gov>
Date: Mon, Aug 21, 2017 at 2:41 PM
Subject: Fwd: DOC-OS-2017-001150
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Hi Mark (b)(5) [REDACTED]
[REDACTED] ?

Lola

----- Forwarded message -----
From: James LeDuc - NOAA Federal <james.leduc@noaa.gov>
Date: Thu, Aug 17, 2017 at 11:56 AM
Subject: DOC-OS-2017-001150
To: FOIA Office - NOAA Service Account <foia@noaa.gov>

Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Mark Graff - NOAA Federal <mark.graff@noaa.gov>, Devin Brakob - NOAA Federal <devin.r.brakob@noaa.gov>

(b)(5) [REDACTED] ?

This is a request under the Freedom of Information Act, 5 U.S.C. § 552 et. seq. The materials requested relate to presidential designations of national monuments. As such, I request all records relating to, or consisting of, communications — in any format — generated or received by the Department of Commerce related to: a. Any public communication to the Department of Commerce and/or its Bureaus on or since January 20, 2017 requesting a review of the national monuments identified in President Trump's Executive Order dated April 26, 2017. A list of the monuments at issue is found in the DOI fact sheet on the Executive Order. That memo can be found here. <https://morningconsult.com/wp-content/uploads/2017/05/Executive-Order-Fact-Sheet-Reviewing-Abuses-of-the-Antiquities-Act-of-19....pdf> b. Any Department of Commerce data or studies on the impacts to local, regional, and national economies produced by the monuments at issue. These requests are not meant to be exclusive of any other records that, although not specifically requested, have a reasonable relationship to the subject matter of this request. If you or your office has destroyed or determines to withhold any documents 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.

Jim LeDuc

NOAA HCHB Room 58020

Office [202-482-0965](tel:202-482-0965)

Ce (b)(6) [REDACTED]

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, August 22, 2017 7:39 AM
To: Symone Stone - NOAA Affiliate; Denise Hamilton - NOAA Federal; Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate; Lisa Love - NOAA Federal; Nkolika Ndubisi - NOAA Federal; Maria Williams - NOAA Federal; Annie Thomson - NOAA Federal; Gregory Raymond - NOAA Federal; James LeDuc - NOAA Federal; Devin Brakob - NOAA Federal; Velna Bullock - NOAA Federal; Elizabeth McLanahan - NOAA Federal; Scott Smullen - NOAA Federal; Mary Ann Whitmeyer - NOAA Federal; Mark Seiler - NOAA Federal; Jerry McNamara; Stephen Lipps - NOAA Federal; Karen Robin - NOAA Federal; Shem Yusuf - NOAA Federal; DALTON CUMMINGS - NOAA Affiliate; Tejuana Michael - NOAA Federal
Cc: Robert Swisher - NOAA Federal; Lola Stith - NOAA Affiliate; Dennis Morgan - NOAA Federal; Robert Hogan; Cc: OCIO/OPPA
Subject: Judicial Watch Judgment and Order
Attachments: Dkt. 28 - Opinion and Order.pdf

Good Morning,

We have just received the Court's Order, holding that NOAA prevailed in the Judicial Watch litigation. In particular, the Court upheld NOAA's use of FOIA Exemption (b)(5) Deliberative Process Privilege to protect the scientific peer review of the Hiatus paper drafted by NOAA scientists within NESDIS/NCEI.

This represents a significant victory for NOAA, and validates NOAA's FOIA practices as it relates to segregability and exemption application. We're thrilled with the outcome, and appreciate all of your hard work in maintaining a strong FOIA program that is compliant with the important transparency responsibilities here in NOAA.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Case No. 15-cv-2088 (CRC)

OPINION AND ORDER

Plaintiff Judicial Watch brought this Freedom of Information Act (“FOIA”) suit seeking documents in the possession of the National Oceanographic and Atmospheric Administration (“NOAA”) related to a study (the “Hiatus Paper”) by several NOAA scientists that was published in the journal *Science*. NOAA withheld three sets of documents—drafts of the Hiatus Paper, internal correspondence among NOAA scientists concerning the Hiatus Paper, and outside peer reviewer comments—under Exemption 5 of FOIA. The parties have filed cross-motions for summary judgment regarding this withholding. For the reasons below, the court grants the Department of Commerce’s motion for summary judgment and denies Judicial Watch’s cross-motion.¹

Summary judgment is appropriate when the “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “FOIA cases typically and appropriately are decided on motions for summary judgment.” Cavezza v. Dep’t of Justice, 113 F. Supp. 3d 271, 275 (D.D.C. 2015).

¹ Judicial Watch has withdrawn its challenges to the adequacy of the Department’s search for records and the Department’s withholding of other information under Exemption 6. Pl.’s Mem. of Law in Supp. of Pl.’s Opp’n to Def’s Mot. for Summ. J. 2 n.1.

Exemptions to FOIA are to be narrowly construed and the agency bears the burden of proving that any withheld records fall within the scope of an exemption to FOIA. AquAlliance v. U.S. Bureau of Reclamation, 856 F.3d 101, 102–03 (D.C. Cir. 2017). Exemption 5 of FOIA, which NOAA has invoked, permits the withholding of “inter-agency or intra-agency memorandums or letters that 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). As relevant here, this includes documents protected by the deliberative process privilege. See, e.g., Formaldehyde Inst. v. Dep’t of Health & Human Servs., 889 F.2d 1118, 1121 (D.C. Cir. 1989). To qualify for the deliberative process privilege, an inter-agency or intra-agency document must be “predecisional,” meaning that it was “generated before the adoption of an agency policy,” and “deliberative,” meaning that it “reflects the give-and-take of the consultative process.” Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

Judicial Watch first contends that the documents withheld here cannot fall within the scope of Exemption 5 because they concern science, rather than policy. Unfortunately for Judicial Watch, the D.C. Circuit has already resolved that question in the Department’s favor. In Formaldehyde Institute, the D.C. Circuit held that a peer review letter sent to agency scientists regarding a possible publication was covered by Exemption 5. 889 F.2d at 1120. The Court explained that the letter was “predecisional because it preceded the agency’s decision whether and in what form to publish” the article and it was deliberative because “the agency secured review commentary in order to make that decision.” Id.; see also Hooker v. Dep’t of Health & Human Servs., 887 F. Supp. 2d 40, 57–58 (D.D.C. 2012) (holding that peer review comments, draft manuscripts, and communications discussing draft manuscripts fell within the scope of Exemption 5).

Judicial Watch offers no basis on which to distinguish Formaldehyde Institute. The drafts of the Hiatus Paper, the NOAA scientists' deliberations, and the peer review materials are equally predecisional because they involve drafts and "recommendation[s] (with suggestions) regarding an article's suitability for publication," Formaldehyde Inst., 889 F.2d at 1123. These documents are likewise deliberative because they form part of "the deliberative decision about whether and in what form to publish" the Hiatus Paper, id. at 1124. And finally, NOAA (and its *amici*) put forth un rebutted evidence that disclosure here would harm the deliberative process, such as by creating a "chilling effect on . . . the candor of potential reviewers of government-submitted articles," id. at 1125. See Spinrad Decl. ¶¶ 23–26. The drafts of the Hiatus Paper, internal deliberations, and peer reviewer comments thus fall within the scope of Exemption 5.

Next, Judicial Watch contends that alleged misconduct by the NOAA scientists who prepared the Hiatus Paper overrides Exemption 5. While the D.C. Circuit has never held that government misconduct can abrogate the deliberative process privilege in a FOIA case, some decisions from this District have so held. See, e.g., Neighborhood Assistance Corp. of Am. v. Dep't of Hous. & Urban Dev., 19 F. Supp. 3d 1, 13–14 (D.D.C. 2013); Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs., 903 F. Supp. 2d 59, 67 (D.D.C. 2012). But see Judicial Watch, Inc. v. Dep't of State, 2017 WL 1078544, at *6 (D.D.C. Mar. 20, 2017) (refusing to apply government misconduct exception to FOIA case); Wright v. Admin. for Children & Families, 2016 WL 5922293, at * 11 (D.D.C. Oct. 16, 2016) (same).

Regardless of whether such an exception exists in the FOIA context, it would not be applicable here. Since the very purpose of FOIA is to help uncover government misconduct, if any allegation of misconduct sufficed to pierce the deliberative process privilege, the exception would soon swallow the privilege whole. Rather, as the cases applying the exception have

explained, the misconduct alleged must be particularly severe, as where “the ‘policy discussions’ sought to be protected . . . were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government.” ICM Registry, LLC v. Dep’t of Commerce, 538 F. Supp. 2d 130, 132–33 (D.D.C. 2008).

Judicial Watch presents no evidence sufficient to raise the specter of such nefarious government misconduct. It cites to a single article in a British tabloid reporting, based on a former employee’s allegation, that the Hiatus Paper was based on “misleading” data and was not subjected to NOAA’s “rigorous internal evaluation process.” Pl.’s Mem. of Law in Supp. of Pl.’s Opp’n to Def’s Mot. for Summ. J. 4. But this article, alone, does not meet that narrow standard. Nor does Judicial Watch put forth any evidence evincing a connection between the withheld discussions of the paper itself and the alleged deficiencies in the underlying, publicly available data on which the paper relies. For these reasons, it fails to show that the narrow government misconduct exception would be applicable here.

Finally, Judicial Watch challenges the withholding on the ground that the Department failed to properly release segregable information. However, the Department is “entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material.” Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C. Cir. 2007). The Department’s affidavits adequately allege that the agency released all reasonably segregable material and Judicial Watch provides no evidence to contradict these affidavits or to otherwise rebut that presumption.

For the foregoing reasons, it is hereby

ORDERED that [16] Defendant's Motion for Summary Judgment is GRANTED. It is further **ORDERED** that [22] Plaintiff's Cross-Motion for Summary Judgment is DENIED.

SO ORDERED.



CHRISTOPHER R. COOPER
United States District Judge

Date: August 21, 2017

Robert Swisher - NOAA Federal

From: Robert Swisher - NOAA Federal
Sent: Tuesday, August 22, 2017 7:55 AM
To: Zachary Goldstein; Douglas A Perry
Cc: Mark Graff - NOAA Affiliate
Subject: Fwd: Order in Judicial Watch v. Dep't of Commerce (15-cv-2088)
Attachments: Dkt. 28 - Opinion and Order.pdf

Zach/Doug,

Good News....

We have just received the Court's Order, holding that NOAA prevailed in the Judicial Watch litigation. In particular, the Court upheld NOAA's use of FOIA Exemption (b)(5) Deliberative Process Privilege to protect the scientific peer review of the Hiatus paper drafted by NOAA scientists within NESDIS/NCEI. The Court also ruled that there was no NOAA misconduct. See the attached Opinion and Order.

This represents a significant victory for NOAA, and validates NOAA's FOIA practices as it relates to segregability and exemption application.

----- Forwarded message -----

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Tue, Aug 22, 2017 at 7:04 AM
Subject: Fwd: Order in Judicial Watch v. Dep't of Commerce (15-cv-2088)
To: Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>, Dennis Morgan - NOAA Federal <dennis.morgan@noaa.gov>, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>
Cc: Robert Hogan <robert.j.hogan@noaa.gov>, Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>, Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>

The Judge ruled in our favor in the Judicial Watch hiatus paper case! This is a US District Court of D.C. opinion protecting agency scientific deliberations and peer review as falling within the protection of the (b)(5) Deliberative Process Privilege. This will likely be referenced by any scientific agency protecting the peer review process during a FOIA request going forward, and will be picked up by DOJ in their next FOIA Guide for agencies to see the extent of the consultant corollary doctrine within the extent of the privilege.

The Judge's opinion and order is attached.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) (C)

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From: **Snell, Kevin (CIV)** <Kevin.Snell@usdoj.gov>

Date: Mon, Aug 21, 2017 at 5:38 PM

Subject: Order in Judicial Watch v. Dep't of Commerce (15-cv-2088)

To: "Myers, Jordan (Federal)" <jmyers@doc.gov>, Hillary Davidson <HDavidson@doc.gov>, Rose Stanley - NOAA Federal <rose.stanley@noaa.gov>, "ruthann.lowery@noaa.gov" <ruthann.lowery@noaa.gov>, Rodney Vieira - NOAA Federal <rod.vieira@noaa.gov>, "mark.graff@noaa.gov" <mark.graff@noaa.gov>

Cc: "Snell, Kevin (CIV)" <Kevin.Snell@usdoj.gov>

All,

(b)(5)

A large block of text is redacted with black bars. The redaction covers approximately four lines of text.

Kevin

Kevin Snell

Trial Attorney

U.S. Department of Department of Justice

Civil Division, Federal Programs Branch

[202.305.0924](tel:202.305.0924)

--

Rob Swisher

Director, Governance and Portfolio Division

[NOAA OCIO](#)

W-301-628-5755

(b)(6)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Case No. 15-cv-2088 (CRC)

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Judicial Watch first contends that the documents withheld here cannot fall within the scope of Exemption 5 because they concern science, rather than policy. Unfortunately for Judicial Watch, the D.C. Circuit has already resolved that question in the Department’s favor. In Formaldehyde Institute, the D.C. Circuit held that a peer review letter sent to agency scientists regarding a possible publication was covered by Exemption 5. 889 F.2d at 1120. The Court explained that the letter was “predecisional because it preceded the agency’s decision whether and in what form to publish” the article and it was deliberative because “the agency secured review commentary in order to make that decision.” Id.; see also Hooker v. Dep’t of Health & Human Servs., 887 F. Supp. 2d 40, 57–58 (D.D.C. 2012) (holding that peer review comments, draft manuscripts, and communications discussing draft manuscripts fell within the scope of Exemption 5).

Judicial Watch offers no basis on which to distinguish Formaldehyde Institute. The drafts of the Hiatus Paper, the NOAA scientists' deliberations, and the peer review materials are equally predecisional because they involve drafts and "recommendation[s] (with suggestions) regarding an article's suitability for publication," Formaldehyde Inst., 889 F.2d at 1123. These documents are likewise deliberative because they form part of "the deliberative decision about whether and in what form to publish" the Hiatus Paper, id. at 1124. And finally, NOAA (and its *amici*) put forth un rebutted evidence that disclosure here would harm the deliberative process, such as by creating a "chilling effect on . . . the candor of potential reviewers of government-submitted articles," id. at 1125. See Spinrad Decl. ¶¶ 23–26. The drafts of the Hiatus Paper, internal deliberations, and peer reviewer comments thus fall within the scope of Exemption 5.

Next, Judicial Watch contends that alleged misconduct by the NOAA scientists who prepared the Hiatus Paper overrides Exemption 5. While the D.C. Circuit has never held that government misconduct can abrogate the deliberative process privilege in a FOIA case, some decisions from this District have so held. See, e.g., Neighborhood Assistance Corp. of Am. v. Dep't of Hous. & Urban Dev., 19 F. Supp. 3d 1, 13–14 (D.D.C. 2013); Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs., 903 F. Supp. 2d 59, 67 (D.D.C. 2012). But see Judicial Watch, Inc. v. Dep't of State, 2017 WL 1078544, at *6 (D.D.C. Mar. 20, 2017) (refusing to apply government misconduct exception to FOIA case); Wright v. Admin. for Children & Families, 2016 WL 5922293, at * 11 (D.D.C. Oct. 16, 2016) (same).

Regardless of whether such an exception exists in the FOIA context, it would not be applicable here. Since the very purpose of FOIA is to help uncover government misconduct, if any allegation of misconduct sufficed to pierce the deliberative process privilege, the exception would soon swallow the privilege whole. Rather, as the cases applying the exception have

explained, the misconduct alleged must be particularly severe, as where “the ‘policy discussions’ sought to be protected . . . were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government.” ICM Registry, LLC v. Dep’t of Commerce, 538 F. Supp. 2d 130, 132–33 (D.D.C. 2008).

Judicial Watch presents no evidence sufficient to raise the specter of such nefarious government misconduct. It cites to a single article in a British tabloid reporting, based on a former employee’s allegation, that the Hiatus Paper was based on “misleading” data and was not subjected to NOAA’s “rigorous internal evaluation process.” Pl.’s Mem. of Law in Supp. of Pl.’s Opp’n to Def’s Mot. for Summ. J. 4. But this article, alone, does not meet that narrow standard. Nor does Judicial Watch put forth any evidence evincing a connection between the withheld discussions of the paper itself and the alleged deficiencies in the underlying, publicly available data on which the paper relies. For these reasons, it fails to show that the narrow government misconduct exception would be applicable here.

Finally, Judicial Watch challenges the withholding on the ground that the Department failed to properly release segregable information. However, the Department is “entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material.” Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C. Cir. 2007). The Department’s affidavits adequately allege that the agency released all reasonably segregable material and Judicial Watch provides no evidence to contradict these affidavits or to otherwise rebut that presumption.

For the foregoing reasons, it is hereby

ORDERED that [16] Defendant's Motion for Summary Judgment is GRANTED. It is further **ORDERED** that [22] Plaintiff's Cross-Motion for Summary Judgment is DENIED.

SO ORDERED.



CHRISTOPHER R. COOPER
United States District Judge

Date: August 21, 2017

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, August 22, 2017 8:13 AM
To: Symone Stone - NOAA Affiliate; Denise Hamilton - NOAA Federal; Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate; Lisa Love - NOAA Federal; Nkolika Ndubisi - NOAA Federal; Maria Williams - NOAA Federal; Annie Thomson - NOAA Federal; Gregory Raymond - NOAA Federal; James LeDuc - NOAA Federal; Devin Brakob - NOAA Federal; Velna Bullock - NOAA Federal; Elizabeth McLanahan - NOAA Federal; Scott Smullen - NOAA Federal; Mary Ann Whitmeyer - NOAA Federal; Mark Seiler - NOAA Federal; Jerry McNamara; Stephen Lipps - NOAA Federal; Karen Robin - NOAA Federal; Shem Yusuf - NOAA Federal; DALTON CUMMINGS - NOAA Affiliate; Tejuana Michael - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Robert Hogan; Robert Swisher - NOAA Federal
Subject: DOJ Template Language for FALs
Attachments: Determination_Adverse_FPL_OGIS_Appeals_language (2017-08-01).docx; Determination_Full_Releases_FPL_language (2017-08-01).docx

Good Morning,

During the last Chief FOIA Officer's meeting, DOJ and OGIS provided sample language to use in agency Final Action Letters (FAL). DOC has confirmed that we are to continue to provide appeal language in all FALs, including full grants, in order to provide the sufficient notice required by 15 CFR 4.10 and 4.7, consistent with the DOC Best Practices issued in 2016.

As such, please find attached the DOJ-suggested template language for adverse determinations. I'm also attaching a "full release" template for reference. DOC has asked that we begin utilizing the template language immediately. Again, although the "full release" template DOJ provided does not include appeal language, considering the DOC regulations, all FAL's should include the appeal language that is contained in the template adverse FAL below. Thank you and best regards.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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For adverse determinations:

Format 1:

If you have any questions or concerns or would like to discuss any aspect of your request, you may contact the analyst who processed your request [Name] by telephone at [telephone number], or by email at [email address]. You may also contact the Department's FOIA Public Liaison:

Commented [TM(1): Enter the analyst's information.

Commented [TM(2): Change, as needed.

Dr. Michael Toland
U.S. Department of Commerce
Office of Privacy and Open Government
1401 Constitution Ave. NW
Room 52010
Washington, DC 20230
(202) 482-3842
mtoland@doc.gov

Commented [TM(3): Change, as needed, for relevant FOIA Public Liaison.

Please refer to your FOIA request tracking number, DOC-OS-2017-000465, when contacting us.

Commented [TM(4): Update with appropriate tracking number.

In addition, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
e-mail at ogis@nara.gov
telephone at 202741-5770; toll free at 1 877-684-6448
facsimile at 202-741-5769

You have the right to appeal this [denial/partial denial] of your FOIA request. An appeal must be received within 90 calendar days of the date of this response letter. Address your appeal to the following office:

Commented [TM(5): Update with type of denial.

Assistant General Counsel for Employment, Litigation and Information (Office)
U.S. Department of Commerce
Office of the General Counsel
Room 5890
1401 Constitution Ave., NW
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov or by FOIAonline, if you have an account in FOIAonline, at https://foiaonline.regulations.gov/foia/action/public/home#. The appeal should include a copy of the original request and initial denial, if any. All appeals should

include a statement of the reasons why the records requested should be made available and why the adverse determination was in error.

The appeal letter, the envelope, and the e-mail subject line should be clearly marked "Freedom of Information Act Appeal." The e-mail, FOIAonline, and Office are monitored only on working days during normal business hours (8:30 a.m. to 5:00 p.m., Eastern Time, Monday through Friday). FOIA appeals posted to the e-mail box, FOIAonline, or Office after normal business hours will be deemed received on the next normal business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

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(202) 482-3842
mtoland@doc.gov

Commented [TM(6)]: Change, as needed.

Commented [TM(7)]: Change, as needed, for relevant FOIA Public Liaison.

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Commented [TM(4): Change, as needed, for relevant FOIA Public Liaison.

Please refer to your FOIA request tracking number, [DOC-OS-2017-000465], when contacting us.

Commented [TM(5): Update with appropriate tracking number.

Robert Swisher - NOAA Federal

From: Robert Swisher - NOAA Federal
Sent: Tuesday, August 22, 2017 8:18 AM
To: OCIO/OPPA
Subject: Fwd: Order in Judicial Watch v. Dep't of Commerce (15-cv-2088)
Attachments: Dkt. 28 - Opinion and Order.pdf

#GPD, #Mark, #Lola....

----- Forwarded message -----

From: Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>
Date: Tue, Aug 22, 2017 at 7:54 AM
Subject: Fwd: Order in Judicial Watch v. Dep't of Commerce (15-cv-2088)
To: Zachary Goldstein <Zachary.Goldstein@noaa.gov>, Douglas A Perry <Douglas.A.Perry@noaa.gov>
Cc: Mark Graff - NOAA Affiliate <mark.graff@noaa.gov>

Zach/Doug,

Good News....

We have just received the Court's Order, holding that NOAA prevailed in the Judicial Watch litigation. In particular, the Court upheld NOAA's use of FOIA Exemption (b)(5) Deliberative Process Privilege to protect the scientific peer review of the Hiatus paper drafted by NOAA scientists within NESDIS/NCEI. The Court also ruled that there was no NOAA misconduct. See the attached Opinion and Order.

This represents a significant victory for NOAA, and validates NOAA's FOIA practices as it relates to segregability and exemption application.

----- Forwarded message -----

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Tue, Aug 22, 2017 at 7:04 AM
Subject: Fwd: Order in Judicial Watch v. Dep't of Commerce (15-cv-2088)
To: Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>, Dennis Morgan - NOAA Federal <dennis.morgan@noaa.gov>, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>
Cc: Robert Hogan <robert.j.hogan@noaa.gov>, Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>, Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>

The Judge ruled in our favor in the Judicial Watch hiatus paper case! This is a US District Court of D.C. opinion protecting agency scientific deliberations and peer review as falling within the protection of the (b)(5) Deliberative Process Privilege. This will likely be referenced by any scientific agency protecting the peer review process during a FOIA request going forward, and will be picked up by DOJ in their next FOIA Guide for agencies to see the extent of the consultant corollary doctrine within the extent of the privilege.

The Judge's opinion and order is attached.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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----- Forwarded message -----

From: **Snell, Kevin (CIV)** <Kevin.Snell@usdoj.gov>

Date: Mon, Aug 21, 2017 at 5:38 PM

Subject: Order in Judicial Watch v. Dep't of Commerce (15-cv-2088)

To: "Myers, Jordan (Federal)" <jmyers@doc.gov>, Hillary Davidson <HDavidson@doc.gov>, Rose Stanley - NOAA Federal <rose.stanley@noaa.gov>, "ruthann.lowery@noaa.gov" <ruthann.lowery@noaa.gov>, Rodney Vieira - NOAA Federal <rod.vieira@noaa.gov>, "mark.graff@noaa.gov" <mark.graff@noaa.gov>

Cc: "Snell, Kevin (CIV)" <Kevin.Snell@usdoj.gov>

All,

(b)(5)

Kevin

Kevin Snell

Trial Attorney

U.S. Department of Department of Justice

Civil Division, Federal Programs Branch

[202.305.0924](tel:2023050924)

--

Rob Swisher
Director, Governance and Portfolio Division
[NOAA OCIO](#)
W-[301-628-5755](#)
(b)(6)

--

Rob Swisher
Director, Governance and Portfolio Division
[NOAA OCIO](#)
W-301-628-5755
(b)(6)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Case No. 15-cv-2088 (CRC)

OPINION AND ORDER

Plaintiff Judicial Watch brought this Freedom of Information Act (“FOIA”) suit seeking documents in the possession of the National Oceanographic and Atmospheric Administration (“NOAA”) related to a study (the “Hiatus Paper”) by several NOAA scientists that was published in the journal *Science*. NOAA withheld three sets of documents—drafts of the Hiatus Paper, internal correspondence among NOAA scientists concerning the Hiatus Paper, and outside peer reviewer comments—under Exemption 5 of FOIA. The parties have filed cross-motions for summary judgment regarding this withholding. For the reasons below, the court grants the Department of Commerce’s motion for summary judgment and denies Judicial Watch’s cross-motion.¹

Summary judgment is appropriate when the “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “FOIA cases typically and appropriately are decided on motions for summary judgment.” Cavezza v. Dep’t of Justice, 113 F. Supp. 3d 271, 275 (D.D.C. 2015).

¹ Judicial Watch has withdrawn its challenges to the adequacy of the Department’s search for records and the Department’s withholding of other information under Exemption 6. Pl.’s Mem. of Law in Supp. of Pl.’s Opp’n to Def’s Mot. for Summ. J. 2 n.1.

Exemptions to FOIA are to be narrowly construed and the agency bears the burden of proving that any withheld records fall within the scope of an exemption to FOIA. AquAlliance v. U.S. Bureau of Reclamation, 856 F.3d 101, 102–03 (D.C. Cir. 2017). Exemption 5 of FOIA, which NOAA has invoked, permits the withholding of “inter-agency or intra-agency memorandums or letters that 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). As relevant here, this includes documents protected by the deliberative process privilege. See, e.g., Formaldehyde Inst. v. Dep’t of Health & Human Servs., 889 F.2d 1118, 1121 (D.C. Cir. 1989). To qualify for the deliberative process privilege, an inter-agency or intra-agency document must be “predecisional,” meaning that it was “generated before the adoption of an agency policy,” and “deliberative,” meaning that it “reflects the give-and-take of the consultative process.” Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

Judicial Watch first contends that the documents withheld here cannot fall within the scope of Exemption 5 because they concern science, rather than policy. Unfortunately for Judicial Watch, the D.C. Circuit has already resolved that question in the Department’s favor. In Formaldehyde Institute, the D.C. Circuit held that a peer review letter sent to agency scientists regarding a possible publication was covered by Exemption 5. 889 F.2d at 1120. The Court explained that the letter was “predecisional because it preceded the agency’s decision whether and in what form to publish” the article and it was deliberative because “the agency secured review commentary in order to make that decision.” Id.; see also Hooker v. Dep’t of Health & Human Servs., 887 F. Supp. 2d 40, 57–58 (D.D.C. 2012) (holding that peer review comments, draft manuscripts, and communications discussing draft manuscripts fell within the scope of Exemption 5).

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Next, Judicial Watch contends that alleged misconduct by the NOAA scientists who prepared the Hiatus Paper overrides Exemption 5. While the D.C. Circuit has never held that government misconduct can abrogate the deliberative process privilege in a FOIA case, some decisions from this District have so held. See, e.g., Neighborhood Assistance Corp. of Am. v. Dep't of Hous. & Urban Dev., 19 F. Supp. 3d 1, 13–14 (D.D.C. 2013); Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs., 903 F. Supp. 2d 59, 67 (D.D.C. 2012). But see Judicial Watch, Inc. v. Dep't of State, 2017 WL 1078544, at *6 (D.D.C. Mar. 20, 2017) (refusing to apply government misconduct exception to FOIA case); Wright v. Admin. for Children & Families, 2016 WL 5922293, at * 11 (D.D.C. Oct. 16, 2016) (same).

Regardless of whether such an exception exists in the FOIA context, it would not be applicable here. Since the very purpose of FOIA is to help uncover government misconduct, if any allegation of misconduct sufficed to pierce the deliberative process privilege, the exception would soon swallow the privilege whole. Rather, as the cases applying the exception have

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Judicial Watch presents no evidence sufficient to raise the specter of such nefarious government misconduct. It cites to a single article in a British tabloid reporting, based on a former employee’s allegation, that the Hiatus Paper was based on “misleading” data and was not subjected to NOAA’s “rigorous internal evaluation process.” Pl.’s Mem. of Law in Supp. of Pl.’s Opp’n to Def’s Mot. for Summ. J. 4. But this article, alone, does not meet that narrow standard. Nor does Judicial Watch put forth any evidence evincing a connection between the withheld discussions of the paper itself and the alleged deficiencies in the underlying, publicly available data on which the paper relies. For these reasons, it fails to show that the narrow government misconduct exception would be applicable here.

Finally, Judicial Watch challenges the withholding on the ground that the Department failed to properly release segregable information. However, the Department is “entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material.” Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C. Cir. 2007). The Department’s affidavits adequately allege that the agency released all reasonably segregable material and Judicial Watch provides no evidence to contradict these affidavits or to otherwise rebut that presumption.

For the foregoing reasons, it is hereby

ORDERED that [16] Defendant's Motion for Summary Judgment is GRANTED. It is further **ORDERED** that [22] Plaintiff's Cross-Motion for Summary Judgment is DENIED.

SO ORDERED.



CHRISTOPHER R. COOPER
United States District Judge

Date: August 21, 2017

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, August 22, 2017 8:33 AM
To: (b)(6)
Subject: Won the Judicial Watch climate change paper FOIA case
Attachments: JW v. NOAA Opinion and Order.pdf; Brief of Science Legal Defense Fund, American Meteorological Society, and UCS in support of Defendant.pdf; Dkt. 16 - Motion for Summary Judgment.pdf; Dkt. 16 - 1 Graff Declaration.pdf

Hey guys,



Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE

Defendant.

Case No. 1:15-cv-02088-CRC

**BRIEF OF CLIMATE SCIENCE LEGAL DEFENSE FUND, AMERICAN
METEOROLOGICAL SOCIETY, AND UNION OF CONCERNED SCIENTISTS
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT**

Ian Fein (Cal. Bar No. 281394)
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SUTCLIFFE LLP
405 Howard Street
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(415) 773-5700

Kelsi Brown Corkran
(D.C. Bar No. 501157)
Counsel of Record
Benjamin Chagnon (D.C. Bar No. 1044746)
Shani S. Harmon (D.C. Bar No. 1020893)
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400
kcorkran@orrick.com

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

I, Kelsi Brown Corkran, counsel of record for *Amici Curiae* Climate Science Legal Defense Fund (CSLDF), American Meteorological Society (AMS), and Union of Concerned Scientists (UCS), certify that, to the best of my knowledge and belief, amici CSLDF, AMS, and UCS have no parent companies, subsidiaries, or affiliates with any outstanding securities in the hands of the public. Furthermore, CSLDF, AMS, and UCS are organized under Section 501(c)(3) of the Internal Revenue Code, and no publicly held company has a 10% or greater ownership interest in the organizations. These representations are made in order that judges of this Court may determine the need for recusal.

/s/ Kelsi Brown Corkran
Kelsi Brown Corkran
Counsel of Record for Amici Curiae

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INTEREST OF AMICI¹

Amici are nonprofit organizations committed to ensuring robust, independent scientific research into vitally important but politically charged subjects like climate change. Such research can occur only where scientists feel free to explore new ideas and provide candid feedback to each other without fear that their confidential exchanges or preliminary drafts will later be subject to indiscriminate public disclosure. Amici are thus deeply concerned about attempts, like those in this case, to obtain scientists' confidential correspondence and drafts. Amici have an interest in ensuring that public records laws are applied in a manner that appropriately protects the privileged, deliberative records of government scientists and the colleagues with whom they collaborate.

Climate Science Legal Defense Fund (CSLDF) was founded in 2011 in response to the increasing incidence of legal attacks against climate scientists. Its mission is to protect the scientific endeavor in general—and climate science and climate scientists in particular—from assaults being launched through the legal system, including intrusive public records requests.

American Meteorological Society (AMS) was founded in 1919 and is dedicated to advancing the atmospheric and related sciences for the benefit of society. It accomplishes this goal by, among other things, publishing several peer-reviewed scientific journals. AMS has more than 13,000 members, including scientists, researchers, and other climate professionals. It is committed to strengthening scientific work across the public, private, and academic sectors, and believes that collaboration and information sharing are critical to ensuring that society benefits from the best, most current scientific knowledge and understanding available.

¹ Amici CSLDF, AMS, and UCS state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Union of Concerned Scientists (UCS) was founded in 1969 and is supported by an alliance of 500,000 citizens and scientists dedicated to using science to foster a healthy environment and safe world. UCS combines independent scientific research and citizen action to develop innovative and practical solutions to pressing environmental and security problems like climate change. UCS believes that a crucial ingredient in achieving these goals is maintaining research institutions within the federal government that foster an environment of independent and rigorous scientific inquiry free from political interference.

INTRODUCTION

The efforts to obtain government scientists' privileged materials in this case are, unfortunately, all too familiar. Over the last decade, groups across the political spectrum have attempted to discredit scientific studies they dislike not by contesting the validity of the underlying data or methodology, or by showing that the studies' results cannot be reproduced (which is how the scientific process traditionally works), but rather by seeking to use the scientists' emails and preliminary drafts against them. This strategy has been a particularly common tactic of those who dispute the scientific consensus on climate change.

Whatever one's reasons for seeking such materials, however, these types of records are generally protected from disclosure by the deliberative process privilege—as courts have repeatedly recognized in cases similar to this one. Government scientists' correspondence, preliminary drafts, and peer review materials are quintessential deliberative, pre-decisional records safeguarded by Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5). Maintaining the confidentiality of such records is necessary for the reasons that Congress codified the deliberative process privilege in that exemption: Quality government science (on which both policymakers and the general public rely) depends on an uninhibited exchange of ideas among scientists, and the unintended release of their correspondence and

preliminary drafts would likely result in public confusion.

Indeed, the policy concerns animating the deliberative process privilege are directly implicated in this very case. Numerous scientific organizations (including some of the present amici) specifically warned of the dangerous chilling effects that would result if the materials withheld by the National Oceanographic and Atmospheric Administration (NOAA) in this case were ordered released pursuant to an earlier congressional subpoena. These same effects would occur if the materials were released pursuant to FOIA instead. Ordering their release would harm (or halt altogether) government scientists' ability to collaborate with colleagues, damage the government's ability to recruit or retain top scientists, and deter critically important research into politically charged fields like climate change.

Moreover, releasing such materials is entirely unnecessary to ensure transparency in government science. The scientific method itself promotes transparency by, for example, requiring that research undergo rigorous peer review before publication and that its underlying data and methodology generally be made available to the public. NOAA scientists faithfully followed these practices here, and even took additional measures to ensure transparency by volunteering to answer questions directly from congressional critics. These steps allowed others to test the reliability of their research, and to disagree with their findings where testing suggested a different result. That is the way science works—and how it has already worked in this case, without compelled disclosure of the scientists' deliberative records.

Accordingly, the Court should enter summary judgment for the government and reject Plaintiff's attempt to obtain these scientists' confidential correspondence and preliminary drafts.

ARGUMENT

I. NOAA Has Withheld Only Privileged Correspondence And Preliminary Drafts Of Its Climate Science Paper.

A. NOAA Publicly Released The Data And Methodology Behind Its Paper.

The FOIA request at issue in this case centers around a June 2015 paper that NOAA scientists published in the prominent, peer-reviewed journal *Science*. See Thomas Karl et al., *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus*, 348 *Sci.* 1469 (June 26, 2015) (“Hiatus Paper” or “Paper”). The Paper addressed (and refuted) earlier claims about a so-called “hiatus” in global warming—i.e., the notion that the rate of global warming slowed in the 21st century as compared to the second half of the 20th century.

As explained in the government’s motion and accompanying declarations, NOAA scientists in 2014 developed an idea to reexamine the alleged “hiatus” in light of two recent developments: NOAA had made certain improvements to its dataset of sea surface temperatures, and 2013 and 2014 were two of the five warmest years on record. See Def.’s Mot. for Summ. J. (“MSJ”) at 1-3, ECF No. 16; Decl. of Mark Graff (“Graff Decl.”) ¶ 10, ECF No. 16-1. When researchers accounted for those developments, they found that global temperatures in the last 15 years rose as fast or faster than they did during the latter half of the 20th century. In other words, any slowdown in warming that could be described as a “hiatus” had largely disappeared.

The Hiatus Paper attracted significant attention—in part because those who dispute the scientific consensus on climate change had previously seized upon the alleged “hiatus” as a reason to oppose restrictions on greenhouse gas emissions. One such contrarian was Representative Lamar Smith, a Republican from Texas who chairs the House Committee on Science, Space, and Technology. Over the course of several months, Smith sent increasingly invasive record requests to NOAA in an effort to undermine the Paper’s credibility.

At first, Smith’s inquiry focused on obtaining the data and methodology underlying the Paper.² NOAA fully cooperated with these requests. The agency pointed Smith to the websites where—consistent with standard scientific practice—all of the underlying data and methodologies had already been made available to the public.³ NOAA also directed Smith to other publicly available datasets and peer-reviewed papers relevant to the methods it had used.⁴ And at NOAA’s own suggestion, several authors of the Paper traveled to Washington D.C. on two separate occasions to answer, in person, any questions that Smith’s committee had about the Paper.⁵ NOAA also offered to make some of its top scientists available for additional transcribed interviews with committee staff.⁶

As NOAA explained, it had made its data and methodology “available to the Committee, the public, and the scientific community”; accordingly, if anyone “doubt[ed] the integrity of the study, [they] ha[d] the tools [they] need[ed] to commission a competing scientific assessment.”⁷

² See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm’r, NOAA (July 14, 2015), <http://tinyurl.com/gqotymh> (requesting “[a]ll data related to [the NOAA] study and the updated global datasets, including the methods of analysis used to adjust the data.”).

³ See Letter from Robert Moller, Acting Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Aug. 20, 2015), <http://tinyurl.com/j8hjjlx>.

⁴ See, e.g., Letter from Coby Dolan, Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 2, 2015), <http://tinyurl.com/zc3w8eg>; Letter from Coby Dolan, Director of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Dec. 15, 2015), <http://tinyurl.com/h49e2wp>.

⁵ See Letter from Coby Dolan, Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 27, 2015), <http://tinyurl.com/gumxt9t>.

⁶ See Letter from Kathryn Sullivan, Adm’r, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 20, 2015), <http://tinyurl.com/h55yhqw>.

⁷ *Id.*

B. Representative Smith Sought Privileged Communications From NOAA.

Representative Smith then shifted his focus to allegations that the Paper was politically motivated. He subpoenaed the NOAA scientists' internal, deliberative communications related to the Paper.⁸ Smith acknowledged that "NOAA has provided in-person briefings, publicly available data related to the [Hiatus] study, and has agreed to make several witnesses available for voluntary interviews."⁹ He further demanded, however, "the production of e-mails and other communications sent and received by NOAA officials."¹⁰ Smith attempted to justify this extraordinary subpoena by alleging in public statements that NOAA "altered the data to get the results they needed to advance this administration's extreme climate change agenda."¹¹

NOAA declined to provide the privileged correspondence. The agency explained that protecting "the confidentiality of these communications among scientists is essential to frank discourse" and consistent with "long-standing practice in the scientific community."¹²

Other scientists supported NOAA's decision, and criticized as dangerous and improper Smith's inquiry into their colleagues' confidential correspondence. Eight major professional

⁸ See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (Oct. 13, 2015), <http://tinyurl.com/h9g4rty>.

⁹ See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Penny Pritzker, Sec'y, Dep't of Commerce (Dec. 1, 2015), <http://tinyurl.com/h8exxdj>.

¹⁰ *Id.*; see also Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (Feb. 22, 2016), <http://tinyurl.com/z2ce6ul>.

¹¹ Jeff Tollefson, *US Science Agency Refuses Request for Climate Records*, Nature, Oct. 28, 2015, <http://tinyurl.com/hul3jzr>; see also Lamar Smith, *Letter to the Editor*, N.Y. Times, Dec. 9, 2015, <http://tinyurl.com/zm3nkmr> (characterizing the "motivations behind [the Hiatus] study" as "clearly suspect"); Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, and Tech., to Penny Pritzker, Sec'y, Dep't of Commerce (Nov. 18, 2015), <http://tinyurl.com/jrrbefm> (alleging the Paper was "prematurely rushed to publication ... to fit the Administration's aggressive climate agenda").

¹² Tollefson, *US Science Agency Refuses Request*, *supra* note 11.

scientific organizations (including amici AMS) wrote: “These broad inquiries threaten to inhibit the free exchange of ideas across scientific disciplines not only for NOAA, but for other government experts and the academic and industry scientists with whom they collaborate.”¹³ They explained that breaking the confidentiality of such communications would cause a dangerous “chilling effect” on government scientists and, in particular, their willingness to conduct research on politically charged topics like climate change.¹⁴ Nearly 600 scientists made a similar point in a letter praising NOAA for standing up to Smith’s “bullying tactics.”¹⁵ And nearly two dozen former NOAA scientists also weighed in: “We know firsthand that scientists need intellectual space to debate new ideas and give each other confidential feedback without worrying that an individual comment will be subject to public scrutiny at a later date.”¹⁶ They warned that releasing the scientists’ privileged emails would “significantly damage NOAA’s ability to conduct science.”¹⁷

Smith’s subpoena came under political fire as well. Representative Eddie Bernice

¹³ Letter from Am. Ass’n for the Advancement of Sci. (AAAS) et al., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 24, 2015), <http://tinyurl.com/zdpwrdrn>.

¹⁴ *Id.*; accord Letter from Am. Meteorological Soc’y (AMS) to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 4, 2015), <http://tinyurl.com/h9fze9l> (“The demand for internal communications ... imposes a chilling effect on future communication among scientists” and “can be viewed as a form of intimidation that could deter scientists from freely carrying out research on important national challenges.”); Letter from Union of Concerned Scientists (UCS) to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Feb. 26, 2016), <http://tinyurl.com/jb7ucua> (the “demands have a chilling effect by deterring federal scientists from freely carrying out their research regardless of the political or policy implications”).

¹⁵ Letter from Dr. Guy Almes, Dir., Acad. for Advanced Telecomm. & Learning Techs., et al., to Kathryn Sullivan, Adm’r, NOAA (Dec. 7, 2015), <http://tinyurl.com/zwoztdy> (explaining that releasing the NOAA scientists’ correspondence “can create a chilling effect on both federal scientists and any other scientist with whom they collaborate or correspond”).

¹⁶ Letter from Dr. Susan Avery, President, Woods Hole Oceanographic Inst., et al., to Kathryn Sullivan, Adm’r, NOAA (Dec. 7, 2015), <http://tinyurl.com/gp5lorh>.

¹⁷ *Id.*

Johnson, the ranking Democrat on the House Science Committee, criticized Smith's subpoena as a mere "fishing expedition." "[O]btaining all of the data and methods used in this study seemingly was not enough for the Majority. You also demanded internal communications by NOAA scientists regarding their scientific research," she wrote in a letter to Smith, adding that she "cannot help but note that your requests in this case echo the tactics" of other climate change contrarians "who frequently submit similar FOIA requests of climate scientists in both federal government and in state universities."¹⁸ Johnson lamented that Smith's "entire effort smacks of the discredited tactics used by climate change denial groups (oftentimes funded by the fossil fuel industry) to sway public opinion based on misinformation, innuendo, and falsehoods."¹⁹

C. Judicial Watch Requested The Same Privileged Materials Via FOIA.

While NOAA was responding to Smith's inquiries, Judicial Watch submitted a FOIA request that expressly referenced Smith's subpoena and sought many of the same privileged materials. *See* Ex. A to Answer, ECF No. 8-1. Indeed, Judicial Watch asserted in a press release that this lawsuit seeks "the same documents unsuccessfully subpoenaed by [the] House committee."²⁰ The organization also announced its belief that the "Obama administration put politics before science to advance global warming alarmism," and trumpeted its previous attempts to use FOIA to pursue "alleged data manipulation by global warming advocates."²¹

¹⁸ Letter from Eddie Bernice Johnson, Ranking Member, H. Comm. on Sci., Space, & Tech., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 23, 2015), <http://tinyurl.com/qd5psrd>.

¹⁹ Letter from Eddie Bernice Johnson, Ranking Member, H. Comm. on Sci., Space, & Tech., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 19, 2015), <http://tinyurl.com/z4dmwue>.

²⁰ Press Release, Judicial Watch, Judicial Watch Sues for Documents Withheld From Congress in New Climate Data Scandal (Dec. 22, 2015), <http://tinyurl.com/o9vk22d>.

²¹ *Id.*

NOAA released hundreds of pages of documents in response to the FOIA request. *See* Graff Decl. ¶¶ 29-31. The agency properly withheld, however, three general categories of records—internal correspondence, unfinished drafts of the Hiatus Paper, and peer review materials—that, as explained below, are the types of deliberative, predecisional records appropriately protected from release under FOIA Exemption 5. *See also* Def.’s MSJ at 8-20.

II. Public Records Laws Are Increasingly Being Misused To Pursue Privileged Correspondence And Research Materials Like Those At Issue Here.

As Representative Johnson observed (and Judicial Watch’s own press release reveals), the attempts to obtain the NOAA scientists’ privileged records in this case are unfortunately familiar. Over the past decade, organizations across the political spectrum have increasingly used public records laws to attack research findings (or even fields of study) that they dislike.²² As in this case, the records requests typically do not seek the data, methodology, or funding sources of completed studies. Rather, the requests seek privileged prepublication materials—such as preliminary drafts, private critiques from other scientists, and even researchers’ personal documents and correspondence.²³ These types of materials, however, are traditionally protected as confidential to ensure that scientists can raise new ideas and engage in robust debate without fear that their deliberations will later be publicized or taken out of context. *See* Decl. of Dr. Richard Spinrad ¶¶ 14-24, ECF No. 16-4 (hereinafter “Spinrad Decl.”).

The increasing frequency of these sorts of public records requests underscores the importance of protecting scientists’ deliberative materials from improper disclosure. As

²² *See, e.g.*, Michael Halpern, *Freedom to Bully: How Laws Intended to Free Information Are Used to Harass Researchers*, Ctr. for Sci. & Democracy, Union of Concerned Scientists (Feb. 2015), <http://tinyurl.com/hjzyq6g>; Rachel Levinson-Waldman, *Academic Freedom and the Public’s Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship at 1-5*, Am. Constitution Soc’y (Sept. 2011), <http://tinyurl.com/h87kevm>.

²³ *See* Halpern, *Freedom to Bully*, *supra* note 22, at 2.

explained in greater detail below (at 12-21), releasing such materials could stifle important research, confuse the public, and harm the government’s ability to collaborate with outside scientists and recruit or retain top talent. *See* Spinrad Decl. ¶¶ 22-26. These potentially damaging effects are exacerbated in the field of climate science, which—because of its political salience—is particularly vulnerable to partisan attacks and concerted efforts to confuse the public. *See, e.g., id.* ¶¶ 23, 25 (noting that, in the climate science context, “the potential for a chilling effect is particularly high” and “the risks of misinterpretation or confusion” are “elevated”).

In fact, the attempts to obtain the NOAA scientists’ privileged materials in this case are disturbingly similar to earlier efforts to obtain confidential records from climate scientist Dr. Michael Mann, who, by virtue of his position at a public university, was also the subject of intrusive public records requests.²⁴ Dr. Mann became a chief target of climate change contrarians because he was one of the authors of a seminal paper depicting the so-called “hockey stick” curve, which showed a spike in global temperature over the past century and a half.²⁵

As in this case, Dr. Mann’s emails were initially the subject of a failed civil subpoena by a political figure. Virginia Attorney General Ken Cuccinelli tried, unsuccessfully, to subpoena all of Dr. Mann’s personal emails with more than thirty other scientists during his tenure at the University of Virginia. *See Cuccinelli v. Rector & Visitors of Univ. of Va.*, 722 S.E.2d 626 (Va. 2012) (holding that the Attorney General lacked authority to make the demands). But also like

²⁴ Representative Johnson made this same connection between the present case and the Dr. Mann dispute, describing both as “invasive fishing expeditions in search of a pretext to discredit” climate scientists. Johnson Oct. 23 Letter, *supra* note 18 (quoting Editorial, *Harassing Climate-Change Researchers*, Wash. Post, May 29, 2011, <http://tinyurl.com/zg8p75o>).

²⁵ *See* Michael E. Mann et al., *Northern Hemisphere Temperatures During the Past Millenium: Inferences, Uncertainties, and Limitations*, 26 *Geophysical Res. Letters* 759 (1999).

here, another organization that frequently files public records requests, the American Tradition Institute²⁶, then stepped in and tried to obtain the privileged records via that method instead.

The Virginia Supreme Court unanimously rejected the attempt to obtain Dr. Mann’s emails in an opinion that strongly affirmed the importance of protecting the confidentiality of scientists’ correspondence. *See Am Tradition Inst. (“ATI”) v. Rector & Visitors of Univ. of Va.*, 756 S.E.2d 435, 442 (Va. 2014). The state high court quoted at length an affidavit from the University Provost explaining that “compelled disclosure of [scientists’] unpublished thoughts ... and personal scholarly communications would mean a fundamental disruption of the norms and expectations which have enabled research to flourish.” *Id.*

Although the *ATI* case involved a state-law exemption for public records at institutions of higher education, the same rationales extend to protecting such records under the deliberative process privilege of FOIA Exemption 5. Indeed, the West Virginia Supreme Court later relied on the *ATI* opinion (and the declaration quoted above) in applying this Court’s federal deliberative process precedent to its own state analogue. *See Highland Mining Co. v. W. Va. Univ. Sch. of Med.*, 774 S.E.2d 36, 53-54 (W. Va. 2015) (“The same reasoning applies with equal force here.”). The court in *Highland Mining* rejected a coal company’s attempt to use a public records statute to discredit a public university scientist who had published articles linking the environmental impacts of surface coal mining with health problems of local residents. *See id.* at 43. The court upheld the university’s decision to withhold the same kinds of materials at issue in this case—i.e., “drafts, data compilations and analyses, proposed edits, e-mails and other communications, and peer review comments and responses relate[d] to the planning, preparation

²⁶ The American Tradition Institute, now known as the Energy and Environmental Legal Institute, has filed similar public records requests regarding the work of scientists in many other states as well. *See Halpern, Freedom to Bully, supra* note 22, at 6.

and editing necessary to produce a final published article”—on the ground that they would improperly reveal the scientist’s deliberative process. *See id.* at 52-53.

Dr. Mann referenced the *Highland Mining* case—and his own experience in *ATI*—in an editorial that he co-authored warning about the potential abuse of public records laws in cases like this. Groups “across the political spectrum” are increasingly requesting “not only records of discussions about the strengths and weaknesses of work, but also preliminary paper drafts and private constructive criticisms from colleagues,” Dr. Mann warned, noting that “[t]hese requests can attack and intimidate [scientists], threatening their reputations, chilling their speech, disrupting their research, discouraging them from tackling contentious topics, and ultimately confusing the public.”²⁷ Presciently, Dr. Mann’s editorial appeared in the journal *Science* just weeks before the NOAA scientists’ Hiatus Paper.

III. The Deliberative Process Privilege Appropriately Protects The Confidentiality Of Government Scientists’ Correspondence And Drafts.

In enacting FOIA, Congress recognized that certain government records should appropriately be withheld from public disclosure. *See EPA v. Mink*, 410 U.S. 73, 80 (1973). Exemption 5 of FOIA codified, among other things, the common law “deliberative process privilege,” which safeguards from disclosure materials that reveal “the decisionmaking processes of government agencies.” *Wolfe v. Dep’t of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc). The privilege is designed to improve the quality of agency decisions by promoting the uninhibited exchange of ideas, and also to prevent the public confusion that could result from releasing documents that do not represent the government’s final word on a given matter. *See Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

²⁷ Michael Halpern & Michael Mann, Editorial, *Transparency Versus Harassment*, 348 *Sci.* 479 (May 1, 2015), <http://tinyurl.com/jumo5nc>.

Consistent with these policies, courts have regularly protected deliberative, predecisional scientific materials like those at issue in this case. *See, e.g., Formaldehyde Inst. v. Dep't of Health and Human Servs.*, 889 F.2d 1118, 1124-25 (D.C. Cir. 1989) (peer review comments); *Hooker v. U.S. Dep't of Health & Human Servs.*, 887 F. Supp. 2d 40, 57-59 (D.D.C. 2012) (internal email communications, edits to draft manuscript, and peer review comments); *ViroPharma Inc. v. Dep't of Health & Human Servs.*, 839 F. Supp. 2d 184, 192-94 (D.D.C. 2012) (draft scientific documents and internal review documents); *Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184, 189 (D.D.C. 2009) (draft scientific model that calibrated raw data); *Weinstein v. U.S. Dep't of Health & Human Servs.*, 977 F. Supp. 41 (D.D.C. 1997) (peer review materials); *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health & Human Servs.*, 844 F. Supp. 770, 782-83 (D.D.C. 1993) (draft manuscript and software program designed to manipulate raw data); *Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 115 (D.D.C. 1984) (draft reports); *Highland Mining*, 774 S.E.2d at 48-54 (drafts, data compilations and analyses, proposed edits, emails, and other communications related to research articles). The same policy concerns and reasoning discussed in these cases support the government's position here.

A. Protecting Drafts, Correspondence, And Peer Review Materials Allows An Uninhibited Exchange Of Ideas That Is Critical To The Scientific Process.

The deliberative process privilege recognizes that “free and uninhibited exchange and communication of opinions, ideas, and points of view” is necessary to the “wise functioning” of government. *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 n.31 (D.C. Cir. 1974). Such uninhibited communication is impossible, however, if government employees fear public disclosure of their preliminary thoughts and ideas. “[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances ... to the detriment of the decisionmaking process.” *NLRB v. Sears, Roebuck &*

Co., 421 U.S. 132, 150-51 (1975). Government employees “will not communicate candidly ... if each remark is a potential item of discovery and front page news.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001). In other words, “the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.” *Wolfe*, 839 F.2d at 773.

Accordingly, the deliberative process privilege “prevent[s] injury to the quality of agency decisions,” *Sears*, 421 U.S. at 151, by removing the “threat of cross-examination in a public tribunal,” *Montrose*, 491 F.2d at 68 n.31. The privilege ensures that government employees “feel free to provide ... their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

The work of government scientists is particularly dependent on uninhibited exchanges, and no less susceptible to the chilling effect of threatened public disclosure. This court has thus long recognized that the deliberative process privilege protects preliminary scientific drafts and correspondence because disclosure would “discourage the intellectual risk-taking so essential to technical progress.” *Chem. Mfrs*, 600 F. Supp. at 118. The “give and take of science,” UCS Letter, *supra* note 14, is the same “give-and-take of the consultative process” that Congress sought to safeguard in Exemption 5, *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Homeland Sec.*, 648 F. Supp. 2d 152, 163 (D.D.C. 2009); *see also Horsehead Indus. v. EPA*, No. 94-1299, slip op. at 15-20 (D.D.C. Oct. 1, 1996) (government scientists’ “frank exchanges of view regarding [their research] reside near the core of an agency’s deliberative process”).

Uninhibited exploration and discussion is fundamental to the scientific process. Research projects typically begin with “only rough ideas ... that are not yet fully formed.” Spinrad Decl.

¶ 14; *see also Humane Soc’y v. Super. Ct. of Yolo Cnty.*, 155 Cal. Rptr. 3d 93, 113 (Cal. Ct. App. 2013) (scientific research involves “trying new ideas, investigating lines of thinking that do not work out, suggesting ideas that turn out to be wrong”). Further, scientists do not pursue their research in isolation; they develop and refine hypotheses “through exchanges and candid debates with peers inside and outside the federal government.” Spinrad Decl. ¶ 14; *see also Chem. Mfrs.*, 600 F. Supp. at 118 (scientists “discuss hypotheses which have not matured” and “can be effectively shared only with peers in regular and confidential communication”). These exchanges take the form of informal email correspondence and formal peer review—both of which are “critical to developing and releasing scientific information of the highest possible quality.” Spinrad Decl. ¶ 15.

These important exchanges can only take place, however, if scientists are given the “intellectual space to debate new ideas and give each other confidential feedback without worrying that an individual comment will be subject to public scrutiny at a later date.” Avery et al. Letter, *supra* note 16. Accordingly, there is a “well-established presumption” within the scientific community that such exchanges “are not intended to be, and will not be, shared with a wider audience.” Spinrad Decl. ¶ 20. Indeed, peer reviewers are often expressly instructed to treat the draft as privileged and confidential, as they were in this case. *See* Graff Decl. ¶¶ 17-20. “Confidentiality is essential to ensuring the participants are free to propose new ideas or explanations without fear of misinterpretation or being taken out of context.” Spinrad Decl. ¶ 20.

The preliminary work of the NOAA scientists at issue in this case thus fall comfortably within the class of materials protected by the deliberative process privilege. Requiring the disclosure of scientists’ communications, drafts, and peer review materials would have an “obvious chilling effect” on the candid, informal exchanges and debates that are crucial to the

scientific method. *Chem. Mfrs*, 600 F. Supp. at 118; *see also Formaldehyde Inst.*, 889 F.2d at 1124-25 (deeming it “indisputable,” based on scientists’ affidavits, that “release of reviewers’ editorial comments would ... have a chilling effect on ... the candor of potential reviewers of government-submitted articles”). Absent a robust “exchange of scientific understanding” among government scientists and their colleagues, “the pace of scientific progress would slow.” Spinrad Decl. ¶ 21; *see also ATI*, 756 S.E.2d at 442 (“compelled disclosure of [scientists’] unpublished thoughts, data, and personal scholarly communications would mean a fundamental disruption of the norms and expectations which have enabled research to flourish”). Such a slowdown would deprive policymakers—as well as the general public—of important information that helps guide their own decisions. *See AAAS et al. Letter*, *supra* note 13.

For many of the same reasons, the contributions of outside scientists—through both informal correspondence and formal peer review—are also generally protected by the deliberative process privilege. *See, e.g., Wash. Research Project, Inc. v. Dep’t of Health, Educ. & Welfare*, 504 F.2d 238, 249-50 (D.C. Cir. 1974) (protecting reports prepared by outside consultant peer review panels); *Formaldehyde Inst.*, 889 F.2d at 1122-25 (external peer review comments); *Hooker*, 887 F. Supp. 2d at 54-55 (correspondence with external coauthor). Peer review comments from outside scientists can “play[] essentially the same part in an agency’s process of deliberation” as would comments from other government scientists. *Klamath Water Users*, 532 U.S. at 10; *see also Dow Jones & Co., Inc. v. Dep’t of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990) (“Exemption 5 permits an agency to protect the confidentiality of communications from outside the agency so long as those communications are part and parcel of the agency’s deliberative process.”) (emphasis omitted). Indeed, because experts specializing in a given area are spread out among various institutions, the exchange and debate necessary to the

scientific process may effectively require participation by scientists outside the federal government. *See* Spinrad Decl. ¶¶ 16-18; *see also Formaldehyde Inst.*, 889 F.2d at 1122 (when government scientists “encounter problems outside their ken” it is “preferable that they enlist the help of outside experts skilled at unraveling their knotty complexities”).

If correspondence with outside scientists were not protected by Exemption 5, those scientists might alter their comments or simply refuse to collaborate with their government counterparts. *See Formaldehyde Inst.*, 889 F.2d at 1125 (disclosure of reviewers’ comments “would very likely have a chilling effect on either the candor of potential reviewers of government-submitted articles or on the ability of the government to have its work considered for review at all”); Spinrad Decl. ¶ 24 (“If an outside scientist believed that their communications with federal scientists may become public, he or she may change the way they engage with federal colleagues in a way that slows the exchange of ideas, or they may choose not to engage in this type of valuable, informal peer review at all.”); Avery et al. Letter, *supra* note 16 (releasing correspondence will “mak[e] it more difficult for NOAA scientists to collaborate with peers in academia and the private sector”); *see also ATI*, 756 S.E.2d at 442 (similar).

Similarly, compelled disclosure would also make it more difficult for the government to recruit or retain top scientists, who would likely enjoy the benefits of confidentiality in private industry or academia and thus refuse to work where public records laws “render their communications involuntarily public.” *ATI*, 756 S.E.2d at 442; *see also AAAS et al. Letter*, *supra* note 13 (releasing NOAA scientists’ emails will inhibit agencies’ ability “to attract world-class scientific talent”). “Such a loss of technical expertise in federal agencies would then greatly harm the quality of agency decisions regarding scientific issues.” Dianna G. Goldenson, *FOIA Exemption Five: Will It Protect Government Scientists From Unfair Intrusion?*, 29 B.C.

Envtl. Aff. L. Rev. 311, 314 (2002) (arguing that the deliberative process privilege should protect government scientists from unfair intrusion into scientific research).

As mentioned above (at 10), these concerns about a chilling effect are heightened in the particular context of climate science, where scientific developments “typically generate a high level of interest or controversy.” Spinrad Decl. ¶ 23; *see also Climate Science in the Political Arena: Hearing Before the H. Select Comm. on Energy Independence and Global Warming*, 111th Cong. 25-27 (2010) (testimony of Dr. Ben Santer, Department of Energy climate scientist: “I would now be leading a different life if my research suggested that there was no human effect on climate. I would not be the subject of congressional inquiries, Freedom of Information Act requests, or e-mail threats. I would not need to be concerned about the safety of my family.”).

Indeed, these concerns are front and center in this very case. The letters opposing Smith’s subpoena all warned of the chilling effects that would occur if the NOAA scientists’ deliberative materials were ordered disclosed. Requiring disclosure of scientists’ deliberative materials—whether via subpoena or FOIA—“could deter scientists from freely carrying out research on important national challenges” like climate change. AMS Letter, *supra* note 14.²⁸

B. Protecting Such Materials From Disclosure Also Helps Avoid Public Confusion.

Protecting preliminary, deliberative scientific materials also avoids “premature disclosure of ongoing discussions that might confuse the public.” *Cleary, Gottlieb*, 844 F. Supp. at 782; *see*

²⁸ *See also, e.g.*, AAAS et al. Letter, *supra* note 13 (compelled disclosure would “have a chilling effect on the willingness of government scientists to conduct research that intersects with policy-relevant scientific questions”); UCS Letter, *supra* note 14 (compelled disclosure creates a “chilling effect by deterring federal scientists from freely carrying out their research regardless of the political or policy implications”); Almes et al. Letter, *supra* note 15 (compelled disclosure “can create a chilling effect on both federal scientists and any other scientist with whom they collaborate or correspond”).

also Russell, 682 F.2d at 1048.

Scientists frequently pursue initial ideas and preliminary hypotheses in email exchanges and early drafts of a study only to abandon them later. Withholding of non-final drafts is thus appropriate because the public “could mistakenly interpret the views within a draft as the [final] views of the agency.” *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 161 F. Supp. 3d 120, 129 (D.D.C. 2016); *see also Hooker*, 887 F. Supp. 2d at 58-59 (affirming agency’s decision to withhold drafts of scientific manuscript). The same is true for the NOAA scientists’ confidential correspondence: Release of these internal deliberations could “confuse the public by disclosing tentative rationales not ultimately published” in the final Paper. *FPL Grp., Inc. v. IRS*, 698 F. Supp. 2d 66, 83 (D.D.C. 2010); *see also Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 306 F. Supp. 2d 58, 72 (D.D.C. 2004) (describing internal email as “exactly the kind of internal predecisional discussion that, if revealed, might confuse the public”). So too might the public latch onto early, candid critiques by reviewers, even if the authors subsequently bolstered their conclusions to address and assuage the reviewers’ concerns. “There is no real public interest in such documents save perhaps for satisfying public curiosity.” *Pies v. U.S. IRS*, 668 F.2d 1350, 1353 (D.C. Cir. 1981) (“Such documents, if released, may actually mislead the public.”).

The risk of public confusion is particularly acute when it comes to prepublication scientific correspondence. Scientists familiar with a particular subject matter will often communicate with each other using “shorthand and informal language in sharing ideas that are actually highly technical and complex.” Spinrad Decl. ¶ 25. “While use of informal or shorthand language is useful and appropriate to expedite discussions among peers, more formal explanations and, in many cases, caveats, would be necessary for products that are intended to be shared with a public audience.” *Id.* Moreover, “[s]cientists use many words that mean

something very different to much of the public.”²⁹ And their informal shorthand, in particular, is often “interpreted in a vastly different manner by the lay public.” Spinrad Decl. ¶ 25; *see also Humane Soc’y*, 155 Cal. Rptr. 3d at 113-14 (“researchers communicate informally, often in jargon or shorthand, ... [in] ways open to misinterpretation”). Beyond scientists’ use of jargon and shorthand, they also often use especially blunt or harsh language in critiquing each other’s work. *See, e.g.*, Halpern, *Freedom to Bully*, *supra* note 22, at 4 (“candid discussion[] among researchers ... does not cast doubt on the strengths of [the ultimate] conclusions; rather, it constitutes the typically unvarnished, yet rigorous, deliberative process by which scientists test and refine their conclusions”). Releasing scientists’ peer review materials or email exchanges can thus easily confuse the public, especially if they are taken out of context.

Indeed, this is precisely what occurred in the so-called “Climategate” manufactured controversy of 2009, when a hacker stole thousands of emails from the University of East Anglia’s Climate Research Unit. The emails were used to confuse the public by generating “media coverage ... based on email statements quoted out of context.”³⁰ For example, opponents of greenhouse gas regulations highlighted an exchange where one scientist referred to using a “trick.” The “trick,” however, was actually just a scientific technique—i.e., a “trick of the trade”—which had been publicly disclosed in a published, peer-reviewed journal article.³¹

Numerous investigations found that nothing in the hacked emails actually called into question

²⁹ Susan Joy Hassol, *Improving How Scientists Communicate About Climate Change*, 89 *Eos* 106, 106 (Mar. 2008), <http://tinyurl.com/hkjas9g> (collecting examples).

³⁰ *Myths vs. Facts: Denial of Petitions for Reconsideration of the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, U.S. Env’tl. Prot. Agency, <http://tinyurl.com/j3xgnrf> (last visited Jan. 27, 2017).

³¹ *See, e.g., Debunking Misinformation About Stolen Climate Emails In The “Climategate” Manufactured Controversy*, Union of Concerned Scientists, <http://tinyurl.com/zto92to> (last visited Jan. 27, 2017).

the underlying climate data and research.³² Public confusion from the incident, however, still persists today. Indeed, the emails are, apparently, a reason why the new President of the United States says he questions the science behind climate change.³³

The deliberative process privilege protects government scientists' correspondence and non-final drafts from becoming part of a similar misinformation campaign in the future.

C. Protecting Such Materials Does Not Undermine Transparency.

Notwithstanding the need to protect their deliberative preliminary materials from public disclosure, scientists do not seek to isolate their actual work from public vetting. Rather, consistent with standard scientific practice, they typically embrace transparency by publishing their research in peer-reviewed journals and making their data and methodologies available via public databases. *See* AMS Letter, *supra* note 14 (“reporting on research results fully and transparently through the peer-reviewed literature and providing the capability for other scientists to replicate that research ... is a fundamental foundation of the scientific process”). The proper way to test a scientific paper is not by sifting through email correspondence and non-final drafts. Instead, the public can test the accuracy of government science—without threatening the deliberative process—by independently evaluating and vetting the final results. *See, e.g.,* AAAS et al. Letter, *supra* note 13 (“part of the purpose of placing research into the

³² *See, e.g., id.* (collecting investigations); *Myths vs. Facts*, *supra* note 30; Jess Henig, *Some ‘Climategate’ Conclusions*, FactCheck.Org, Apr. 15, 2010, <http://tinyurl.com/28qfqwr>; Editorial, *Closing the Climategate*, 468 *Nature* 345 (Nov. 18, 2010), <http://tinyurl.com/gnl213y> (although some hacked emails exhibited “bravado” and “rudeness,” such “robust exchanges were typical in science” and reflective of the sometimes “bruising process” of peer review).

³³ *See, e.g., Donald Trump’s New York Times Interview: Full Transcript*, N.Y. Times (Nov. 23, 2016), <http://tinyurl.com/j3on4f3> (“[Climate change is] a very complex subject. I’m not sure anybody is ever going to really know. ... [T]hey say they have science on one side but then they also have those horrible emails that were sent between the scientists. Where was that, in Geneva or wherever five years ago? Terrible.”).

scholarly record is so other scientists can attempt to replicate, confirm, or refute it”).

Consistent with this practice, the deliberative process privilege does not prevent the disclosure of underlying data in the government’s control where that data would not expose the scientists’ deliberative process. *Compare, e.g., Sw. Ctr. for Biological Diversity v. USDA*, 170 F. Supp. 2d 931, 941 (D. Ariz. 2000) (ordering release of “raw research data,” which “itself does not expose the deliberative process”), *with Chem. Mfrs.*, 600 F. Supp. at 117-19 (exempting preliminary data from release where scientists have not yet completed a final report).³⁴

Indeed, this distinction between underlying research data and other, more deliberative materials is reflected in the disclosure rules regarding federally funded research. *See* OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, 64 Fed. Reg. 54,926 (Oct. 8, 1999). Under those rules, federal grant recipients must turn over only “research data,” which is defined as “the recorded factual material commonly accepted in the scientific community as necessary to validate research findings.” *Id.* at 54,930. However, recognizing “the importance of ensuring that [those rules do] not interfere with the traditional scientific process”—wherein “scientists need to deliberate over, develop, and pursue alternative approaches in their research,” *id.* at 54,926-54,927—this definition specifically *excludes* “preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues,” *id.* at 54930; *see also Am. Chem. Council, Inc. v. U.S. Dep’t of Health & Human Servs.*, 922 F. Supp. 2d 56, 62 (D.D.C. 2013) (same). In other words, it exempts from compelled disclosure exactly the types of deliberative, predecisional materials at

³⁴ Of course, some data may still be exempt from disclosure for other reasons. *See, e.g.,* 5 U.S.C. § 552(b)(6) (exempting “medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”).

issue in this case.³⁵

Moreover, as described above, NOAA here complied with all the scientific transparency norms by publicly posting on its website the datasets underlying the Hiatus Paper even before Representative Smith had requested them. *See* Moller Letter, *supra* note 3. And the agency went above and beyond by sending its scientists to explain their methodology and answer questions posed by the congressional committee in person. *See* Dolan Oct. 27 Letter, *supra* note 5. The scientific organizations highlighted NOAA's transparency in their opposition to Smith's subpoena, and "applaud[ed] the open access to data and methodologies that NOAA consistently achieves." AMS Letter, *supra* note 14; *see also* AAAS et al. Letter, *supra* note 13 ("The data and methodology of the paper in question have been publicly shared and discussed directly with committee staff."); UCS Letter, *supra* note 14 ("NOAA made all data and methodology publicly available. Not a shred of evidence of scientific misconduct has surfaced."). Thus, as NOAA noted, if anyone "doubts the integrity of the study," they have all the "tools [they] need[] to commission a competing scientific assessment." Sullivan Nov. 20 Letter, *supra* note 6.

Indeed, as the scientific organizations noted, since the Hiatus Paper's publication "there have been other peer-reviewed research papers published by university scientists and derived from other independent data sources that have also analyzed the climate hiatus." AAAS et al.

³⁵ The deliberative process privilege also likely would not prevent disclosure of any outside funding sources for government scientists, or undue influence by other outside parties. *See, e.g.,* Justin Gillis & John Schwartz, *Deeper Ties to Corporate Cash for Doubtful Climate Researcher*, N.Y. Times, Feb. 21, 2015, <http://tinyurl.com/zm772tz> (describing FOIA request which revealed that a government astrophysicist had failed to disclose substantial outside funding). This is because—in contrast to communications with non-governmental scientists who participate in formal or informal peer review, *see supra* at 16-17—communications with outside parties who act in their own self-interest are generally not considered privileged or exempt from disclosure under FOIA Exemption 5. *See, e.g., Physicians Comm. for Responsible Med. v. Nat'l Insts. of Health*, 326 F. Supp. 2d 19, 29-30 (D.D.C. 2004).

Letter, *supra* note 13. Some of these papers—including one published earlier this month—have largely corroborated the Paper’s findings that there has been no slowdown in the rate of global warming during the 21st century.³⁶ Others, meanwhile, have pushed back on some of its conclusions.³⁷

“This is the way in which science advances,” the scientific organizations explained. AAAS et al., Letter, *supra* note 13. Not through fishing expeditions into scientists’ deliberative, confidential correspondence and preliminary drafts.

CONCLUSION

The government’s motion for summary judgment should be granted.

Respectfully submitted,

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January 27, 2017

³⁶ See, e.g., Zeke Hausfather et al., *Assessing Recent Warming Using Instrumentally Homogenous Sea Surface Temperature Records*, 3 *Sci. Advances* (Jan. 2017), <http://tinyurl.com/hetylun>; Bala Rajaratnam et al., *Debunking the Climate Hiatus*, 133 *Climatic Change* 129 (Nov. 2015), <http://tinyurl.com/j9v228x>.

³⁷ See, e.g., John C. Fyfe et al., *Making Sense of the Early-2000s Warming Slowdown*, 6 *Nature Climate Change* 224 (Feb. 2016).

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Docket No. 15-cv-2088 (CRC)

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

)	
JUDICIAL WATCH, INC.,)	
425 Third Street, SW, Suite 800)	
Washington, D.C. 20024)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 15-2088 (CRC)
)	
U.S. DEPARTMENT OF)	
COMMERCE,)	
1401 Constitution Avenue, NW)	
Washington, D.C. 20230)	
)	
Defendant.)	
_____)	

DECLARATION OF MARK H. GRAFF

Pursuant to 28 U.S.C. § 1746, I, Mark H. Graff, declare and state as follows:

1. I am currently the Freedom of Information Act (FOIA) Officer for the National Oceanic and Atmospheric Administration (NOAA), which is a part of the United States Department of Commerce (DOC). I have occupied this position since September 6, 2015. My primary duties include management of requests submitted to NOAA for records made under both the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a (PA). In that capacity, I oversee NOAA's receipt and log-in of in-coming FOIA requests, the tasking and coordination of searches for responsive records, and review of out-going responses.

2. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, upon conclusions and determinations reached and made in accordance therewith, and upon my personal examination of

the withheld and redacted documents. Additionally, this declaration includes the search terms, locations and parameters agreed upon with the plaintiffs and utilized by those who conducted the search. I am personally familiar with Plaintiff Judicial Watch's FOIA request, which is at issue in this civil action. I submit this declaration in support of a motion for summary judgment filed by the Department of Commerce in the above-captioned lawsuit.

3. This declaration provides background information on the development of a paper entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* ("Hiatus Paper" or "the Paper"), which was published in June 2015 in the journal *Science* and is the focus of the FOIA request at issue in this case. It also explains NOAA's search for records responsive to Plaintiff's FOIA request and the FOIA exemptions applied in processing the responsive records. A *Vaughn* index (Exhibit 1) provides a detailed description of information withheld by NOAA and challenged by Plaintiff, as well as NOAA's basis for those withholdings.

I. BACKGROUND

4. The National Centers for Environmental Information (NCEI), located within the NOAA's National Environmental Satellite, Data, and Information Service (NESDIS), develops use-inspired datasets, products and reports that describe average weather conditions (and changes therein) over the United States and the globe. NCEI acts as the "Nation's Scorekeeper" regarding the trends and anomalies of weather and climate, focusing on essential climatic elements such as temperature and rainfall, as well as extreme events such as hurricanes and droughts.

5. NCEI produces and maintains datasets for global ocean areas and global land areas. Changes in surface temperature over long periods are studied using several datasets that are continuously maintained and updated. There are separate datasets for the ocean and the land, which are then merged to create a global dataset.

6. Scientists throughout the government, including at agencies other than NOAA and researchers outside of the government, use NOAA's temperature datasets for a variety of purposes, including for climatic research and climate assessments. NCEI scientists are continually working on improving these datasets to provide scientists and the public with the most up-to-date and accurate information.

7. NCEI scientists periodically interpret and analyze global datasets and release to the public the most up-to-date climate science, often through publication in scientific journals. NCEI scientists use the most recent information from these datasets to propose new scientific theories and also re-evaluate earlier conclusions reached within the scientific community in light of new or updated data.

8. The Hiatus Paper is an example of analysis and interpretation of the updated underlying data, work which is consistent with the mission of NOAA. Nine NOAA scientists contributed to this paper: Thomas Karl (the lead author), Dr. Anthony Arguez, Dr. Boyin Huang, Mr. Jay Lawrimore, Mr. James McMahon, Dr. Matthew Menne, Dr. Thomas Peterson, Dr. Russell Vose, and Dr. Huai-min Zhang. Thomas Karl is the former Director of NCEI. Jay Lawrimore, Dr. Russell Vose, and Dr. Huai-min Zhang are supervisory scientists at NCEI. Dr. Anthony Arguez and Dr. Matthew Menne are climate scientists at NCEI. Since the publication

of the paper, Dr. Thomas Karl and Dr. Thomas Peterson have retired, and Mr. James McMahon no longer works at NCEI.

9. The Intergovernmental Panel on Climate Change (IPCC) released a report in stages between September 2013 and November 2014 that concluded that the upward global surface temperature trend from 1998-2012 was lower than the upward global surface temperature trend from 1951-2012. This apparent observed slowing was dubbed the “hiatus.”

10. There were significant developments related to the alleged “hiatus” in the two years immediately following the release of the IPCC report. In particular, both 2013 and 2014 were among the top-five warmest years on record for the globe. In addition, NOAA scientists made significant improvements to its sea surface temperature dataset, one of the largest being a correction that accounted for the difference in data collected from buoys and ships. (Until the mid-1970s, ships were used to measure sea surface temperatures; since then, buoys have increasingly been used.) Scientists developed a method to correct for the difference between these two observing systems, and incorporated those corrections into its dataset and subsequently the paper that is the subject of this request.

11. On or about October 31, 2014, Director Karl shared with a group of NOAA scientists a draft of a paper that he had worked on himself, inspired by some of the papers exchanged previously by the NCEI scientists. The draft developed an idea for properly accounting for the “hiatus,” based on the additional two years of global temperature data and the improvements to NOAA’s sea surface temperature dataset. Director Karl asked the scientists to provide feedback to his draft.

12. The scientists who received the draft responded with feedback in various forms, including exchanging drafts of the paper with edits done via track changes and sending emails providing feedback.

13. Until the paper was submitted to *Science*, many drafts and revisions were exchanged along with emails and one-on-one discussions about various aspects of the paper, including: suggestions on how best to describe the data, opinions on statistical error uncertainty ranges, thoughts on implications of other researchers' work, and so on. Such collaboration via drafts and discussions in emails and orally is standard practice at NCEI.

14. On or about December 23, 2014, a NOAA author submitted the draft paper to *Science* via an online portal.

15. *Science* follows a formal peer review process that is described on their public website. See <http://www.sciencemag.org/authors/peer-review-science-publications>. Peer reviewers are subject matter experts in the topic of the submitted paper who are able to use their expertise to evaluate the scientific rigor and merit of the paper.

16. Peer reviewers provide feedback on an array of issues, including making an overall recommendation as to whether the paper should be published, in view of *Science's* mission and also providing more detailed critique on a range of issues. These issues include the technical rigor of the data and methods used and whether the conclusions of the report are novel or similar to work already published. See <http://www.sciencemag.org/sites/default/files/REinstr13.pdf>.

17. According to *Science*, their peer review process is anonymous. The identities of reviewers are never revealed to authors, and reviewers are instructed not to identify themselves to any entity, including the press. Reviews are shared only with the author, potentially other reviewers (for cross-comment), and the Board of the journal. See <http://www.sciencemag.org/authors/peer-review-science-publications>.

18. Reviewers are expressly instructed to treat the submitted manuscript as privileged and confidential:

The submitted manuscript is a privileged communication and must be treated as a confidential document. Please destroy all copies of the manuscript after review. Please do not share the manuscript with any colleagues without the explicit permission of the editor. Reviewers should not make personal or professional use of the data or interpretations before publication without the authors' specific permission (unless you are writing an editorial or commentary to accompany the article).

<http://www.sciencemag.org/authors/peer-review-science-publications>.

19. This is reinforced in the journal's Instructions to Peer Reviewers of reports, which states:

Confidentiality: We expect reviewers to protect the confidentiality of the manuscript and ensure that it is not disseminated or exploited. Please destroy your copy of the manuscript when you are done. Only discuss the paper with a colleague with permission from the editor. We do not disclose the identity of our reviewers.

<http://www.sciencemag.org/sites/default/files/REinstr13.pdf>.

20. The authors received via email the first round of reviews from *Science* on or about February 26, 2015. In this case, *Science* sent the manuscript to five peer reviewers. These reviewers provided their comments anonymously to NOAA through *Science*, as is standard in the peer review process for *Science*.

21. After determining the best response to all of the peer reviewer comments, the authors submitted the revised manuscript and a response to reviewer comments to *Science* via the online submission portal on or about March 27, 2015. See Categories C and D of part 2 of the *Vaughn* Index.

22. On or about April 22, 2015, the authors received the second round of reviews from *Science* via email. The authors developed responses to this second round of comments, made revisions accordingly, and submitted the revised manuscript and response to reviewer comments to *Science* via the online portal on or about May 5, 2015. *See id.*

23. After submitting the revised manuscript, the authors received notice that it would be published, received galley proofs, and approved them. On June 4, 2015, the paper was published online on the *Science* website. This was followed up by publication in the printed volume of *Science* on June 26, 2015 (Volume 348, Issue 6242, at 1469).

II. ADMINISTRATIVE PROCESSING OF PLAINTIFF'S REQUEST

24. Plaintiff's FOIA request was addressed to NOAA, which is located within the Department of Commerce ("the Department"). The request sought, in relevant part:

1. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the methodology and utilization of Night Marine Air Temperatures to adjust ship and buoy temperature data.
2. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the use of other global temperature datasets for both NOAA's in-house dataset improvements and monthly press releases conveying information to the public about global temperatures.

3. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the utilization and consideration of satellite bulk atmospheric temperature readings for use in global temperature datasets.

25. When NOAA officials first reviewed the request, they determined that it did not reasonably describe the records sought. NOAA and the Department, through counsel, conferred with Plaintiff's counsel to negotiate a clear description of the materials sought.

26. During the course of those discussions, NOAA indicated to Plaintiff that it understood Plaintiff's request to reflect an interest in the Hiatus Paper. Defendant suggested Plaintiff modify the FOIA request to call for a search for all documents and communications referring to the Hiatus Paper from October 1, 2014 through June 4, 2015. Defendant offered to search the files of the nine authors of the Study. Plaintiff confirmed its interest in the Hiatus Paper, but indicated that it sought only records referring to the topics listed in its initial FOIA request.

27. The parties ultimately "reached an agreement regarding the scope of the request and the relevant search parameters," which was memorialized in the Second Joint Status Report, submitted to this Court on March 1, 2016. Regarding the documents at issue in this litigation, the parties agreed that:

"Defendant will search the records of the nine authors of the June 4, 2015 study entitled Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus published in Science ("Karl Study") for records referring to the Karl Study and that contain the following search terms:

(1) "NMAT" and "Night Marine Air Temperatures";

(2) "ISTU", "ICOADS", and "sea ice";

(3) "satellite", "Advanced Very High Resolution Radiometer", "AVHRR", "Advanced Microwave Scanning Radiometer", and "AMSR".

For items 1, 2, and 3 of Plaintiff's FOIA request, the timeframe for the searches will be October 1, 2014 to June 4, 2015."

See Second Joint Status Report, ECF No. 10.

28. In the Third Joint Status Report, submitted to this Court on March 22, 2016, the parties agreed that NOAA, through the Department, would produce responsive, non-exempt records, as described above, to Plaintiff by May 27, 2016. *See* ECF No. 11.

29. On May 27, 2016, the Department released 102 pages of material in its entirety and 90 partially redacted pages. Defendant withheld in their entirety 8,013 pages of records. *See* May 27 Cover Letter (Exhibit 2); *see also* Fourth Joint Status Report, ECF No. 12. In that letter, NOAA informed Plaintiff that "[b]ecause the request sought records of multiple custodians, there is a significant amount of duplicative material in the responsive records." Exhibit 2.

30. NOAA made a supplemental release of records on September 16, 2016, providing Plaintiff with an additional 44 pages of released material after further review the records identified and described in the letter accompanying the May 27, 2016, production, 7 of which were partially redacted because they included Tom Karl's personal telephone number.

31. After the September release, NOAA continued to evaluate the responsiveness and exemption status of the records that had been identified. Contemporaneously with this filing (on December 15), NOAA is releasing another 62 records providing Plaintiff with additional records that were previously withheld.

32. Because of the further segregation and responsiveness review NOAA conducted that led to the release of additional material to the Plaintiff, the page counts in the May 27 cover letter (and also the Fourth Joint Status Report) originally provided to Plaintiff are no longer accurate. A complete listing of all records withheld in full or in part pursuant to an exemption is reflected in the attached *Vaughn* Index.

II. THE SEARCH PROCESS

33. After NOAA and Plaintiffs, through counsel, reached an agreement as to the terms of the search for this FOIA request, it was determined that the records requested resided within one office: NCEI. NCEI's headquarters is located in Asheville, North Carolina. This determination was based on the fact that all of the agreed-upon custodians work or had worked within NCEI during the time in which responsive records were created.

34. The nine authors of the Hiatus Paper were Thomas R. Karl, Anthony Arguez, Boyin Huang, Jay H. Lawrimore, James R. McMahon, Matthew J. Menne, Thomas C. Peterson, Russell S. Vose, and Huai-Min Zhang.

35. NOAA instructed eight of the nine authors (record custodians) that were still within NCEI to conduct a search in accordance with the parameters agreed to by the parties and memorialized in the Second Joint Status Report. NOAA specified that custodians must search their email, electronic, and paper records.

36. Each records custodian still at NCEI¹ searched his own records in accordance with these instructions. As such, all search terms and parameters of the search as agreed upon by the Plaintiff were utilized by NOAA in the search of the files where responsive records were likely to be filed.

37. There were no common areas to be searched at NCEI because the authors all kept their own files separate.

38. After the custodians collected their records, they were forwarded for responsiveness and exemption review.

39. The search conducted was reasonably calculated to uncover all relevant, non-duplicative documents.

40. The Department compiled two sets of bates-numbered files, which included, in addition to the partially redacted and fully withheld email records, placeholder pages, which are discussed further in Paragraph 49. One bates-numbered file reflects the email records, and the other bates-numbered file reflects documents, as contained on parts 1 and 2 of the *Vaughn*.

41. Each record was evaluated separately for responsiveness, and each email was deemed to be one record.

42. In the case of an email with attachment(s), responsiveness determinations were made independently for that email and any attachment(s) to that email.

43. For email records that were joined with other emails in a chain, NOAA deemed responsive any email that related to the Paper and contained an agreed-upon search term as well

¹ One custodian (Thomas Peterson) had retired by the time of the search. His archived email inbox and outbox were searched by another author who was still with NOAA at the time. No additional, non-duplicative records created by Mr. Peterson that are responsive to this request are known to have existed following the retirement of Mr. Peterson.

as other, surrounding emails that were related to or provided important context for the email that contained the search term. If an email appeared to directly relate to the subject matter of the request in an email containing the search term, a case-by-case determination was made in good faith and in the effort to maximize transparency as to whether that record was responsive even though not technically within the search terms outlined in the Second Joint Status Report.

44. The search was reasonably calculated to uncover all relevant documents and there are no known locations where additional, non-duplicative, responsive material is likely to be found. Accordingly, all files determined to be reasonably likely to contain responsive, non-duplicative material were searched.

III. The Vaughn Index

45. I have read the *Vaughn* index attached as Exhibit 1 and reviewed the documents referenced in that index. Based on my review of the documents and on information provided me in the course of my official duties, I have determined that the material redacted from the referenced documents falls within the enumerated FOIA exemptions identified in the index.

46. The *Vaughn* index is divided into two parts. The first part covers responsive emails that were withheld or redacted. It identifies each record by Bates stamp numbers (which correspond to the numbering on records provided to Plaintiff), the originator, the recipient(s), the date of the record, the title of the email, the exemption invoked, and the basis for withholding.

47. Due to how the email records are stored in and were printed from the user's email accounts, some email records are duplicative but certain copies truncate the metadata for that record email (e.g., the sender, recipient, subject line, who was cc'd on the records). Sometimes

NOAA was able to reconstruct the information by looking to duplicate instances that were printed differently, or by going to the original files. We have generally inferred that the subject line that prints at the top of the printed email chain carried through for individual email records connected to that string of emails.

48. The second part of the *Vaughn* index covers non-email documents that were withheld in their entirety, except for a relatively small number of documents that were released to Plaintiffs upon further review. These documents consist almost exclusively of five categories of records. Records that fell into one of the five categories are labeled in the *Vaughn* index by a letter that corresponds to a category. The few exceptions that do not fall into one of the five categories have a more detailed description.

49. The *Vaughn* index reflects occasional “gaps” in the Bates stamp numbering. For example, *Vaughn* part one reflects an entry for bates page 1, and the next entry is for bates page 4. Such “gaps” exist for three reasons. First, not all pages had redacted information. Only pages with redacted information are accounted for on the *Vaughn*. Second, NOAA, in an effort to be transparent during production, included pages that served as “placeholders” for records in email chains that were removed because those records were either non-responsive or were fully withheld under Exemption 5. For example, if one page with responsive records was produced with redactions, followed by four fully withheld pages of records, the four fully withheld pages were represented in the production by a placeholder page that indicated four pages of material had been withheld as either not responsive or as exempt under Exemption 5. That placeholder page was bates stamped during the initial production, but NOAA has not listed it in the *Vaughn*

index. And third, NOAA removed bates-marked documents that were non-responsive that had been inadvertently bates stamped during the initial production. The withheld records, if responsive, are represented elsewhere in the *Vaughn* index.

50. As reflected in the first part of the *Vaughn* index, NOAA withheld or redacted emails under Exemption 5 because they are protected by the deliberative process privilege. *See, generally, Vaughn* part 1. These records are inter-agency or intra-agency communications. The bulk of this information reflects the predecisional and deliberative exchange of ideas and recommendations among scientists within and outside NOAA as NOAA scientists developed and edited the Hiatus Paper or discussed the underlying analysis of the datasets for purposes of developing the paper. The information also includes communications among NOAA personnel carrying out related agency deliberations such as development of public communications and presentations to Congress. The communications are, unless otherwise indicated, among NOAA personnel and reflect agency deliberations or input to agency determinations. These deliberations were in preparation for agency decisions, including how to analyze and present the data and interpretation. A relatively small number of the deliberative communications reflect input from non-federal scientists who were contacted either by one of the authors or by the journal *Science* to provide feedback and input on the Paper. These non-federal scientists provided NOAA's scientists input for the agency's ongoing processes of developing the Hiatus Paper, as well as providing input for the agency's potential updating of underlying datasets and analysis based on those datasets. Additionally, one scientist provided input to inform the agency's development of a communications plan for the paper.

51. In addition to the emails redacted or withheld, NOAA withheld drafts of the Hiatus Paper. *See Vaughn* part two Category A. These documents are inter-agency or intra-agency drafts. This category includes the drafts of the “supplementary materials” that accompanied the Hiatus Paper and were made available for download by *Science* upon publication of the Paper. Category A in the *Vaughn* Index sometimes lists the draft paper text, figures and supplementary materials as one entry and sometimes separately. These were pre-decisional drafts that contained the opinions and recommendations of one or more NOAA authors; draft language, data, and data interpretation for consideration by other NOAA authors; comments on previous drafts of the paper; and/or responses to other NOAA authors’ or expert reviewers’ comments on earlier drafts of the paper. Disclosure of deliberative draft documents that were not ultimately finalized or adopted by NOAA risks confusing the public concerning NOAA’s position and also risks data or statements being taken out of context. Disclosure of these deliberative draft materials would also seriously undermine the quality and integrity of NOAA’s decisionmaking process, by deterring NOAA staff or experts outside the agency who are collaborating in development of the agency’s work from expressing their candid views on the development of data analysis and presentation.

52. NOAA also withheld documents that contain questions for discussion and draft graphs that were circulated by an author and created for author discussions during the development of the Hiatus Paper. *See Vaughn* part two Category E. These records are inter-agency or intra-agency documents. These documents are deliberative and pre-decisional, as they

reflect NOAA scientists' deliberations as to what constitutes the best data analysis and presentation for the Hiatus Paper.

53. NOAA also withheld drafts of a cover letter from Tom Karl to *Science* magazine in response to peer review comments. *See Vaughn* part two Category B. These records are inter-agency or intra-agency drafts. These drafts are predecisional and deliberative in that they include discussions and exchanges among authors in determining what to include, and how to present, their formal letter to accompany their peer review responses. The draft cover letters to *Science* contain edits or otherwise do not include the final wording of the letter, reflecting that the scientists' approach had not been finalized at that point.

54. NOAA also withheld draft responses to peer reviewers enlisted by *Science* as part of that journal's peer review process. *See Vaughn* Index part two Category C. These records are inter-agency or intra-agency drafts. These drafts reflect pre-decisional discussions and proposed responses to peer review comments. The drafts contain opinions and recommendations of one or more NOAA authors; draft language, data, and data interpretation for consideration by other authors; comments on previous drafts of the responses to peer reviewers; and/or responses to other authors' comments on earlier drafts of the responses to peer reviewers. These drafts helped the NOAA authors determine how best to respond to comments provided during the peer review process initiated by the submission of the Hiatus Paper to *Science* for potential publication. These documents are internal, pre-decisional drafts that reflect the view of NOAA authors as to how to present their response to peer review feedback.

55. NOAA also withheld the final responses to peer reviewers enlisted by *Science* as part of that journal's peer review process. See *Vaughn* Index Part 2 Category D. These records are inter-agency or intra-agency documents. These documents are predecisional and deliberative because they are responses to constructive criticism and advice submitted by scientific experts as part of the confidential peer review process for papers submitted to scientific journals. The responses were submitted as part of a process to assist in the authors' deliberations regarding whether and in what form to publish the paper. Confidentiality is important to the peer review process, and disclosure of the responses to peer reviews would discourage the sharing of candid thoughts of both the reviewers and of the scientists.

56. In addition to this formal peer review, NOAA's authors also welcomed the assistance of informal peer review from a limited group of scientific experts in evaluating the underlying datasets and developing the Hiatus Paper. It is common for NOAA scientists to seek input from other qualified experts to get a second opinion on a working hypothesis or to provide expertise that an author's affiliated organization may lack. Sometimes those scientists are employed outside the federal government, but they share the common goal with NOAA of advancing scientific inquiry and developing accurate information on climate science.

57. This collegial relationship and shared goals lays the groundwork for an author to reach out for the kind of honest, confidential feedback necessary to formulate a sustainable, justified scientific conclusion.

58. Each of these scientists who offered their assistance is highly regarded in their specialized fields. Their prior work represents a portion of the prior published literature on the

alleged hiatus. Some of those works were consulted by the team in developing the “hiatus” paper and were cited as references in it.

59. One of the outside scientists who contributed (and is listed in the “Acknowledgements” section of the Hiatus Paper) is Dr. Gerald (Jerry) A. Meehl, an affiliate with the National Center for Atmospheric Research (NCAR), which is a National Science Foundation Federally Funded Research and Development Center. *See* <https://www2.ucar.edu/about-us/quick-facts>. In November 2014, Director Karl emailed Dr. Meehl and invited him to comment on drafts of the paper, and he provided insights and feedback in response. *See* Bates 66 (11/27/14) (released).

60. If a paper is expected to get an unusual amount of attention, a journal may seek pre-publication reactions from experts in the field outside of that journal’s formal peer review process. On occasion, those experts who are contacted by the journal will then directly communicate with the author(s) of the article and share their thoughts on the article.

61. These communications provide important feedback to the authors on the Hiatus Paper and often provide information, relied upon by NOAA, about the external expert’s own related recent or ongoing work. These communications provide input to the continuous, ongoing work to update and improve datasets and trend analyses, as described in Paragraphs 5 through 7.

62. One outside scientist who provided input (and is cited in the references for the Hiatus Paper) is Dr. Kevin E. Trenberth, who (like Dr. Meehl) is also affiliated with the NCAR. Dr. Trenberth was contacted for his expertise by a journalist prior to publication of the Hiatus Paper and asked to provide comment on the paper. Dr. Trenberth then contacted Director Karl

by email to provide feedback and discuss implications of the conclusion in light of other literature. *See* Bates 379 (6/1/15). As discussed in paragraph 61, above, this type of input provides important feedback and also helps inform the continuous, ongoing work to update and improve datasets and trend analyses. In part, this information was also provided to inform NOAA in its deliberations as it formulated its public communications messaging for the Hiatus Paper. *See* Bates 381-382 (6/1/15).

63. Last, Dr. Kevin Cowtan, who is affiliated with the University of York in the United Kingdom, is an outside scientist who contacted Dr. Boyin and Director Karl, after being contacted by a writer at *Science* who was seeking comment on the paper before publication, during the embargo period. *See* Bates 292-293 (6/2/15). Those emails indicate that all participants understood and respected that there was an embargo on publicly disseminating or discussing the work until it was officially released on June 4. *See, e.g.*, Bates 295 (6/2/15). Director Karl indicated in an email that he would like to continue to review and incorporate Dr. Cowtan's work in NOAA's ongoing work. *See* Bates 295-296 (6/2/15). As discussed in paragraph 61, above, this type of input provides important feedback and also helps inform the continuous, ongoing work to update and improve our datasets and trend analyses.

64. Disclosure of any of this information that is pre-decisional and deliberative would inhibit candid internal discussions and expressions of ideas, recommendations, criticism, and judgments regarding the development of scientific theories and presentations of information to the public and to Congress. Disclosure of the details of these confidential discussions, drafts, and responses, could reasonably be expected to chill the open and frank exchange of comments

and opinions that occurs between NOAA scientists and a limited group of qualified outside experts at such times. It would also inhibit candid internal discussions and the expression of recommendations and judgments regarding preferred courses of action for agency personnel.

65. To the extent the redacted or withheld information contains some factual material, the authors' selection and presentation of that factual material reflects the agency's deliberative process and is therefore protected from disclosure. Singling out a particular data point in the course of a deliberative discussion reflects a preliminary judgment or argument rather than an assertion of scientific fact. There is a risk of misconstruing or taking out of context an instance where one piece of information has been singled out for purposes of an informal discussion.

66. With regard to information withheld pursuant to exemption (b)(6), NOAA has determined that the individual privacy interests outweighed the public interest in disclosure.

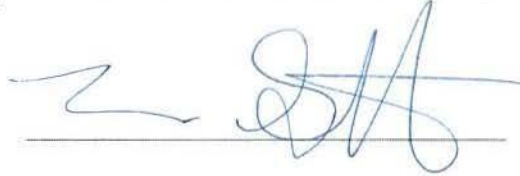
67. I am further satisfied that NOAA has reasonably concluded that there was no additional non-exempt, responsive information that could be reasonably segregated and released to the plaintiff.

IV. CONCLUSION

In summary, the Department conducted thorough searches of all components that were reasonably likely to maintain responsive records and withheld only reasonably segregable information under exemption (b)(5) and (b)(6). Additionally, the search was reasonably calculated to uncover all relevant documents, and there are no known locations where additional, non-duplicative, responsive material is likely to be found.

Pursuant to 28 U.S.C. § 1746, I hereby affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 4th day of December, 2016, Silver Spring, Maryland.

A handwritten signature in blue ink, consisting of a stylized 'M' followed by 'H' and 'G', written over a horizontal line.

Mark H. Graff

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Docket No. 15-cv-2088 (CRC)

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendant U.S. Department of Commerce hereby moves for summary judgment on all of Plaintiff's claims. This motion is supported by a statement of material facts as to which there is no genuine issue, a memorandum of points and authorities, the Declarations of Mark Graff and Dr. Richard Spinrad, and a *Vaughn* index. A proposed order is attached.

Dated: December 15, 2016

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Docket No. 15-cv-2088 (CRC)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

In this Freedom of Information Act (“FOIA”), Plaintiff Judicial Watch requested from the National Oceanographic and Atmospheric Administration (“NOAA”), a component of the Department of Commerce, records relating to different temperature metrics and datasets.¹ The parties conferred and reached an agreement regarding the scope of the request and relevant search parameters. Using those agreed-upon parameters, NOAA conducted a search and ultimately produced responsive, non-exempt material.

Plaintiff now challenges the adequacy of NOAA’s search and all of its redactions and withholdings. But as discussed more fully herein, NOAA conducted a search that was reasonably calculated to locate all non-duplicative records in its possession responsive to Plaintiff’s request. Moreover, all of the challenged information and records that NOAA withheld were properly exempt from production. The Court should therefore grant summary judgment in favor of the Department of Commerce.

FACTUAL BACKGROUND

I. The Hiatus Paper

The FOIA request at issue centers around a June 4, 2015 study authored by NOAA scientists and published in the journal *Science* entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* (“Hiatus Paper” or “the Paper”). Between September 2013 and November 2014, the Intergovernmental Panel on Climate Change (“IPCC”) released a report in stages that concluded that the upward global surface temperature trend from 1998-2012

¹ The FOIA request also sought communications between NOAA and the House of Representatives Committee on Science, Space, and Technology. The agency made a separate production of these records, which Plaintiff’s counsel indicated in writing that Plaintiff did not intend to challenge. Therefore, this motion for summary judgment and accompanying documents do not address the agency’s response to that aspect of the request.

was lower than that from 1951-2012. Declaration of Mark Graff (“Graff Decl.”) Decl. ¶ 9 (attached herein as Exhibit A). The apparent observed slowing of the global surface temperatures was dubbed the “hiatus.” *Id.* The Hiatus Paper, drafted after that report by a team of NOAA scientists, sought to properly account for the alleged “hiatus.”

NOAA’s National Centers for Environmental Information (“NCEI”) produces and maintains datasets for global ocean areas and global land areas. *Id.* ¶ 6. Scientists throughout the government, including scientists at agencies other than NOAA, and outside of the government, use the sea surface temperature and land surface temperature datasets for a variety of purposes, including for climatic research and climate assessments. *Id.* NCEI scientists continually work to improve the datasets to provide the public the most up-to-date and accurate information. *Id.* There were two significant developments related to the “hiatus” after the IPCC’s report. In particular, 2013 and 2014 were two of the five warmest years on record for the globe. *Id.* ¶ 10. Also, NOAA scientists made significant improvements to its sea surface temperature dataset, one of largest being a correction that accounted for the difference in data collected from ships and buoys. *Id.* Buoys have been increasingly used since the 1970s to measure sea surface temperatures, and scientists developed a method to correct for the difference between these two observing systems and incorporated those corrections into the dataset. *Id.*

NCEI scientists regularly interpret and analyze datasets and release to the public the most up-to-date climate science, often through publication in scientific journals. *Id.* ¶ 7. The Hiatus Paper is an example of analysis and interpretation of the updated underlying data. *Id.* ¶ 8.

Around late October 2014, Tom Karl, then the Director of NCEI, circulated a draft paper to a group of NOAA scientists that developed an idea for properly accounting for the alleged “hiatus” based on the additional two years of global temperature data and the improvements to

NOAA's sea surface temperature dataset. *Id.* ¶ 11. Karl sought feedback on the draft paper, and a team of scientists at NOAA worked to develop a manuscript. *See id.* ¶¶ 11-13. Many drafts and revisions were exchanged among these scientists, along with emails discussing various aspects of the paper or its content, including suggestions on how best to describe the data, opinions on statistical error uncertainty ranges, thoughts on the implications of other researchers' work, and so on. *Id.* ¶ 13. Such collaboration via discussions and drafts is standard practice at NCEI. *Id.* ¶ 13.

In December 2014, the authors submitted the draft paper to the journal *Science*. *Id.* ¶ 14. Once there, the draft paper went through the journal's peer review process, in which five anonymous peer reviewers weighed in on the manuscript. *Id.* ¶ 20. When the authors received feedback, they discussed internally how to respond in writing to the comments they received, and also revised the manuscript to address the questions and concerns raised. *See id.* ¶ 21. After a second round of peer review, NOAA received word that the article would be published, and *Science* published the Paper on its website on June 4, 2015. *Id.* ¶ 23.

II. The FOIA Request and NOAA's Response

Plaintiff's FOIA request, dated October 30, 2015, sought in relevant part:

1. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the methodology and utilization of Night Marine Air Temperatures to adjust ship and buoy temperature data.
2. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the use of other global temperature datasets for both NOAA's in-house dataset improvements and monthly press releases conveying information to the public about global temperatures.
3. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the

utilization and consideration of satellite bulk atmospheric temperature readings for use in global temperature datasets.

Graff Decl. ¶ 24; *see also* Answer, ECF No. 8-1.

Upon review of the request, NOAA officials determined that it did not reasonably describe the records requested. Graff Decl. ¶ 25. Through counsel, NOAA conferred with Plaintiff to negotiate a clear description of the material sought. *Id.* During the course of those discussions, NOAA indicated to Plaintiff that it understood the request to reflect an interest in the Hiatus Paper and accordingly suggested modifying the request to call for a search for all documents and communications referring to the Hiatus Paper from its nine authors. *Id.* ¶ 26. Plaintiff confirmed its interest in that study, but indicated that it sought only records referring to the topics listed in its initial FOIA request. *Id.*

The parties ultimately “reached an agreement regarding the scope of the request and relevant search parameters.” Second Joint Status Report, ECF No. 10 at 2. For Plaintiff’s FOIA request, NOAA agreed to search the records of the nine authors of the Hiatus Paper for records referring to that paper and that contain one of the following search terms: “NMAT,” “Night Marine Air Temperatures,” “ISTI,” “ICOADS,” “sea ice,” “satellite,” “Advanced Very High Resolution Radiometer,” “AVHRR,” “Advanced Microwave Scanning Radiometer,” and “AMSR.” *Id.*; Graff Decl. ¶ 27.

After NOAA directed those custodians to run the agreed-upon searches, it made a production on May 27, 2016 of 102 pages of material in its entirety and 90 partially redacted pages. *See* Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12 at 2. NOAA withheld in their entirety 8,013 pages of records, and informed Plaintiff that because it sought records from nine separate custodians, a significant amount of duplicative material existed in the responsive records. *See* Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12. The parties then

discussed the details of potential challenges to NOAA's production, and NOAA agreed to provide Plaintiff a draft *Vaughn* index in an attempt to narrow the issues in dispute. *See* Fifth & Sixth Joint Status Report, ECF Nos. 13 & 14. Upon further review of the withheld information, on September 16, 2016, NOAA released to Plaintiff an additional 44 pages of material (7 of those pages were partially redacted to exclude Mr. Karl's cell phone number), Graff Decl. ¶ 30, and contemporaneous with this filing on December 15, 2016, NOAA released an additional 62 records, Graff Decl. ¶ 31.

STANDARD OF REVIEW

A court reviews an agency's response to a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B). "FOIA cases are typically and appropriately decided on motions for summary judgment." *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009). In deciding at the summary judgment stage whether an agency has fully discharged its obligations under FOIA, "the agency must show, viewing the facts in the light most favorable to the requester, that there is no genuine issue of material fact." *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994).

ARGUMENT

I. NOAA's Search Was Reasonable, Adequate, and Satisfies Its Obligation Under the FOIA

A. The Standard for an Adequate Search

The touchstone for determining whether an agency should prevail on a motion for summary judgment in FOIA litigation is whether the agency demonstrates that its "search for documents was adequate." *Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009). An agency's search is adequate if "it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The adequacy of a FOIA

search is thus gauged “not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.” *Ancient Coin Collectors Guild v. U.S. Dep’t of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) (quoting *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003)). In short, “[t]he adequacy of the search . . . is judged by a standard of reasonableness.” *Steinberg*, 23 F.3d at 551; *see also DiBacco v. U.S. Army*, 795 F.3d 178, 194–95 (D.C. Cir. 2015) (“A search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request.” (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986))).

“In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith.” *Id.* (quoting *Weisberg v. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). Such affidavits are sufficient if they “set[] forth the search terms and the type of search performed, and aver[] that all files likely to contain responsive materials (if such records exist) were searched.” *Chambers v. U.S. Dep’t of Interior*, 568 F.3d 998, 1003 (D.C. Cir. 2009) (quoting *McCready v. Nicholson*, 465 F.3d 1, 7 (D.C. Cir. 2006)). This standard does not require that “the affidavits of the responding agency set forth with meticulous documentation the details of an epic search for the requested records.” *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). “Rather, in the absence of countervailing evidence or apparent inconsistency of proof, affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice” *Id.* Moreover, “[s]uch agency affidavits attesting to a reasonable search ‘are afforded a presumption of good faith,’ and ‘can be rebutted only with evidence that the agency’s search was not made in good faith.’” *Riccardi v. US Dep’t of Justice*, 32 F. Supp. 3d 59, 63 (D.D.C. 2014) (quoting *Def. of Wildlife v. U.S. Dep’t of Interior*, 314 F. Supp.2d 1, 8 (D.D.C. 2004)).

Finally, courts in this circuit recognize the “well-worn rule . . . that the adequacy of a FOIA search is not to be judged by its results.” *Rosenberg v. United States Dep’t of Immigration & Customs Enf’t*, 13 F. Supp. 3d 92, 104 (D.D.C. 2014). “The question is not ‘whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was *adequate*.’” *Steinberg*, 23 F.3d at 551 (quoting *Weisberg v. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)) (emphases in original). Thus, courts have rejected challenges to the adequacy of a search, even when a “slim yield may be intuitively unlikely” and a “reasonable observer would find th[e] result[s] unexpected.” *Ancient Coin Collectors Guild*, 641 F.3d at 514. Moreover, “mere speculation that as yet uncovered documents might exist[] does not undermine the determination that the agency conducted an adequate search for the requested records.” *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004); *see also Sheffield v. Holder*, 951 F. Supp. 2d 98, 101 (D.D.C. 2013) (noting that a requester “cannot rest . . . on mere conjecture or ‘purely speculative claims about the existence and discoverability of other documents’” (quoting *Elec. Privacy Info. Ctr. v. Dep’t of Homeland Sec.*, 384 F. Supp. 2d 100, 107 (D.D.C. 2005))).

B. NOAA Conducted an Adequate Search

As set forth in Mark Graff’s Declaration, NOAA’s search for records responsive to Plaintiff’s FOIA request was more than adequate. *See Perry*, 684 F.2d at 127. Judicial Watch and NOAA reached an agreement as to how the search would be carried out. The agency would search the records of the nine Hiatus Paper authors for any record referring to that study and containing the term “NMAT,” “night marine air temperatures,” “ISTI,” “ICOADS,” “sea ice,” “satellite,” “advanced very high resolution radiometer,” “AVHRR,” “advanced microwave scanning radiometer,” and “AMSR.” Graff Decl. ¶ 27; Second Joint Status Report at 2, ECF No.

10. The timeframe for the search would be October 1, 2014 to June 4, 2015. *Id.* NOAA determined that the records requested resided within one office, NCEI, because all of the agreed-upon custodians work or had worked there during the time frame in which responsive records were created. *Id.* ¶ 33. NOAA then directed those custodians to search their email, electronic, and paper files for records referring to the Karl Study and containing the agreed-upon search terms. *Id.* ¶ 35. Those scientists searched their electronic files (including email) and non-electronic files, collected any potentially responsive material, and forwarded that material for responsiveness and exemption review. *Id.* ¶¶ 36-38.² There were no common areas at NCEI for NOAA to search. *Id.* ¶ 37. Thus, all files determined to be reasonably likely to contain responsive, non-duplicative material were searched. *Id.* ¶ 44.

On this record, NOAA's search should be upheld under FOIA. NOAA has provided "a reasonably detailed [declaration], setting forth the search terms and the type of search performed," and averred that all files likely to contain responsive, non-duplicative materials were searched. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby*, 920 F.2d at 68). NOAA has "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68.

II. NOAA Properly Withheld Information Under Exemption 5

FOIA does not require disclosure of "matters that are . . . inter-agency or intra-agency memorandums or letters [which] would not be available by law to a party other than an agency in

² One custodian had retired from NCEI by the time the search was conducted and so that former employee's archived email was searched by another custodian. *See* Graff Decl. ¶ 36 n.1. No additional records responsive to this request from that author are known to have existed following his retirement. *See id.*

litigation with the agency.” 5 U.S.C. § 552(b)(5). “Exemption 5 . . . exempt[s] those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 thus protects the attorney-client privilege, the attorney work product privilege, and the deliberative process privilege. *Id.*; see also *Rockwell Int’l Corp. v. Dep’t of Justice*, 235 F.3d 598, 601 (D.C. Cir. 2001).

The deliberative process privilege “allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). According to the D.C. Circuit,

There are essentially three policy bases for this privilege. First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that officials should be judged by what they decided, not for matters they considered before making up their minds.

Russell v. Dep’t of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (quoting *Jordan v. Dep’t of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978)).

The privilege is necessary because “those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process.” *Sears*, 421 U.S. at 150-51. “[E]fficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to ‘operate in a fishbowl.’” *EPA v. Mink*, 410 U.S. 73, 87 (1973), *abrogated on other grounds*, Pub. L. No. 93-502, 88 Stat. 1561 (1974). There are “[t]wo requirements [that] are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative.” *In re Sealed Case*, 121 F.3d at 737.

The agency is best situated “to know what confidentiality is needed ‘to prevent injury to the quality of agency decisions.’” *Chem. Mfrs. Ass’n v. Consumer Prod. Safety Comm’n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting *Sears*, 421 U.S. at 151). NOAA’s justification for asserting Exemption 5 is “sufficient if it appears ‘logical’ or ‘plausible.’” *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007).

Here, NOAA properly withheld information under Exemption 5 that is protected by the deliberative process privilege because the information withheld reflects deliberations in preparation for decisions of how to analyze and present data and theory, as well as decisions about how to respond to peer review comments and deliberations on developing public communications and congressional presentations. *See* Graff Decl. ¶¶ 50-63. Disclosure of such information, which is predecisional and deliberative, and contains selected factual material intertwined with opinion, would inhibit candid internal discussions and the expression of recommendations and judgments. *Id.* ¶ 64. Disclosure of the details of these confidential discussions and drafts could reasonably be expected to chill the open and frank exchange of comments and opinions that NOAA officials engage in, as well as inhibit candid internal discussions and recommendations regarding preferred courses of action for agency personnel. *Id.*

The documents withheld in full or in part under the deliberative process privilege fall generally into three categories: (1) drafts of the Hiatus Paper; (2) internal deliberations, including email exchanges; and (3) peer review materials, both formal and informal. As explained below and in the attached *Vaughn*, each redacted or withheld document contains both predecisional and deliberative information. Accordingly, NOAA properly asserted Exemption 5 based on the deliberative process privilege.

1. Drafts of the Hiatus Paper

NOAA withheld pursuant to Exemption 5 inter- or intra-agency, predecisional, and deliberative draft versions of the Hiatus Paper (including drafts of its accompanying figures and “supplementary materials”) that were produced while NOAA scientists were developing the Paper. Graff Decl. ¶ 51.³ “[D]raft documents by their very nature, are typically predecisional and deliberative, because they reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors.” *In re Apollo Grp., Inc. Sec. Litig.*, 251 F.R.D. 12, 31 (D.D.C. 2008) (non-FOIA case) (citation omitted). Accordingly, “drafts are commonly found exempt under the deliberative process exemption.” *People for the Am. Way Found. v. Nat’l Park Serv.*, 503 F. Supp. 2d 284, 303 (D.D.C. 2007). Among other reasons for this, disclosure of “decisions to insert or delete material or to change a draft’s focus or emphasis . . . would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work.” *Dudman Commc’ns Corp. v. Dep’t of Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987). Indeed, drafts are ordinarily exempt regardless of whether or to what extent segments of the draft made their way into the final product: “If the segment appeared in the final version, it is already on the public record and need not be disclosed. If the segment did not appear in the final version, its omission reveals an agency deliberative process: for some reason, the agency decided not to rely on that fact or argument after having been invited to do so.” *Exxon Corp. v. Dep’t of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983) (quoting *Lead Industries Ass’n v. OSHA.*, 610 F.2d 70, 86 (2d Cir. 1979)); see *ViroPharma Inc. v. HHS*, 839 F. Supp. 2d 184, 193 (D.D.C. 2012) (“The choice of what factual

³ The fact that some draft versions were shared for peer review purposes outside of the federal government does not affect those drafts’ status as inter- or intra-agency. See *infra* at Section II.3.

material . . . to include or remove during the drafting process is itself often part of the deliberative process, and thus is properly exempt under Exemption 5.”); *cf. Marzen v. HHS*, 825 F.2d 1148, 1155 (7th Cir. 1987) (noting that privilege “protects not only the opinions, comments and recommendations in the draft, but also the process itself”).

These drafts are predecisional inasmuch as they were generated to assist the agency in preparing the final version of the Hiatus Paper. *See Quarles v. Dep’t of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (explaining that materials are predecisional when “prepared in order to assist an agency decisionmaker in arriving at . . . decisions”). And they are deliberative in that they reflect the development of the final paper; these non-final, predecisional drafts contain opinions and recommendations of the NOAA authors; draft language, data, and data interpretation for consideration by other NOAA authors; comments on previous drafts of the paper; and/or responses to other NOAA authors’ or peer reviewers’ comments on earlier drafts of the paper. *See* Graff Decl. ¶ 51; *Vaughn* part 2 Category A. Withholding this material under Exemption 5 was proper, and the release of such drafts would inhibit agency scientists from expressing their views and deter NOAA scientists from participating candidly in the development of scientific products in the future. *See* Graff Decl. ¶ 51.⁴

2. Communications Among NOAA Personnel

Also integral to the drafting of the Hiatus Paper, the authors frequently communicated and exchanged ideas with one another via email during the Paper’s development. Here, NOAA

⁴ Equally appropriate, NOAA’s *Vaughn* also shows that the agency withheld draft documents that aided in or related to the development of the Paper, such as “[d]raft graphs of land and ocean temperature data created by NOAA scientists to be used in the paper,” *Vaughn* part 2 at bates pages 1170-73, “[d]raft graphs and charts of SST data to be used in [the] development of the paper,” *Vaughn* part 2 at bates pages 2071-76, and a “[d]raft powerpoint by [an] author presenting information on global temperature and presenting data analysis done by NOAA scientists for the paper,” *Vaughn* part 2 at bates pages 1876-86.

withheld inter- or intra-agency, predecisional, and deliberative communications. *See* Graff Decl. ¶ 50. In pursuing a research objective, scientists may begin with only a rough idea, and then develop, test, and revise that idea as data is collected and interpreted. Declaration of Richard W. Spinrad (“Spinrad Decl.”) ¶ 14 (attached herein as Exhibit B). Possible interpretations are generated and tested in part through candid debates and exchanges among peers. *Id.* ¶ 15. Indeed, the exchange and debate among peers is the mechanism that allows NOAA to ensure its scientific products are robustly developed and accurately tested. *Id.* ¶ 16. And there is a general and well-established presumption that such discussions are not intended to be, and will not be, shared with a wider audience, as confidentiality is essential to ensuring participants feel free to propose new ideas or explanations without fear of misinterpretation or being taken out of context. *Id.* ¶ 20. It is critical that this type of information be protected so as not to chill candid exchanges and debates, as well as to avoid the risk of confusing the public with preliminary or incomplete information. *See id.* ¶¶ 23-25.

NOAA’s *Vaughn* index reinforces that these types of predecisional and deliberative communications occurred here, were integral to the development of the Hiatus Paper, and were appropriately withheld or redacted. *See Abteu v. U.S. Dep’t of Homeland Sec.*, 808 F.3d 895, 898 (D.C. Cir. 2015) (“[O]fficials should be judged by what they decided, not for matters they considered before making up their minds” (citation and internal quotation mark omitted)). For example, NOAA is redacting or withholding communications between scientists in which authors asked for clarification on data analysis conducted for developing the Paper, *Vaughn* part 1 at bates pages 22-23, shared opinions on the results of a draft data analysis for developing the Paper, *Vaughn* part 1 at bates page 15, offered opinions as to the best approach to take in the Paper, *Vaughn* part 1 at bates pages 300, 335, 362-63, and provided opinions on statistical error

uncertainty ranges for development of the Paper, *Vaughn* part 1 at bates page 245. Moreover, NOAA withheld a document that presented questions and draft graphs to spur discussion among the NOAA scientists. This document was created and circulated for the purpose of author discussions during the development of the Hiatus Paper, and shows NOAA scientists considering what constitutes the best data analysis and presentation for the Paper. *See Vaughn* part 2 Category E; Graff Decl. ¶ 52.⁵

In addition to withholding communications concerning the development of the Hiatus Paper, NOAA also withheld communications and information reflecting the development of a plan by its officials for communications and press release in preparation for publication of the paper, *e.g. Vaughn* part 1 at bates page 289-90, *Vaughn* part 2 at bates page 7446-50, as well as the agency's development of a presentation to Congress, *e.g., Vaughn* part 1 at bates pages 143, 324 (explaining that redacted email reflected "NOAA scientist discussing climate change research and developing the agency's presentation for Congress"). This withheld information, which reflects NOAA's development of how to brief Congress and the public, is predecisional and deliberative and falls squarely within Exemption 5. *E.g., Judicial Watch, Inc. v. U.S. Dep't of the Treasury*, 796 F. Supp. 2d 13, 31 (D.D.C. 2011) (noting email discussing response to press inquiry protected under deliberative process privilege).

All of this material is precisely the sort of information that the deliberative process privilege is designed to protect. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854,

⁵ Similarly, NOAA withheld information reflecting discussions among scientists concerning potential scientific inquiries. *See, e.g., Vaughn* part 1 at bates page 75 (discussing future climate research and asking for opinion on this research and on possible role of NOAA scientists in this research). Again, such material is predecisional and deliberative, and therefore is exempt from disclosure. *E.g., Sears*, 421 U.S. at 151 n.18 (explaining that protection extends to records that are part of decisionmaking process even where process does not produce actual decision by agency).

866 (D.C. Cir. 1980) (document is “predecisional” if it is “generated before the adoption of an agency policy” and “deliberative” if it “reflects the give-and-take of the consultative process”); *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 9 (2001) (explaining that deliberative process privilege’s “object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government”) (citation omitted); *Russell*, 682 F.2d at 1048 (“[T]he exemption protects not only communications which are themselves deliberative in nature, but all communications which, if revealed, would expose to public view the deliberative process of an agency.”). Moreover, any factual material in the withheld documents reflect the authors’ selection and presentation of factual material, Graff Decl. ¶ 65, and as such it too is covered by the deliberative process privilege. *See, e.g., Ancient Coin Collectors Guild*, 641 F.3d at 513 (explaining that factual material can be withheld where it reflects “an exercise of discretion and judgment calls” and that the “legitimacy of [the] withholding” turns on “whether the selection or organization of facts is part of an agency’s deliberative process”).

Because all of the redacted and withheld information is inter- or intra-agency, predecisional, and deliberative in nature, NOAA properly applied Exemption 5.

3. Peer Review Material

NOAA also withheld inter- or intra-agency material reflecting the different peer review processes its analyses and drafts underwent prior to publication of the Hiatus Paper. *Science* follows a formal peer review process in which subject matter experts evaluate the rigor and merit of the paper, and provide feedback on an array of issues. Graff Decl. ¶ 15. Those anonymous, impartial reviewers share their reviews with the authors, *Science*’s board, and potentially other reviewers (for cross-comment). *Id.* ¶ 17.

Here, *Science* sent the manuscript to five anonymous peer reviewers, and the scientists received two rounds of comments. Upon receiving these reviewers' comments, the NOAA scientists deliberated internally as to how to respond in writing to every comment received. NOAA properly withheld peer reviewer comments, the agency's internal draft responses to these peer reviewer comments, draft cover letters NOAA's scientists wrote to accompany their response, as well as the agency's final responses to peer reviewer comments. See Graff Decl. ¶¶ 53-54; *Vaughn* part 2 Category B, C, D.

The D.C. Circuit has specifically held that comments provided by peer reviewers during the peer review process for publication of scientific articles in scientific journals are covered by Exemption 5 because they are both "pre-decisional because it preceded the agency's decision whether and in what form to publish" the paper and were part of the agency's deliberative process "because the agency secured review commentary in order to make that decision." See *Formaldehyde Inst. v. U.S. Dep't of Health and Human Servs.*, 889 F.2d 1118, 1123-25 (D.C. Cir. 1989). As that Court recognized, agency scientists "must regularly rely on the comments of expert scientists to help them evaluate the readiness of agency work for publication [and i]n that sense they must rely on the opinions and recommendations of temporary consultants." *Id.* at 1125.

The scientists' draft responses to the peer reviewer comments are also covered by Exemption 5 since these materials, including personal opinions and recommendations, draft language, data, and data interpretation for consideration, as well as comments on previous drafts of the responses, reflect predecisional and deliberative discussions. See *Vaughn* part 2 Category C; Graff Decl. ¶ 54. Similarly, the final responses to peer review comments that NOAA submitted to *Science* during the peer review process reflect the agency's response to constructive

criticism and advice, and were part of the process to assist in the authors' deliberation as to whether and in what form to publish the paper. *See Vaughn* part 2 Category D; Graff Decl. ¶ 55. These final responses, then, fit comfortably within Exemption 5. *See Petroleum Info. Corp.*, 976 F.2d at 1434 (agency documents that were "prepared in order to assist an agency decisionmaker in arriving at his decision" are "predecisional" (citation omitted)); *Coastal States Gas Corp.*, 617 F.2d at 866. Finally, the draft cover letters to *Science* accompanying the scientists' responses to the peer review comments contain edits or otherwise do not include the final wording of the letter, reflecting that the scientists' final approach had not been finalized at that point. *Vaughn* part 2 Category B; Graff Decl. ¶ 53. Withholding such draft material was appropriate.

The fact that the peer review comments were sent by *Science*, and the responses to those peer reviewer comments were sent back to *Science*, does not affect their status as "intra-agency" materials that may be protected by Exemption 5. "Recognizing that the purpose of the exemption was to promote the quality of agency policy decisions and that often these policy decisions were best made by incorporating the advice of outside experts, [the D.C. Circuit] developed a 'consultant corollary' whereby communications with temporary consultants would be considered 'intra-agency' for the purposes of Exemption 5." *Judicial Watch v. U.S. Dep't of Transp.*, 950 F. Supp. 2d 213, 216 (D.D.C. 2013) (citing cases). "When communications between an agency and a non-agency aid the agency's decision-making process and the non-agency did not have an outside interest in obtaining a benefit that is at the expense of competitors, the communication must be considered an intra-agency communication for the purposes of FOIA Exemption 5." *Judicial Watch*, 950 F. Supp. 2d at 218-19 (citing *Nat'l Inst. of Military Justice v. U.S. Dep't of Defense*, 512 F.3d 677 680-85 (D.C. Cir. 2008) ("*NIMJ*"); *Lardner v. U.S. Dep't of Justice*, No. 03-0180, 2005 WL 758267, at *1 (D.D.C. Mar. 31, 2015);

see also, e.g., Hooker v. HHS, 887 F. Supp. 2d 40, 55 (D.D.C. 2012) (upholding agency’s withholding of predecisional and deliberative letter from former employee where he “played the same role in the agency’s process of deliberation after his departure that he would have played had he remained”), *aff’d*, No. 13-5280, 2014 WL 3014213 (D.C. Cir. May 13, 2014); *see also Elec. Privacy Info. Ctr. v. DHS*, 892 F. Supp. 2d 28, 46 (D.D.C. 2012) (“In order to be excluded from the exemption, the contractors must assume a position that is ‘necessarily adverse’ to the government.”).⁶

Moreover, maintaining the confidentiality of these communications is important, as disclosure would discourage the sharing of candid thoughts of the reviewers and scientists. Graff Decl. ¶ 55, 64; *see also* Spinrad Decl. ¶¶ 20-21 (explaining importance of confidentiality in developing scientific products). Here, as in *Formaldehyde*, it is “indisputable” that both “reviewers’ comments are expected to be confidential” and “disclosure of reviewers’ comments would seriously harm the deliberative process.” 889 F.2d at 1124 (internal citations and quotations omitted).

Outside of *Science*’s formal peer review process, NOAA scientists welcomed the informal peer review from a limited number of consultants in evaluating the underlying datasets

⁶ *Department of the Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), holding that Exemption 5 did not protect documents submitted by American Indian Tribes to the Interior Department addressing tribal interests that were then the subject of state and federal water allocation proceedings, does not prevent the application of the consultant corollary here. Rather, the D.C. Circuit “has allowed any communication that aids the agency’s deliberative process to be protected as ‘intra-agency,’” and “*Klamath* only modifies this by requiring that we not protect communications with interested parties seeking a government benefit that is adverse to others seeking that benefit.” *Judicial Watch*, 950 F. Supp. 2d at 218 (footnote omitted).

Also, to fall within the consultant corollary, there is no requirement that an individual must possess a contractual relationship with the agency in question. *See, e.g., NIMJ*, 512 F.3d at 679-87 (deliberative process privilege exempted from disclosure comments received by Department of Defense, in the course of issuing regulations, from non-governmental lawyers who were former high ranking governmental officials or academics or both).

and developing the Hiatus Paper. Graff Decl. ¶ 56; *see also Formaldehyde Inst.*, 889 F.2d at 1125. In the field of climate science, only a small number of scientists have the relevant, specialized expertise, *see* Spinrad ¶ 17, and it is common for scientists to seek input from colleagues both inside and outside the federal government, *id.* ¶ 19. Sometimes experts that are located outside of the federal government have an expertise that can aid the agency. *See id.* ¶ 17. The consultants here, each of whom is highly regarded in his specialized field, Graff Decl. ¶ 58, share the common goal with NOAA of advancing scientific inquiry and developing accurate information on climate science, *see id.* ¶ 56; *see also Formaldehyde*, 889 F.2d at 1122, quoting *Ryan v. Dep't of Defense*, 617 F.2d 781, 789-90 (D.C. Cir. 1980) (“In the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.”).

As the *Vaughn* and Mark Graff’s declaration make clear, withholding this informal peer review was also appropriate, as their input was used by NOAA to ensure that only the highest quality scientific product would be released. Tom Karl, for example, asked a scientist affiliated with the National Center for Atmospheric Research to comment on a draft while the paper was in development, and that scientist provided insights and feedback in response. Graff Decl. ¶ 59; *Vaughn* part 1 bates 66-67 (explaining redacted information contained feedback and review of a data analysis for the paper and raises issue for further discussion). Other climate science experts responded to the authors upon learning from *Science* of the pending publication, as commonly occurs after an author submits a high-profile scientific paper for publication. *See* Graff Decl. ¶ 60. Two other experts provided feedback on the Paper, discussed implications of the Hiatus

Paper’s conclusion, or provided and discussed data analyses, Graff Decl. ¶¶ 62-63, *Vaughn* part 1 at bates 292-93, which helped provide important feedback about the agency’s product and informed the agency’s continuous, ongoing work of updating agency datasets and trend analyses, Graff Decl. ¶¶ 62-63; *see Vaughn* part 1 at bates 295-96 (noting that expert’s work may be incorporated into a future NOAA analysis). With respect to these types of communications, a general and well-established presumption exists that these communications will not be shared with a wider audience, which is essential to scientific exchanges and the testing and refinement of ideas that help ensure that the agency’s scientific products are well developed and robust. *See Spinrad* Decl. ¶ 20. Disclosing this material could inhibit candid discussions and exchanges and chill the open and frank exchanges upon which NOAA scientists rely. *See Graff* Decl. ¶ 64.

In sum, NOAA’s *Vaughn* and declarations make plain that the agency appropriately applied Exemption 5 to redact and withhold information protected by the deliberative process privilege.

III. NOAA Properly Withheld Information Under Exemption 6

Exemption 6 protects the privacy of individuals from unwarranted invasion. Exemption 6 allows the withholding of 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). Exemption 6 requires the agency to balance the individual’s right to privacy against the public’s interest in disclosure. *See U.S. Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976); *Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991). When weighing the public interest involved in disclosure, the court considers: (1) whether disclosure would serve the “core purpose” for which Congress enacted the FOIA. *i.e.*, to show “what the government is up to,” and (2) the public interest in general, not particular interests of

the person or group seeking the information. *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 750, 775 (1989).

Here, Exemption 6 has been applied to protect information in which individuals have a recognized privacy interest, specifically, the phone numbers of NOAA scientists. *See, e.g., Vaughn* part 1 at bates 23. Because this information can be identified as applying to a specific individual, the information withheld under Exemption 6 constitutes “similar files” within the meaning of statute; courts have routinely held that phone numbers meet this threshold test. *See, e.g., Judicial Watch, Inc. v. U.S. Dep't of State*, 875 F. Supp. 2d 37, 47 (D.D.C. 2012); *Smith v. Dep't of Labor*, 798 F. Supp. 2d 274, 283 (D.D.C. 2011); *Lowy v. IRS*, No. C 10-767, 2011 WL 1211479, at *16 (N.D. Cal. Mar. 30, 2011).

This threshold test having been met, the next step is to compare the privacy interest at stake with the benefit disclosure would provide toward the public’s understanding of how government operates. *Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994). Here, there is a substantial privacy interest at stake in preventing the burden of unsolicited phone calls and harassment. *See Moore v. Bush*, 601 F. Supp. 2d 6, 14 (D.D.C. 2009); *United Am. Fin., Inc. v. Potter*, 667 F. Supp. 2d 49, 65-66 (D.D.C. 2009); *cf. Shurtleff v. EPA*, 991 F. Supp. 2d 1, 18 (D.D.C. 2013) (protecting email address). By contrast, an individual’s phone number sheds no light on the operations and activities of the agency. NOAA balances the individual’s strong privacy interests against the fact that release of this information would fail to shed any light on the conduct of governmental business, and reasonably concluded that, with regard to the information withheld pursuant to Exemption 6, the individual privacy interests outweighed any public interest in disclosure. Graff Decl. ¶ 66. *See FLRA*, 510 U.S. at 497 (“We must weigh the privacy interest . . . in nondisclosure . . . against the only relevant public interest in the FOIA

balancing analysis – the extent to which disclosure of the information sought would she[d] light on an agency’s performance of its statutory duties’ or otherwise let citizens know what their government is up to.”). Accordingly, Exemption 6 was properly applied.

IV. NOAA Has Produced All Reasonably Segregable Information

The FOIA requires that, if a record contains information that is exempt from disclosure, any “reasonably segregable” information must be disclosed after deletion of the exempt information, 5 U.S.C. § 552(b), unless the non-exempt portions are “inextricably intertwined with exempt portions.” *Mead Data Ctr. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977); *Kurdyukov v. U.S. Coast Guard*, 578 F. Supp. 2d 114, 128 (D.D.C. 2008). This provision does not, however, require disclosure of records in which the non-exempt information that remains is meaningless. *See Nat’l Sec. Archive Fund v. CIA*, 402 F. Supp. 2d 211, 221 (D.D.C. 2005) (concluding that no reasonably segregable information existed because “the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words”). Consistent with this obligation, NOAA has reviewed each of the documents redacted or withheld and has concluded that there is no additional non-exempt information that may reasonably be segregated and released. *See* Graff Decl. ¶ 67. Accordingly, no further non-exempt material is subject to release.

CONCLUSION

NOAA has conducted an adequate search for documents responsive to Plaintiff’s request, and properly withheld information exempt from disclosure under Exemptions 5 and 6. Furthermore, all reasonably segregable information has been released to Plaintiff. For these reasons, the Department of Commerce respectfully requests that summary judgment be entered in its favor.

Dated: December 15, 2016

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Docket No. 15-cv-2088 (CRC)

**STATEMENT OF MATERIAL FACTS IN SUPPORT OF UNITED STATES
DEPARTMENT OF COMMERCE’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Civil Rule 7(h)(1), the following is a statement of material facts as to which the movant, the United States Department of Commerce (“the Department”), contends there is no genuine issue:

1. Between September 2013 and November 2014, the Intergovernmental Panel on Climate Change released a report in stages that concluded that the upward global surface temperature trend from 1998-2012 was lower than that from 1951-2012. Declaration of Mark Graff (“Graff Decl.”) ¶ 9.
2. The apparent observed slowing of the global surface temperatures was dubbed the “hiatus.” Graff Decl. ¶ 9.
3. The National Centers for Environmental Information (“NCEI”) at NOAA produces and maintains datasets for global ocean areas and global land areas. Graff Decl. ¶ 6.
4. NCEI scientists continually work to improve the datasets to provide the public the most up-to-date and accurate information. Graff Decl. ¶ 5.

5. NCEI scientists regularly interpret and analyze datasets and release to the public the most up-to-date climate science, often through publication in scientific journals. Graff Decl. ¶ 7.
6. On June 4, 2015, a study authored by NOAA scientists was published in *Science* entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* (“Hiatus Paper” or “the Paper”). Graff Decl. ¶ 23.
7. The Hiatus Paper is an example of analysis and interpretation of the updated underlying data. Graff Decl. ¶ 10.
8. Around late October 2014, Tom Karl, then the Director of NCEI, circulated a draft paper to a group of NOAA scientists that developed an idea for properly accounting for the alleged “hiatus” based on the additional two years of global temperature data and the improvements to NOAA’s sea surface temperature dataset. Graff Decl. ¶ 11.
9. Karl sought feedback on the draft paper, and a team of scientists at NOAA formed to develop a manuscript. *See* Graff Decl. ¶¶ 11-13.
10. Many drafts and revisions were exchanged among these scientists, along with emails discussing various aspects of the paper or its content, including suggestions on how best to describe the data, opinions on statistical error uncertainty ranges, thoughts on implications of other researchers’ work, and so on. Graff Decl. ¶ 13.
11. Such collaboration via discussions and drafts is standard practice at NCEI. Graff Decl. ¶ 13.
12. In December 2014, the authors submitted the draft paper to the journal *Science*. Graff Decl. ¶ 14.

13. Once there, the draft paper went through the journal's peer review process, in which five anonymous peer reviewers weighed in on the manuscript. Graff Decl. ¶ 20.
14. When the authors received feedback, they discussed internally how to respond in writing to the comments they received, and also revised the manuscript to address the questions and concerns raised. *See* Graff Decl. ¶ 21.
15. After a second round of peer review, NOAA received word that the article would be published, and *Science* published the Paper on its website on June 4, 2015. Graff Decl. ¶ 23.
16. Plaintiffs' FOIA request, dated October 30, 2015, sought in relevant part:
 1. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the methodology and utilization of Night Marine Air Temperatures to adjust ship and buoy temperature data.
 2. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the use of other global temperature datasets for both NOAA's in-house dataset improvements and monthly press releases conveying information to the public about global temperatures.
 3. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the utilization and consideration of satellite bulk atmospheric temperature readings for use in global temperature datasets.Graff Decl. ¶ 24; *see also* ECF No. 8-1.
17. Upon review of the request, NOAA officials determined that it did not reasonably describe the records requested. Graff Decl. ¶ 25.
18. Through counsel, NOAA conferred with Plaintiff to negotiate a clear description of the material sought. Graff Decl. ¶ 25.

19. During the course of those discussions, NOAA indicated to Plaintiff that it understood the request to reflect an interest in the Hiatus Paper and accordingly suggested modifying the request to call for a search for all documents and communications referring to the Hiatus Paper from its nine authors. Graff Decl. ¶ 26.
20. Plaintiff confirmed its interest in that study, but indicated that it sought only records referring to the topics listed in its initial FOIA request. Graff Decl. ¶ 26.
21. The parties ultimately “reached an agreement regarding the scope of the request and relevant search parameters.” Second Joint Status Report, ECF No. 10 at 2.
22. For Plaintiff’s FOIA request, NOAA agreed to search the records of the nine authors of the Hiatus Paper for records referring to that paper and that contain one of the following search terms: “NMAT,” “Night Marine Air Temperatures,” “ISTI,” “ICOADS,” “sea ice,” “satellite,” “Advanced Very High Resolution Radiometer,” “AVHRR,” “Advanced Microwave Scanning Radiometer,” and “AMSR.” Second Joint Status Report, ECF No. 10 at 2; Graff Decl. ¶ 27.
23. NOAA determined that the records requested resided within one office, NCEI, because all of the agreed-upon custodians work or had worked there during the time frame in which responsive records were created. Graff Decl. ¶ 33.
24. NOAA then directed those custodians to search their email, electronic, and paper files for records referring to the Karl Study and containing the agreed-upon search terms. Graff Decl. ¶ 35.
25. Those scientists searched their electronic files (including email) and non-electronic files, collected any potentially responsive material, and forwarded that material for responsiveness and exemption review. Graff Decl. ¶¶ 36-38.

26. One custodian had retired from NCEI by the time the search was conducted and so that former employee's archived email was searched by another custodian. No additional records responsive to this request from that author are known to have existed following his retirement. *See* Graff Decl. ¶ 36 n.1.
27. There were no common areas at NCEI for NOAA to search. Graff Decl. ¶ 37.
28. Thus, all files determined to be reasonably likely to contain responsive, non-duplicative material were searched. Graff Decl. ¶ 44.
29. On May 27, 2016, NOAA produced 102 pages of material in its entirety and 90 partially redacted pages. Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12 at 2. NOAA withheld in their entirety 8,013 pages of records. Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12 at 2
30. NOAA informed Plaintiff at that time that because it sought records from nine separate custodians, a significant amount of duplicative material existed in the responsive records. *See* Graff Decl. ¶ 29
31. Upon further review of the withheld information, NOAA made two supplemental productions. *See* Graff Decl. ¶¶ 30-31.
32. On September 16, 2016, NOAA released to Plaintiff an additional 44 pages of material (7 of those pages were partially redacted to exclude Mr. Karl's phone number), Graff Decl. ¶ 30.
33. Contemporaneously with this filing (on December 15), NOAA is releasing an additional 62 records. Graff Decl. ¶ 31.
34. NOAA withheld information pursuant to FOIA Exemption 5 and the deliberative process privilege. *See Vaughn* Index.

35. NOAA withheld information pursuant to FOIA Exemption 6. *See Vaughn* Index.

Dated: December 15, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2016, I filed the attached electronically with the Clerk of the United States District Court for the District of Columbia through the CM/ECF system, which caused the following counsel of record to be served by electronic means:

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Case No. 15-cv-2088 (CRC)

OPINION AND ORDER

Plaintiff Judicial Watch brought this Freedom of Information Act (“FOIA”) suit seeking documents in the possession of the National Oceanographic and Atmospheric Administration (“NOAA”) related to a study (the “Hiatus Paper”) by several NOAA scientists that was published in the journal *Science*. NOAA withheld three sets of documents—drafts of the Hiatus Paper, internal correspondence among NOAA scientists concerning the Hiatus Paper, and outside peer reviewer comments—under Exemption 5 of FOIA. The parties have filed cross-motions for summary judgment regarding this withholding. For the reasons below, the court grants the Department of Commerce’s motion for summary judgment and denies Judicial Watch’s cross-motion.¹

Summary judgment is appropriate when the “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “FOIA cases typically and appropriately are decided on motions for summary judgment.” Cavezza v. Dep’t of Justice, 113 F. Supp. 3d 271, 275 (D.D.C. 2015).

¹ Judicial Watch has withdrawn its challenges to the adequacy of the Department’s search for records and the Department’s withholding of other information under Exemption 6. Pl.’s Mem. of Law in Supp. of Pl.’s Opp’n to Def’s Mot. for Summ. J. 2 n.1.

Exemptions to FOIA are to be narrowly construed and the agency bears the burden of proving that any withheld records fall within the scope of an exemption to FOIA. AquAlliance v. U.S. Bureau of Reclamation, 856 F.3d 101, 102–03 (D.C. Cir. 2017). Exemption 5 of FOIA, which NOAA has invoked, permits the withholding of “inter-agency or intra-agency memorandums or letters that 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). As relevant here, this includes documents protected by the deliberative process privilege. See, e.g., Formaldehyde Inst. v. Dep’t of Health & Human Servs., 889 F.2d 1118, 1121 (D.C. Cir. 1989). To qualify for the deliberative process privilege, an inter-agency or intra-agency document must be “predecisional,” meaning that it was “generated before the adoption of an agency policy,” and “deliberative,” meaning that it “reflects the give-and-take of the consultative process.” Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

Judicial Watch first contends that the documents withheld here cannot fall within the scope of Exemption 5 because they concern science, rather than policy. Unfortunately for Judicial Watch, the D.C. Circuit has already resolved that question in the Department’s favor. In Formaldehyde Institute, the D.C. Circuit held that a peer review letter sent to agency scientists regarding a possible publication was covered by Exemption 5. 889 F.2d at 1120. The Court explained that the letter was “predecisional because it preceded the agency’s decision whether and in what form to publish” the article and it was deliberative because “the agency secured review commentary in order to make that decision.” Id.; see also Hooker v. Dep’t of Health & Human Servs., 887 F. Supp. 2d 40, 57–58 (D.D.C. 2012) (holding that peer review comments, draft manuscripts, and communications discussing draft manuscripts fell within the scope of Exemption 5).

Judicial Watch offers no basis on which to distinguish Formaldehyde Institute. The drafts of the Hiatus Paper, the NOAA scientists' deliberations, and the peer review materials are equally predecisional because they involve drafts and "recommendation[s] (with suggestions) regarding an article's suitability for publication," Formaldehyde Inst., 889 F.2d at 1123. These documents are likewise deliberative because they form part of "the deliberative decision about whether and in what form to publish" the Hiatus Paper, id. at 1124. And finally, NOAA (and its *amici*) put forth un rebutted evidence that disclosure here would harm the deliberative process, such as by creating a "chilling effect on . . . the candor of potential reviewers of government-submitted articles," id. at 1125. See Spinrad Decl. ¶¶ 23–26. The drafts of the Hiatus Paper, internal deliberations, and peer reviewer comments thus fall within the scope of Exemption 5.

Next, Judicial Watch contends that alleged misconduct by the NOAA scientists who prepared the Hiatus Paper overrides Exemption 5. While the D.C. Circuit has never held that government misconduct can abrogate the deliberative process privilege in a FOIA case, some decisions from this District have so held. See, e.g., Neighborhood Assistance Corp. of Am. v. Dep't of Hous. & Urban Dev., 19 F. Supp. 3d 1, 13–14 (D.D.C. 2013); Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs., 903 F. Supp. 2d 59, 67 (D.D.C. 2012). But see Judicial Watch, Inc. v. Dep't of State, 2017 WL 1078544, at *6 (D.D.C. Mar. 20, 2017) (refusing to apply government misconduct exception to FOIA case); Wright v. Admin. for Children & Families, 2016 WL 5922293, at * 11 (D.D.C. Oct. 16, 2016) (same).

Regardless of whether such an exception exists in the FOIA context, it would not be applicable here. Since the very purpose of FOIA is to help uncover government misconduct, if any allegation of misconduct sufficed to pierce the deliberative process privilege, the exception would soon swallow the privilege whole. Rather, as the cases applying the exception have

explained, the misconduct alleged must be particularly severe, as where “the ‘policy discussions’ sought to be protected . . . were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government.” ICM Registry, LLC v. Dep’t of Commerce, 538 F. Supp. 2d 130, 132–33 (D.D.C. 2008).

Judicial Watch presents no evidence sufficient to raise the specter of such nefarious government misconduct. It cites to a single article in a British tabloid reporting, based on a former employee’s allegation, that the Hiatus Paper was based on “misleading” data and was not subjected to NOAA’s “rigorous internal evaluation process.” Pl.’s Mem. of Law in Supp. of Pl.’s Opp’n to Def’s Mot. for Summ. J. 4. But this article, alone, does not meet that narrow standard. Nor does Judicial Watch put forth any evidence evincing a connection between the withheld discussions of the paper itself and the alleged deficiencies in the underlying, publicly available data on which the paper relies. For these reasons, it fails to show that the narrow government misconduct exception would be applicable here.

Finally, Judicial Watch challenges the withholding on the ground that the Department failed to properly release segregable information. However, the Department is “entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material.” Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C. Cir. 2007). The Department’s affidavits adequately allege that the agency released all reasonably segregable material and Judicial Watch provides no evidence to contradict these affidavits or to otherwise rebut that presumption.

For the foregoing reasons, it is hereby

ORDERED that [16] Defendant's Motion for Summary Judgment is GRANTED. It is further **ORDERED** that [22] Plaintiff's Cross-Motion for Summary Judgment is DENIED.

SO ORDERED.



CHRISTOPHER R. COOPER
United States District Judge

Date: August 21, 2017

Dennis Morgan - NOAA Federal

From: Dennis Morgan - NOAA Federal
Sent: Tuesday, August 22, 2017 9:44 AM
To: Graff Mark; Lola Stith - NOAA Affiliate
Cc: Swisher Robert
Subject: Fwd: Judicial Watch Judgment and Order
Attachments: Dkt. 28 - Opinion and Order.pdf

OCIO Weekly Message material? FOIA Website material?

----- Forwarded message -----

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Tue, Aug 22, 2017 at 7:39 AM
Subject: Judicial Watch Judgment and Order
To: Symone Stone - NOAA Affiliate <symone.stone@noaa.gov>, Denise Hamilton - NOAA Federal <denise.hamilton@noaa.gov>, Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>, Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>, Lisa Love - NOAA Federal <lisa.love@noaa.gov>, Nkolika Ndubisi - NOAA Federal <nkolika.ndubisi@noaa.gov>, Maria Williams - NOAA Federal <Maria.Williams@noaa.gov>, Annie Thomson - NOAA Federal <annie.thomson@noaa.gov>, Gregory Raymond - NOAA Federal <gregory.raymond@noaa.gov>, James LeDuc - NOAA Federal <james.leduc@noaa.gov>, Devin Brakob - NOAA Federal <devin.r.brakob@noaa.gov>, Velna Bullock - NOAA Federal <velna.l.bullock@noaa.gov>, Elizabeth McLanahan - NOAA Federal <elizabeth.mclanahan@noaa.gov>, Scott Smullen - NOAA Federal <scott.smullen@noaa.gov>, Mary Ann Whitmeyer - NOAA Federal <mary.ann.whitmeyer@noaa.gov>, Mark Seiler - NOAA Federal <mark.seiler@noaa.gov>, Jerry McNamara <Jerome.McNamara@noaa.gov>, Stephen Lipps - NOAA Federal <stephen.lipps@noaa.gov>, Karen Robin - NOAA Federal <karen.robin@noaa.gov>, Shem Yusuf - NOAA Federal <shem.s.yusuf@noaa.gov>, DALTON CUMMINGS - NOAA Affiliate <dalton.t.cummings@noaa.gov>, Tejuana Michael - NOAA Federal <Tejuana.Hickerson@noaa.gov>
Cc: Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Dennis Morgan - NOAA Federal <dennis.morgan@noaa.gov>, Robert Hogan <robert.j.hogan@noaa.gov>, "Cc: OCIO/OPPA" <ocio.ppa@noaa.gov>

Good Morning,

We have just received the Court's Order, holding that NOAA prevailed in the Judicial Watch litigation. In particular, the Court upheld NOAA's use of FOIA Exemption (b)(5) Deliberative Process Privilege to protect the scientific peer review of the Hiatus paper drafted by NOAA scientists within NESDIS/NCEI.

This represents a significant victory for NOAA, and validates NOAA's FOIA practices as it relates to segregability and exemption application. We're thrilled with the outcome, and appreciate all of your hard work in maintaining a strong FOIA program that is compliant with the important transparency responsibilities here in NOAA.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Case No. 15-cv-2088 (CRC)

OPINION AND ORDER

Plaintiff Judicial Watch brought this Freedom of Information Act (“FOIA”) suit seeking documents in the possession of the National Oceanographic and Atmospheric Administration (“NOAA”) related to a study (the “Hiatus Paper”) by several NOAA scientists that was published in the journal *Science*. NOAA withheld three sets of documents—drafts of the Hiatus Paper, internal correspondence among NOAA scientists concerning the Hiatus Paper, and outside peer reviewer comments—under Exemption 5 of FOIA. The parties have filed cross-motions for summary judgment regarding this withholding. For the reasons below, the court grants the Department of Commerce’s motion for summary judgment and denies Judicial Watch’s cross-motion.¹

Summary judgment is appropriate when the “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “FOIA cases typically and appropriately are decided on motions for summary judgment.” Cavezza v. Dep’t of Justice, 113 F. Supp. 3d 271, 275 (D.D.C. 2015).

¹ Judicial Watch has withdrawn its challenges to the adequacy of the Department’s search for records and the Department’s withholding of other information under Exemption 6. Pl.’s Mem. of Law in Supp. of Pl.’s Opp’n to Def’s Mot. for Summ. J. 2 n.1.

Exemptions to FOIA are to be narrowly construed and the agency bears the burden of proving that any withheld records fall within the scope of an exemption to FOIA. AquAlliance v. U.S. Bureau of Reclamation, 856 F.3d 101, 102–03 (D.C. Cir. 2017). Exemption 5 of FOIA, which NOAA has invoked, permits the withholding of “inter-agency or intra-agency memorandums or letters that 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). As relevant here, this includes documents protected by the deliberative process privilege. See, e.g., Formaldehyde Inst. v. Dep’t of Health & Human Servs., 889 F.2d 1118, 1121 (D.C. Cir. 1989). To qualify for the deliberative process privilege, an inter-agency or intra-agency document must be “predecisional,” meaning that it was “generated before the adoption of an agency policy,” and “deliberative,” meaning that it “reflects the give-and-take of the consultative process.” Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

Judicial Watch first contends that the documents withheld here cannot fall within the scope of Exemption 5 because they concern science, rather than policy. Unfortunately for Judicial Watch, the D.C. Circuit has already resolved that question in the Department’s favor. In Formaldehyde Institute, the D.C. Circuit held that a peer review letter sent to agency scientists regarding a possible publication was covered by Exemption 5. 889 F.2d at 1120. The Court explained that the letter was “predecisional because it preceded the agency’s decision whether and in what form to publish” the article and it was deliberative because “the agency secured review commentary in order to make that decision.” Id.; see also Hooker v. Dep’t of Health & Human Servs., 887 F. Supp. 2d 40, 57–58 (D.D.C. 2012) (holding that peer review comments, draft manuscripts, and communications discussing draft manuscripts fell within the scope of Exemption 5).

Judicial Watch offers no basis on which to distinguish Formaldehyde Institute. The drafts of the Hiatus Paper, the NOAA scientists' deliberations, and the peer review materials are equally predecisional because they involve drafts and "recommendation[s] (with suggestions) regarding an article's suitability for publication," Formaldehyde Inst., 889 F.2d at 1123. These documents are likewise deliberative because they form part of "the deliberative decision about whether and in what form to publish" the Hiatus Paper, id. at 1124. And finally, NOAA (and its *amici*) put forth un rebutted evidence that disclosure here would harm the deliberative process, such as by creating a "chilling effect on . . . the candor of potential reviewers of government-submitted articles," id. at 1125. See Spinrad Decl. ¶¶ 23–26. The drafts of the Hiatus Paper, internal deliberations, and peer reviewer comments thus fall within the scope of Exemption 5.

Next, Judicial Watch contends that alleged misconduct by the NOAA scientists who prepared the Hiatus Paper overrides Exemption 5. While the D.C. Circuit has never held that government misconduct can abrogate the deliberative process privilege in a FOIA case, some decisions from this District have so held. See, e.g., Neighborhood Assistance Corp. of Am. v. Dep't of Hous. & Urban Dev., 19 F. Supp. 3d 1, 13–14 (D.D.C. 2013); Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs., 903 F. Supp. 2d 59, 67 (D.D.C. 2012). But see Judicial Watch, Inc. v. Dep't of State, 2017 WL 1078544, at *6 (D.D.C. Mar. 20, 2017) (refusing to apply government misconduct exception to FOIA case); Wright v. Admin. for Children & Families, 2016 WL 5922293, at * 11 (D.D.C. Oct. 16, 2016) (same).

Regardless of whether such an exception exists in the FOIA context, it would not be applicable here. Since the very purpose of FOIA is to help uncover government misconduct, if any allegation of misconduct sufficed to pierce the deliberative process privilege, the exception would soon swallow the privilege whole. Rather, as the cases applying the exception have

explained, the misconduct alleged must be particularly severe, as where “the ‘policy discussions’ sought to be protected . . . were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government.” ICM Registry, LLC v. Dep’t of Commerce, 538 F. Supp. 2d 130, 132–33 (D.D.C. 2008).

Judicial Watch presents no evidence sufficient to raise the specter of such nefarious government misconduct. It cites to a single article in a British tabloid reporting, based on a former employee’s allegation, that the Hiatus Paper was based on “misleading” data and was not subjected to NOAA’s “rigorous internal evaluation process.” Pl.’s Mem. of Law in Supp. of Pl.’s Opp’n to Def’s Mot. for Summ. J. 4. But this article, alone, does not meet that narrow standard. Nor does Judicial Watch put forth any evidence evincing a connection between the withheld discussions of the paper itself and the alleged deficiencies in the underlying, publicly available data on which the paper relies. For these reasons, it fails to show that the narrow government misconduct exception would be applicable here.

Finally, Judicial Watch challenges the withholding on the ground that the Department failed to properly release segregable information. However, the Department is “entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material.” Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C. Cir. 2007). The Department’s affidavits adequately allege that the agency released all reasonably segregable material and Judicial Watch provides no evidence to contradict these affidavits or to otherwise rebut that presumption.

For the foregoing reasons, it is hereby

ORDERED that [16] Defendant's Motion for Summary Judgment is GRANTED. It is further **ORDERED** that [22] Plaintiff's Cross-Motion for Summary Judgment is DENIED.

SO ORDERED.



CHRISTOPHER R. COOPER
United States District Judge

Date: August 21, 2017

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, August 23, 2017 10:19 AM
To: Samuel Dixon - NOAA Affiliate; Stacey Nathanson - NOAA Federal
Subject: Slides for the 2:30 discussion
Attachments: Consultations Referrals and (b)(5) Final.pptx

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)

(b)(6) (C)

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Referrals, Consultations, and Exemption (b)(5) Deliberative Process

Prepared by Mark H. Graff
NOAA FOIA Officer/Bureau Chief Privacy
Officer
OCIO/GPD

mark.graff@noaa.gov; (301)-628-5658



Freedom of Information Act (5 USC 552)



Outline

1. Birth to Death Processing Flow
2. Regulatory Structure for Referrals
3. The Risks of Other Agency Docs
4. OIP Guidance
5. (b)(5) Two Prong Test
6. The Extent of the Privilege
7. Questions



Regulatory Structure



MISDIRECTED WITHIN THE DEPARTMENT:

Where a component's FOIA office determines that a request was misdirected within the Department:

- The receiving component's FOIA office needs to route the request to the correct bureau(s).
- The search starts the time cutoff for records



Regulatory Structure (Cont'd)



OTHER BUREAUS MAY HAVE RECORDS:

How the proper Department component to respond to a FOIA Request is determined:

- The component that first receives the request and has responsive records.
 - When no records exist, the component that first receives the request and is likely to have responsive records should process the FOIA request.
- Or, the component to which the Departmental FOIA Officer or component FOIA Officer assigns lead responsibility for responding to the request.



Regulatory Structure (Cont'd)



CONSULTATIONS:

When a record is requested that originated with NOAA and another Federal agency has a *significant interest* in the record, NOAA must allow the other Federal agency to review the record before responding to a requester.





Consultations Continued...



Consultations can be done within FOIAonline by uploading the record requiring consultation and then selecting the “**Create Consultation**” button found in the left hand column in FO (if the agency also uses FO)

- If attempts to consult with outside agencies cause a delay in responding to the request, notify the requester that the request will be processed or completed after the consultation has been completed.
- Consultation with another agency constitutes ***unusual circumstances*** and allows you to invoke a 10 day extension.



Regulatory Structure (Cont'd)



REFERRALS:

When NOAA possesses requested records that originated with another Federal agency.

NOAA routes these records to that agency for direct response to the requester.





OIP Referral Guidance



OIP's Summary:

“The agency that is best able to determine a record's sensitivity, and in turn its exemption status, is the agency that should process that record under the Act.

While this may vary in particular cases, as a general rule the agency that originated a record is usually the most appropriate agency to make a FOIA-disclosure determination regarding it.”



The Risks of Other Agency Docs



There are at least **7** different types of referrals and consultations:

1. External Referrals for direct response to the requester including Exemptions asserted by the referring agency to include their appeal language.

Example: ACOE referrals where we respond to requester with their appeal contact.



The Risks of Other Agency Docs



2. External Referrals of the request in its entirety with no asserted Exemptions or responsive records being located by the referring agency.

Example: Recent DOI Refers us records that fall entirely under our purview.



The Risks of Other Agency Docs (Cont'd)



3. Records in which all or part of the record requires a declassification review by the original classifying authority.

Example: Navy necropsy records OCA is the Director of the office that generated those docs.



The Risks of Other Agency Docs (Cont'd)



4. External Consultations for providing withholding recommendations to another agency

Example: Fisheries Management Council Records found within our Control



The Risks of Other Agency Docs (Cont'd)



5. Intra-Departmental taskings requiring a tasking Memorandum

Example: DOC sends us a tasking to conduct a search in Presidential Transition cases through FOIAOnline, and we, in turn, issue taskings within Bureau.



The Risks of Other Agency Docs (Cont'd)



6. External Litigation consultations seeking NOAA's asserted exemptions

Example: FBI recently asked NOAA in the DB Cooper case to provide withholding recommendations on the weather docs from the plane flight.



The Risks of Other Agency Docs (Cont'd)



7. Referrals asking for non-attribution

Example: If we ever have intelligence agency records, they frequently don't want to be identified as the originator of the records.



NAO 205-14: NOAA FOIA Taskings



There are at least 6 types of taskings—it must be clear which type you are being asked to review:

1. Conduct a search for responsive records (fees waived or non-billable)
2. Prepare a fee estimate in a non-referral
3. Prepare a fee estimate for a case being coordinated by DOC, and the aggregate threshold is not determined by NOAA
4. Review referred records and provide release recommendations to the referring entity
5. Review referred records, and respond directly to the requester, incorporating the referring entities exemptions and appeal language.
6. Respond to an adjudication on appeal



OIP GUIDANCE



If they are Agency Records:

When an agency receives a FOIA request for agency records in its possession it must take responsibility for searching for the records and processing the request. It cannot simply refuse to act on the ground that the documents originated elsewhere.





OIP Guidance (Cont'd)



“When litigation (results), the government generally has not raised any issue over which agency is the “proper party defendant,” but instead has provided affidavits from the originating agencies to justify any contested nondisclosure.”

Plain English: DOJ won’t challenge who the Plaintiff names in Court. If you worked on the request, you can be the one sued, and other agencies will just provide affidavits for the records they created.



(b)(5) Two Prong Test



When (b)(5) Deliberative Process Applies:

- (b)(5) Statute generally protects: “Inter and intra-agency” (internal and external) communications that would not be available by law to a party other than an agency in litigation with the agency”.
- Courts define this as only documents that are typically privileged in civil discovery



(b)(5) Two Prong Test (cont'd)



- As to one of those privileges, Deliberative Process Privilege includes:
 - The Inter-agency (internal) and Intra-agency (external) communication requirement which encompasses the “consultant corollary”.
 - If the consultants, contractors, external advisors provided advice similar to what might have been received from an employee. Must ask—
 - Are they an interested party?
 - Seeking benefit at the expense of other applicants?
 - If yes, no (b)(5) protection.



(b)(5) Two Prong Test (cont'd)



Two Part Test:

- 1) Is the material pre-decisional?
 - a) i.e., antecedent to the adoption of the agency policy? (the making of the “policy sausage”)
- 2) Is it deliberative (not factual)—making recommendations, expressing opinions on legal or policy matters?



The Extent of the Privilege



- **Policy behind DPP:**
 - Encourage open and frank discussions among employees and protect the decision making processes of the government
 - Protect against premature disclosure of proposed policies before adopted
 - Protect against public confusion



The Extent of the Privilege



- Since the 2016 FOIA Improvement Act, a **Risk of Harm** must exist for the Privilege to apply.
- Previously, this was only advisory, although in practice, this should not change NOAA's approach, as NOAA routinely required a Risk of Harm Analysis for (b)(5) Deliberative Process.





Risk of Harm



Foreseeable Harm is now a requirement under the 2016 FOIA Improvement Act:

To Reach Foreseeable Harm, OIP summarizes the considerations:

- How sensitive is the decision?
- How sensitive is the decision-making process? (consider peer review)
- Is the decision final yet?
- Would disclosure affect the employees that contributed to the records?
- Would future decisions be jeopardized if the records were released?
- How significant would the “chilling” effect be?
- How old is the record?
- How sensitive are portions of the record?



The Extent of the Privilege



- There is also now a 25 year limit on the use of Deliberative Process.
- After that time—the privilege no longer applies.





Questions



QUESTIONS?

Bogomolny, Michael (Federal)

From: Bogomolny, Michael (Federal)
Sent: Wednesday, August 23, 2017 7:11 PM
To: Graff, Mark (Federal)
Subject: FW: Notice of Inadvertent Disclosure of Attorney-Client Privileged Materials in the 3rd Interim Response to FOIA Request No. DOC-NOAA-2017-000170

Mark,

Was there any follow-up on this?

Thanks,
bogo

From: DiGiacomo, Brian (Federal)
Sent: Tuesday, July 18, 2017 3:45 PM
To: Kara McKenna <Kara.McKenna@causeofaction.org>
Cc: Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Dixon, Samuel (Contractor) <Samuel.Dixon@noaa.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Subject: RE: Notice of Inadvertent Disclosure of Attorney-Client Privileged Materials in the 3rd Interim Response to FOIA Request No. DOC-NOAA-2017-000170

Thank you, Kara. I am copying my Information Law Division Chief, Michael Bogomolny, on this correspondence in case he needs to get in touch with you.

Brian D. DiGiacomo
Assistant General Counsel for Employment, Litigation, and Information
Office of the General Counsel
Room 5896
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230
Office Phone: 202-482-5393
Cell Phone (b)(6)

From: Kara McKenna [<mailto:Kara.McKenna@causeofaction.org>]
Sent: Tuesday, July 18, 2017 3:42 PM
To: DiGiacomo, Brian (Federal) <bDiGiaco@doc.gov>
Cc: Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Dixon, Samuel (Contractor) <Samuel.Dixon@noaa.gov>
Subject: Notice of Inadvertent Disclosure of Attorney-Client Privileged Materials in the 3rd Interim Response to FOIA Request No. DOC-NOAA-2017-000170

Mr. DiGiacomo:

In reviewing the records received from the National Oceanic and Atmospheric Administration (“NOAA”) on July 17, 2017 as part of an interim response to Cause of Action Institute’s (“CoA Institute”) pending Freedom

of Information Act Request (“FOIA”), FOIA Request No. DOC-NOAA-20107-000170, CoA Institute became aware that one of the released records, Doc ID. No. 0.7.1205.6122-000001.pdf included in the .zip file titled “170 Interim 3 part 2 Full Release -20170713T152058Z-001” uploaded to the FOIAonline website appears to include attorney-client privileged materials.

Pursuant to the D.C. Rules of Professional Conduct, Rule 4.4(b), I contacted NOAA FOIA staff, Samuel Dixon, on the morning of July 18, 2017 and verbally informed him of what appears to be an inadvertent disclosure. We await your instructions as to whether this is in fact an inadvertent disclosure, and whether we should return or destroy the document.

Please contact me by telephone at (202) 499-4232 or by e-mail at Kara.McKenna@causeofaction.org. Thank you for your attention to this matter.

Regards,

Kara McKenna

Kara E. McKenna | Counsel

Cause of Action Institute
1875 Eye Street NW, Suite 800
Washington, D.C. 20006

(o) 202-499-2417 / ((b)(6))

Admitted to the practice of law in the States of New York and New Jersey, and the District of Columbia.



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CAUSE *of* ACTION
— INSTITUTE —

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Thursday, August 24, 2017 7:22 AM
To: Bogomolny, Michael (Federal)
Subject: Re: FW: Notice of Inadvertent Disclosure of Attorney-Client Privileged Materials in the 3rd Interim Response to FOIA Request No. DOC-NOAA-2017-000170

Hi Bogo,

(b)(5)
[Redacted]

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Wed, Aug 23, 2017 at 7:10 PM, Bogomolny, Michael (Federal) <MBogomolny@doc.gov> wrote:

Mark,

Was there any follow-up on this?

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bogo

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Sent: Tuesday, July 18, 2017 3:45 PM
To: Kara McKenna <Kara.McKenna@causeofaction.org>

Cc: Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Dixon, Samuel (Contractor) <Samuel.Dixon@noaa.gov>; Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Subject: RE: Notice of Inadvertent Disclosure of Attorney-Client Privileged Materials in the 3rd Interim Response to FOIA Request No. DOC-NOAA-2017-000170

Thank you, Kara. I am copying my Information Law Division Chief, Michael Bogomolny, on this correspondence in case he needs to get in touch with you.

Brian D. DiGiacomo

Assistant General Counsel for Employment, Litigation, and Information

Office of the General Counsel

Room 5896

U.S. Department of Commerce

1401 Constitution Avenue, NW

Washington, D.C. 20230

Office Phone: [202-482-5393](tel:202-482-5393)

Cell Phone (b)(6)

From: Kara McKenna [<mailto:Kara.McKenna@causeofaction.org>]

Sent: Tuesday, July 18, 2017 3:42 PM

To: DiGiacomo, Brian (Federal) <bDiGiaco@doc.gov>

Cc: Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Dixon, Samuel (Contractor) <Samuel.Dixon@noaa.gov>

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Regards,

Kara McKenna

Kara E. McKenna | Counsel

Cause of Action Institute

1875 Eye Street NW, Suite 800

Washington, D.C. 20006

(o) [202-499-2417](tel:2024992417) / (**(b)(6)**)

Admitted to the practice of law in the States of New York and New Jersey, and the District of Columbia.

-



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CAUSE *of* ACTION
— INSTITUTE —

Bogomolny, Michael (Federal)

From: Bogomolny, Michael (Federal)
Sent: Thursday, August 24, 2017 12:01 PM
To: Graff, Mark (Federal)
Subject: RE: FW: Notice of Inadvertent Disclosure of Attorney-Client Privileged Materials in the 3rd Interim Response to FOIA Request No. DOC-NOAA-2017-000170

Thanks, Mark. To be honest, I assumed you would take care of anything needed, but wanted to check up to see if there was any action item for me given Brian's email.

-bogo

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Thursday, August 24, 2017 7:22 AM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Subject: Re: FW: Notice of Inadvertent Disclosure of Attorney-Client Privileged Materials in the 3rd Interim Response to FOIA Request No. DOC-NOAA-2017-000170

Hi Bogo,

(b)(5)
[Redacted]

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)

(b)(6) (C)

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From: Kara McKenna [<mailto:Kara.McKenna@causeofaction.org>]
Sent: Tuesday, July 18, 2017 3:42 PM
To: DiGiacomo, Brian (Federal) <bDiGiaco@doc.gov>
Cc: Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Dixon, Samuel (Contractor) <Samuel.Dixon@noaa.gov>
Subject: Notice of Inadvertent Disclosure of Attorney-Client Privileged Materials in the 3rd Interim Response to FOIA Request No. DOC-NOAA-2017-000170

Mr. DiGiacomo:

In reviewing the records received from the National Oceanic and Atmospheric Administration (“NOAA”) on July 17, 2017 as part of an interim response to Cause of Action Institute’s (“CoA Institute”) pending Freedom of Information Act Request (“FOIA”), FOIA Request No. DOC-NOAA-20107-000170, CoA Institute became aware that one of the released records, Doc ID. No. 0.7.1205.6122-000001.pdf included in the .zip file titled “170 Interim 3 part 2 Full Release -20170713T152058Z-001” uploaded to the FOIAonline website appears to include attorney-client privileged materials.

Pursuant to the D.C. Rules of Professional Conduct, Rule 4.4(b), I contacted NOAA FOIA staff, Samuel Dixon, on the morning of July 18, 2017 and verbally informed him of what appears to be an inadvertent disclosure. We await your instructions as to whether this is in fact an inadvertent disclosure, and whether we should return or destroy the document.

Please contact me by telephone at [\(202\) 499-4232](tel:202-499-4232) or by e-mail at Kara.McKenna@causeofaction.org. Thank you for your attention to this matter.

Regards,

Kara McKenna

Kara E. McKenna | Counsel

Cause of Action Institute
1875 Eye Street NW, Suite 800
Washington, D.C. 20006

(o) [202-499-2417](tel:202-499-2417) / ((b)(6))

Admitted to the practice of law in the States of New York and New Jersey, and the District of Columbia.



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CAUSE *of* ACTION
— INSTITUTE —

Caroline Park - NOAA Federal

From: Caroline Park - NOAA Federal
Sent: Friday, August 25, 2017 9:54 AM
To: Stacey Nathanson; John Almeida - NOAA Federal; Mark Graff - NOAA Federal; Corinne Brown - NOAA Federal; Chua, Alvin
Cc: Gene Martin; Robert Swisher - NOAA Federal; Kornegay, Nick; Steven Goodman - NOAA Federal
Subject: Fwd: NOAA GC AWARDS
Attachments: Final 2016 Awards Program.docx

Congratulations, Stacey, John, Mark, Corinne and Alvin!!!! I nominated you for a NOAA General Counsel team award as "The Freedom of Information Act Support Team." See attached booklet on p6. Very big thanks for everything that you do!

:) Caroline

----- Forwarded message -----

From: Marilou Shanefelt - NOAA Federal <marilou.shanefelt@noaa.gov>
Date: Thu, Aug 24, 2017 at 5:05 PM
Subject: NOAA GC AWARDS
To: _HDQ ALL GC <all.gc@noaa.gov>

The NOAA Office of General Counsel is pleased to recognize the following NOAA GC employees, along with NOAA line and staff office personnel, and federal employees from other agencies, for their exceptional performance and contributions to the work of NOAA GC during the last calendar year. The "Of the Year" Award recipients for 2016-2017 are:

Manager of the Year:

Adam Issenberg

Lindy S. Johnson Attorney of the Year:

Ruth Ann Lowery

Paralegal of the Year:

Brittany Pugh

Administrative Professional of the Year:

Kaili Sams

NOAA GC is also pleased to recognize Russell Callender as a ***NOAA Senior Leader***. Russell has displayed notable leadership in fulfilling NOAA's mission during a period of transition.

We also take this opportunity to recognize the special contributions of a number of individuals who went above and beyond the call of duty to provide exceptional service, as well as the outstanding work of several teams on matters of importance to NOAA GC and to the agency.

Finally, we acknowledge our employees with Length of Service certificates for milestone anniversaries in 2017. Their dedication and commitment to public service is inspiring. For all those celebrating milestones, we thank you for your service to NOAA and to the nation.

The attached booklet provides a full listing of our honorees. We will be holding an award ceremony in Silver Spring on September 29, 2017. Awardees in the Regional Offices will receive their award or Length of Service certificate through the mail. We encourage each Regional Office to hold their own event to recognize their honorees. Congratulations to all of our awardees!

In closing, we extend a heart-felt thank you to every member of NOAA GC for your hard work and commitment to excellence throughout the year. We appreciate all that you do.

Sincerely,

Jeff and Kristen

--

Caroline Park
Deputy Section Chief, Fisheries and Protected Resources Section
NOAA Office of General Counsel
U.S. Department of Commerce
Phone: [\(301\) 713-9675](tel:3017139675)
Fax: [\(301\) 713-0658](tel:3017130658)

NOAA Office of the General Counsel



*2016-2017
Awards*

AWARD RECIPIENTS

MANAGER OF THE YEAR

Adam Issenberg, Fisheries and Protected Resources Section

Adam Issenberg is being recognized for his outstanding contributions to the NOAA General Counsel's Office during a time of transition. He served as Acting Deputy General Counsel through early 2016 and has provided invaluable support and advice to two new deputies. He has played a key role in coordinating views across multiple NOAA GC Sections on cross-cutting legal issues, like designation of critical habitat. He has served as a knowledgeable resource and sounding board on a host of thorny matters under the Magnuson-Stevens Act. Adam has also taken a lead role in developing and promoting the Attorney Honors Program, including facilitating the process for the selection and rotation of NOAA GC's 2017 class.

LINDY S. JOHNSON ATTORNEY OF THE YEAR

Ruth Ann Lowery, Fisheries and Protected Resources Section

Ruth Ann is being recognized for consistently providing outstanding legal advice and support to the NOAA Office of General Counsel. She is widely respected as NOAA GC's foremost expert on section 4 of the Endangered Species Act and the application of its very complex and technical provisions for listing threatened and endangered species and the designation of critical habitat. She has played a crucial role in guiding and advising NMFS on the development of several interagency interpretive policies and rules for improving implementation of ESA section 4, including a rule interpreting the phrase "destruction or adverse modification of critical habitat," and a rule providing important guidance on the process for designating critical habitat. She also serves as lead agency counsel for the Judicial Watch climate change FOIA and other climate-related FOIAs and associated litigation, navigating the difficult tasks of responding to the FOIAs and providing valuable input and astute legal advice to the Department of Justice in the development of briefs and agency declarations.

PARALEGAL OF THE YEAR

Brittany Pugh, Northwest Section

Brittany is recognized for going well beyond the call of duty month after month by effectively and timely performing her paralegal duties while simultaneously providing administrative support while the Northwest Section's administrative assistant position was vacant. Brittany demonstrated high levels of initiative in order to gain mastery of the many and varied additional tasks, including time and attendance, property management, and maintenance of office equipment. She maintained a positive and constructive attitude while balancing the two jobs, taking a mature and pragmatic approach to supporting the interests of the office and the agency. Her willingness and ability to assist with expanded duties during a time of transition meant that the Northwest Section and its attorneys were able to continue functioning at a high level.

AWARD RECIPIENTS

ADMINISTRATIVE PROFESSIONAL OF THE YEAR

Kaili Sams, Natural Resources Section

Kaili is recognized for her extraordinary support of the Natural Resource Section and its attorneys located across the country. Kaili has become an integral part of the Natural Resources Section, and has earned the highest degree of respect and confidence in her abilities to handle the Section's complex needs, including tracking hundreds of billing codes, managing dozens of travel requests, and ensuring timely production of documentation in response to internal case audits. Her contributions, however, extend well beyond the Natural Resources Section. Over the past year, Kaili has spent extended periods covering administrative duties for several other Sections that lacked administrative professional support. She took on these extra duties with enthusiasm and received unanimous praise for the quality of her assistance.

SENIOR LEADER OF THE YEAR

Russell Callender, National Ocean Service

Dr. Russell Callender has become a model for how NOAA leadership can work collaboratively and productively with legal counsel, carefully including counsel early and often when considering significant issues, and thoughtfully applying the legal advice he receives. The benefits of his approach are demonstrated by his strong leadership establishing a compliance program at the National Ocean Service, improving the protection of NOAA trust resources resulting from NOAA actions and decision making.

GENERAL INDIVIDUAL AWARDS

Branden Blum, Natural Resources Section

For exceptional work in support of the closeout of the Deepwater Horizon natural resource damages assessment, including his outstanding efforts to resolve issues involving the disposal of dolphin, whale and sea turtle carcasses collected during the assessment (and retained for years under a court-issued preservation order) and his sound advice on dealing with the payment of certain unresolved costs related to the assessment.

Jonelle Dilley, Oceans and Coasts Section

For exhibiting outstanding leadership and providing thoughtful legal advice instrumental to the National Ocean Service (NOS) in its development and execution of its environmental compliance strategy and program. Jonelle's in-depth knowledge and coordination across nine NOS program offices on broad legal and policy issues ensured consistent NOS-wide resolutions, and helped the client more effectively serve its science and resource-protection mission.

Christopher Fontecchio, Northwest Section

For professional and effective handling of litigation challenging NMFS' distribution of Mitchell Act funds for fish-hatchery programs, developing a litigation strategy, carefully evaluating the relevant record, coordinating internally and with the Department of Justice, and, overall, demonstrating an exemplary level of competence and engagement, which led to significant agency success.

AWARD RECIPIENTS

Britta Hinrichsen, Natural Resources Section

For excellent input and support on a variety of projects related to improving the operational performance of the Damage Assessment, Restoration, and Remediation Program, including the development of a comprehensive communications plan, integration of the DIVER computer system, and refinement of the case-closeout process. Britta is also recognized for her outstanding work as lead attorney on the Bay Long pipeline rupture.

Dan Hytrek, Southwest Section

For outstanding contributions to the completion of immensely complex agreements, biological opinions, a recovery plan, and regional guidance. In particular, Dan is recognized for going above and beyond the call of duty to provide exceptional service to his client in the development and review of the California Water Fix biological opinion. Under an extremely demanding schedule, Dan labored tirelessly to consistently provide timely and highly valued legal advice. Dan has worked effectively with the National Marine Fisheries Service, other Federal agencies, State agencies, and private interests to advance NOAA's interests in protecting and recovering marine resources.

Amy Kauffman, Alaska Section

For exemplary support in the Alaska Section, as well as assisting NOAA GC Sections beyond Alaska, by preparing numerous travel authorizations and vouchers, tracking spending and preparing budget reports, and training new administrative staff. Amy is also recognized for her superb assistance with the 2017 Attorney Honors Program, creating spreadsheets for tracking applicants and interviews, while continuing her outstanding performance of her regular job responsibilities.

Pamela Lawrence, Fisheries and Protected Resources Section

For outstanding work negotiating the terms of the Memorandum of Understanding on the extension of an existing Settlement Agreement with the California American Water Company regarding its withdrawals from the Carmel River, which affect South Central California Coast steelhead, a matter involving sensitive issues and significant enforcement equities. Pam did a great job coordinating with other sections, briefing headquarters, and thinking about creative solutions to impediments.

Laurie Lee, Natural Resources Section

For great professionalism, efficiency, and attention to detail, in her support of the leadership of NOAA's Damage Assessment, Restoration and Remediation Program, and standing as the go-to person for advice on a broad range of significant issues, including overall management and oversight of a 200-case docket; development of a new case closure manual; oversight of the preparation of the annual DARRP Leadership Group report; and leadership of the Section's planning efforts for oil spill response and assessment in the Arctic region. On top of all this, Laurie maintains a sizeable personal caseload, including one of NOAA's most complicated and high-profile Superfund cases.

Mara Levy, Southeast Section

For leadership in several complicated legal challenges to various Gulf of Mexico red snapper regulations, providing extensive support to the Department of Justice, and directly contributing to (1) litigation victories in two cases and a partial victory in another case, and (2) added certainty to NOAA Fisheries in its interpretation of the Magnuson-Stevens Act section 407(d) for red snapper, including the authority to establish separate groups within their individual quotas within the recreational fishing sector and the authority to make changes to quota allocations within the red snapper fishery.

AWARD RECIPIENTS

Charles McLeod, Headquarters (Detailed)

For vital support of the NOAA Office of General Counsel from October 2016 – January 2017. Charles provided timely and succinct coordination in a myriad of areas to ensure uninterrupted flow of personnel actions. Charles quickly became familiar with GC's sections and their requirements for recruitments and retirements, and met challenges head-on despite the agency's transition from one personnel system to another.

Corinna McMackin, Natural Resources Section

For exceptional work as the lead NOAA attorney for the "Alabama Lodge" case, a federal district court lawsuit challenging the selection of a Deepwater Horizon early restoration project. In response to a Court injunction order and under an extremely compressed timeline, Corinna worked tirelessly to oversee completion of a revised restoration plan and evaluation of a range of project alternatives under the National Environmental Policy Act and the Oil Pollution Act.

Aarin Phillips, National Marine Fisheries Service

For exceptional and enthusiastic IT support for NOAA General Counsel's Alaska Section, consistently responding to requests for help with updating software for computer programs and mobile devices, fixing computer glitches, and smoothly transitioning new employees and temporary law clerks into the AKR network.

Loren Remsberg, Enforcement Section

For taking on a large additional portfolio on Highly Migratory Species to cover for a colleague who was away on detail for over a year. Loren expertly handled the heavy workflow, which included, among many other things, numerous rulemakings, permit holder letters, and essential fish habitat permits, and often required legal review on a time-sensitive basis.

Jackie Rolleri, Oceans and Coasts Section

For outstanding contributions in the bankruptcy proceedings of RMS Titanic, the company that has salvage rights to the Titanic. Jackie has played an instrumental role in drafting legal briefs and working with the Department of Justice to draft motions and other required court filings to capably advocate for the protection of the full set of Titanic artifacts.

GENERAL TEAM AWARDS

Atlantic Sturgeon Critical Habitat Final Rule Team

David Bernhart, National Marine Fisheries Service

Stephania Bolden, National Marine Fisheries Service

Deirdre Casey, Northeast Section

Julie Crocker, National Marine Fisheries Service

Kimberly Damon-Randall, National Marine Fisheries Service

Andrew Herndon, National Marine Fisheries Service

Lynn Lankshear, National Marine Fisheries Service

Lisa Manning, National Marine Fisheries Service

Marta Nammack, National Marine Fisheries Service

Cheryl Scannell, Southeast Section

For creative problem solving and outstanding performance to further NOAA's mission. Separate final rules to designate critical habitat for Atlantic sturgeon were developed and drafted by protected resource personnel in NOAA Fisheries' Greater Atlantic and Southeast Regional Offices, with the

AWARD RECIPIENTS

assistance of NOAA General Counsel regional attorneys. Once NOAA Fisheries determined it was appropriate to combine these two lengthy rules into one final rule, these team members worked above and beyond the call of duty in a short period of time to ensure the combined rule complied with all applicable law and was internally consistent. The high performance of this team under challenging circumstances is an exceptional example of furthering the mission, goals and objectives of NOAA.

Bearded Seal Appellate Litigation Team

Peter Boveng, National Marine Fisheries Service
Dr. Michael F. Cameron, National Marine Fisheries Service
Meredith L. Flax, U.S. Department of Justice
Katherine W. Hazard, U.S. Department of Justice
Mary E. Hollingsworth, U.S. Department of Justice
Amy Kauffman, Alaska Section
Jon Kurland, National Marine Fisheries Service
Joe McCabe, Alaska Section
Tammy Olsen, National Marine Fisheries Service
Demian Schane, Alaska Section
Robert P. Stockman, U.S. Department of Justice

For exceptional work successfully appealing a trial court's decision that had vacated NOAA's listing of the Beringia distinct population segment of bearded seals as threatened under the Endangered Species Act. NOAA determined the bearded seal population is threatened by the effects of future sea-ice habitat loss resulting from global climate change over the foreseeable future, but the trial court found that the evidence of the threats and the population's response to those threats was too speculative. On appeal, the Team's exceptional legal and scientific work, thorough preparation of legal arguments and court briefs, cogent explanation of the scientific basis for NOAA's determination, and clear and persuasive oral argument at the hearing were instrumental in the appeals court's reversal of the lower court's decision. The appeals court's favorable ruling is a significant judicial acknowledgment of NOAA's scientific expertise and reasoned exercise of discretion when making difficult conservation and management decisions on the frontiers of climate science.

The Freedom of Information Act Support Team

John Almeida, Northeast Section
Corinne Brown, National Marine Fisheries Service
Alvin Chua, DoC General Counsel's Office
Mark G. Graff, Chief Information Office
Stacey Nathanson, Fisheries and Protected Resources Section

For outstanding support and coordination efforts, which have ensured that NOAA fulfills obligations under the Freedom of Information Act and successfully resolves FOIA-related litigation. Over the past year, NOAA has received numerous FOIA requests that involve large volumes of potentially responsive documents, often generated from several offices. The Team's expertise with Clearwell, FOIA procedure, and the legal bases for withholding documents has been invaluable to program offices and NOAA General Counsel attorneys as they navigate the FOIA process and tackle the management and review of large numbers of documents. Members of the Team have also successfully resolved a number of cases filed against the agency under FOIA. The Team's commitment and dedication to assisting program staff and attorneys demonstrates the best aspects of cross-agency collaboration and significantly furthers the success of NOAA's mission.

AWARD RECIPIENTS

ICCAT Compliance Committee Team

Kimberly Blankenbeker, National Marine Fisheries Service
Derek Campbell, International Section
Todd Dubois, Office of Law Enforcement
Meggan Engelke-Ros, Enforcement Section
Terra Lederhouse, National Marine Fisheries Service
Erika Nunez, Office of Law Enforcement
Staci Rijal, National Marine Fisheries Service
Oriana Villar, National Marine Fisheries Service
Megan Walline, Fisheries and Protected Resources Section

For outstanding contributions to the International Convention for the Conservation of Atlantic Tunas (ICCAT) Compliance Committee's ability to effectively review and improve member compliance, including through the development and advancement of new procedures for reviewing compliance, addressing non-compliance, and member reporting on implementation of ICCAT requirements as well as effective chairing of the Committee. The Team's efforts demonstrably advance the fulfillment of ICCAT's responsibility to conserve Atlantic tuna.

Klamath River Basin Agreements Team

Matt Baun, U.S. Fish and Wildlife Service
Jon Bezdek, U.S. Department of the Interior
Steve Edmondson, National Marine Fisheries Service
Jennifer Frozena, U.S. Department of the Interior
Dan Hytrek, Southwest Section
Kristen Johnson, U.S. Department of the Interior
Irma Lagomarsino, U.S. Department of the Interior
Dennis Lynch, U.S. Geological Survey
Richard Welsh, U.S. Bureau of Reclamation

For negotiating substantial amendments to the Klamath Hydroelectric Settlement Agreement and a new Klamath Power and Facilities Agreement to continue progress toward removal of four dams on the Klamath River, and to maintain the coalition of diverse stakeholders seeking resolution of longstanding resource disputes in the Klamath River Basin. When it became apparent that Congress would not pass legislation necessary to fully implement three Klamath River Basin agreements, including the Klamath Hydroelectric Settlement Agreement, the team participated in complex and controversial negotiations to substantially amend the Klamath Hydroelectric Settlement Agreement to implement dam removal through an administrative process before the Federal Energy Regulatory Commission that would not require authorizing legislation. The Team also developed the new Klamath Power and Facilities Agreement to serve as a bridge from the Klamath Basin Restoration Agreement that terminated due to Congress' failure to pass necessary authorizing legislation. These agreements will advance NOAA's interests in fisheries resources and stakeholder coordination in the Klamath River Basin.

Navy SURTASS LFA Rule Team

John Armor, National Ocean Service
Deborah Ben-David, Fisheries and Protected Resources Section
Briana Dema, Fisheries and Protected Resources Section
Jolie Harrison, National Marine Fisheries Services
Leila Hatch, National Ocean Service

For outstanding work on the SURTASS LFA III litigation remand and settlement, and on the development of the subsequent SURTASS LFA IV regulation. Over a period of several months, team members worked tirelessly to assist NOAA and the Department of Justice to make a decision about whether to appeal an unfavorable judicial opinion and, thereafter, to reach a favorable settlement agreement with plaintiffs that avoided further litigation on the existing LFA III regulation and allowed

AWARD RECIPIENTS

the U.S. Navy to continue its crucial training without the need to seek a National Defense Exemption. The team subsequently worked – in careful coordination with the Department of Justice and the Department of the Interior – to develop regulatory language explaining how the agency interprets “least practical adverse impact” under the MMPA in a manner that thoroughly and persuasively sets forth the basis for the agency’s interpretation.

Pacific Choice Litigation Team

Mariam McCall, Northwest Section
Martha McCoy, Oceans and Coasts Section
Bridget McNeil, U.S. Department of Justice
Maggie Smith, Northwest Section
Melissa Hooper, National Marine Fisheries Service

For masterfully handling litigation over the ownership control limits adopted for the West Coast groundfish trawl rationalization program in the case Pacific Choice Seafoods v. Ross. The Team briefed a motion to dismiss early in the case that – although it was not ultimately successful – helped frame the issues and advance the court’s understanding. The Team subsequently handled a protracted disagreement with plaintiffs over the administrative record that was ultimately resolved in NOAA’s favor. When the NOAA GC lead attorney was out of the office for parental leave, the other team members stepped up to capably handle the remainder of the litigation, including a very challenging mediation session and summary judgment briefing raising novel legal issues. Overall, the Team’s effort was an excellent example of team work at its finest and most effective.

LENGTH OF SERVICE RECOGNITION

10 YEARS OF FEDERAL SERVICE

Laurie Beale
Derek Campbell
Jonelle Dilley
Adam Dilts
Charles Green
Britta Hinrichsen
Demian Schane

15 YEARS OF FEDERAL SERVICE

Ginger Bennett
Alexa Cole
Ruth Ann Lowery

20 YEARS OF FEDERAL SERVICE

Brian McTague
Gladys Miles
Holly Wheeler
Julia Williams

25 YEARS OF FEDERAL SERVICE

Frederick Tucher

AWARD RECIPIENTS

30 YEARS OF FEDERAL SERVICE

Gene Martin

B. Michael McLemore

Ole Varmer

40 YEARS OF FEDERAL SERVICE

Craig O'Connor

From: Cybersecurity & Privacy Law360
Sent: Monday, August 28, 2017 4:16 AM
To: mark.graff@noaa.gov
Subject: Aetna's HIV Lapse Shows Snail Mail's Privacy Pitfalls



CYBERSECURITY & PRIVACY

Monday, August 28, 2017



TOP NEWS

Analysis

Aetna's HIV Lapse Shows Snail Mail's Privacy Pitfalls

Letters to Aetna Inc. policyholders that publicly divulged information about HIV medications represented a clear breakdown of Health Insurance Portability and Accountability Act controls and are a reminder of snail mail's distinct privacy risks, attorneys say. [Read more »](#)

Calif. Says IMDb Age Info Not Protected By 1st Amendment

California's attorney general told a federal court judge on Thursday that IMDb's inclusion of actors' ages on its site is not protected by the First Amendment, with the Screen Actors Guild joining his push to deny the website a quick win in its suit over legislation meant to combat age-discrimination. [Read more »](#)

FOIA Group That Got Al-Awlaki Memos Wins Fees In 9th Circ.

An open-government group that sued under the Freedom of Information Act to obtain legal memos about the U.S.' targeted killing of Anwar al-Awlaki won legal fees Friday, when Ninth Circuit judges concluded for different reasons that the lower court applied the wrong standard to deny fees. [Read more »](#)

11th Circ. Hands Credit Agency Win In FCRA Class Action

The Eleventh Circuit on Thursday refused to revive a class action accusing credit reporting agency TransUnion LLC of improperly listing a consumer as an authorized user of her parents' delinquent credit card account, finding that the agency had published information that was technically accurate. [Read more »](#)

Objector To Cruise TCPA Settlement Fees Denied Attys' Fees

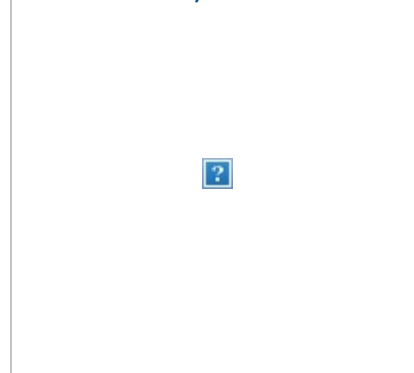
An Illinois federal judge on Thursday denied attorneys' fees to the counsel of an objector who had opposed the fee request by lead counsel in a class action accusing companies marketing cruises of placing millions of robocalls, after finding that his efforts were redundant and failed to help the class. [Read more »](#)

ENFORCEMENT

Cyberfraudster Cops To Running Data Theft Site

A Macedonian national on Friday admitted to running a yearslong identity

Law360 Pro Say Podcast



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LAW FIRMS

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Gibson Dunn
Girard Gibbs
Greenberg Traurig
Greenspoon Marder
Harder Mirell
Hogan Lovells
Hoguet Newman

theft resale scheme, in which he operated a website that acted as a one-stop shop for buyers seeking stolen credit and debit card data and personal information. [Read more »](#)

HK Securities Commish, Police Team Up On Financial Crime

Hong Kong securities regulators and the region's police force signed a memorandum of understanding Friday that lays the groundwork for joint efforts to crack down on financial crime, following a sharp rise in cybersecurity attacks. [Read more »](#)

LITIGATION

Anthem's Record \$115M Data Breach Deal Gets First Nod

U.S. District Judge Lucy Koh on Friday granted preliminary approval to a \$115 million deal ending litigation over Anthem Inc.'s massive 2015 data breach, advancing what's being hailed as the largest-ever data breach settlement, which would provide credit protection and reimbursement for customers and up to \$38 million in attorneys' fees. [Read more »](#)

VW Drivers Make 2nd Bid For Class Cert. In Autodialing Suit

Volkswagen dealership customers accusing the auto giant of violating the Telephone Consumer Protection Act with autodialed solicitations urged a California federal judge on Friday to grant their revised class certification bid, saying it addressed the court's concern about a change in FCC rules about obtaining consent for such calls. [Read more »](#)

Arby's Seeks To Shake Class Suit Over Data Breach

Arby's has asked a Georgia federal court to toss a proposed consumer class action accusing the fast food chain of lacking security measures that left it open for a three-month-long data breach, arguing that it has no duty to safeguard payment card data from the criminal acts of third parties. [Read more »](#)

2nd Circ. Won't Rethink Axing Cafe Customer's Receipt Row

The Second Circuit declined Thursday to rethink its decision that a Paris Baguette America Inc. patron lacked standing to bring her proposed class action alleging the cafe chain violated the Fair and Accurate Credit Transactions Act by unlawfully printing payment card expiration dates on consumers' receipts. [Read more »](#)

Spanish Radio Network Hit With TCPA Class Action Over Texts

Spanish-language radio company Spanish Broadcasting Inc. was hit with a putative class action in Illinois federal court on Thursday over unwanted text messages to cellphone users on the national Do Not Call registry. [Read more »](#)

EXPERT ANALYSIS

6 Cybersecurity Questions Gov't Contractors Should Address

Based on their recent discussions with more than 100 government contractors, Gregory Garrett and Karen Schuler of BDO LLP outline six pain points related to the implementation of cybersecurity information governance, risk management and compliance. [Read more »](#)

Sellers Are Not Liable For Independent Contractors' Calls

The Ninth Circuit's recent decision in Jones v. Royal found that a seller was not vicariously liable for calls made by a telemarketer in violation of the Telephone Consumer Protection Act. Sellers should review their contracts and make sure that their telemarketers are independent contractors in order to minimize their liability, says Patrick McLaughlin of Spencer Fane

Holland & Knight
Hueston Hennigan
Husch Blackwell
Kirkland & Ellis
Kozyak Tropin
Latham & Watkins
Legal Action Center
Lief Cabraser
Loevy & Loevy
Lynn Pinker
Meyer Wilson
Mirick O'Connell
Moore & Van Allen
Morgan Lewis
Morrison & Foerster
Nixon Peabody
Norton Rose Fulbright
Ogletree Deakins
Orrick Herrington
Paul Weiss
Pepper Hamilton
Pillsbury Winthrop
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Sanford Heisler
Sheppard Mullin
Skadden
Solomon Blum
Spencer Fane
Stanton Law Office LLC
Stroock & Stroock
Tabet DiVito
Troutman Sanders

COMPANIES

AARP Inc.
Aetna Inc.
American Bar Association
American Cancer Society Inc.
American Express Company
American Federation of Television and Radio Artists
Anthem Inc.
Arby's Restaurant Group Inc.
Audi AG
BDO LLP
BDO USA LLP

LLP. [Read more »](#)

6 Common Lateral Partner Myths Debunked

It's safe to say that while demand ebbs and flows for legal services, there will never be a shortage of opinions about lateral partner hiring, which is positive for the industry, as anything with such vital importance to careers should attract significant attention. However, there is a unique mythology that travels with the discussions, says Dan Hatch of Major Lindsey & Africa. [Read more »](#)

LEGAL INDUSTRY

How To Deal With Jerks In The Legal Profession

The exact number of jerks in BigLaw has never been established, but anecdotal evidence suggests there are at least a few. Here, mental health experts, life coaches and the author of a new book offer up four tips for dealing with difficult people in law. [Read more »](#)

Amended Chadbourne Gender Bias Suit Wins Grudging OK

A New York federal judge on Friday refused a motion to strike a second amended complaint in the gender discrimination suit against Chadbourne & Parke LLP, saying the additions the plaintiffs made to the complaint in excess of what had been directed did not prejudice the defendants. [Read more »](#)

Holland & Knight Gets Judgment Against Ex-Partner For Fees

Holland & Knight LLP secured a \$772,000 judgment in New York Supreme Court earlier this month against a former trusts and estates partner for unreturned legal fees stemming from his work as a guardian ad litem while at the firm. [Read more »](#)

Kirkland, NYC Charities Secure 'Sesame Street' Royalties

Kirkland & Ellis LLP's pro bono legal services helped 10 New York City charities secure almost \$600,000 in lump sum payments for royalties from the works of the late Tony Geiss, a screenwriter for "Sesame Street" and "The Land Before Time," among other children's classics. [Read more »](#)

Cuban American Bar Assoc. Zeroes In On Attys' Mental Health

After the suicide in June of a prominent Miami attorney rocked the local legal community, the Cuban American Bar Association is making mental health a focus, starting with an annual luncheon Friday that featured attorney Brian Cuban — brother of businessman Mark Cuban — to talk about his struggle with addiction and depression. [Read more »](#)

GC Cheat Sheet: The Hottest Corporate News Of The Week

A new report finds that President Trump's proposed corporate tax cuts are not likely to help workers, Delaware is the latest state to step up companies' data security obligations and corporate counsel are renewing the push for diversity among their outside attorneys. These are some of the top stories in corporate legal news you may have missed last week. [Read more »](#)

In Case You Missed It: Hottest Firms And Stories On Law360

For those who missed out, here's a look back at the law firms, stories and expert analyses that generated the most buzz on Law360 last week. [Read more »](#)

Podcast

Law360's Pro Say: Why Aren't Law Firms More Diverse?

On the latest episode of Law360's Pro Say podcast, the team discusses how the push for law firm diversity is stagnating, a massive verdict against

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GOVERNMENT AGENCIES

Central Intelligence Agency
Defense Contract Audit Agency
Defense Contract Management Agency
Equal Employment Opportunity Commission
Federal Acquisition Regulatory Council
Federal Communications Commission
Federal Reserve System
Federal Trade Commission
National Institute of Standards and Technology
New York Attorney General's Office
Securities and Exchange Commission
U.S. Department of Defense
U.S. Department of Health and Human Services
U.S. Department of Homeland Security
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Johnson & Johnson in a trial over the link between baby powder and cancer, and one firm that fired a partner with ties to a neo-Nazi record label.
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Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Monday, August 28, 2017 8:23 AM
To: Robert Swisher - NOAA Federal; Dennis Morgan - NOAA Federal
Subject: Fwd: NOAA GC AWARDS
Attachments: Final 2016 Awards Program.docx

Very nice proposed award from GC below following the success of FOIA.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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----- Forwarded message -----

From: **Caroline Park - NOAA Federal** <caroline.park@noaa.gov>
Date: Fri, Aug 25, 2017 at 9:54 AM
Subject: Fwd: NOAA GC AWARDS
To: Stacey Nathanson <stacey.nathanson@noaa.gov>, John Almeida - NOAA Federal <john.almeida@noaa.gov>, Mark Graff - NOAA Federal <mark.graff@noaa.gov>, Corinne Brown - NOAA Federal <corinne.brown@noaa.gov>, "Chua, Alvin" <achua@doc.gov>
Cc: Gene Martin <gene.s.martin@noaa.gov>, Robert Swisher - NOAA Federal <robert.swisher@noaa.gov>, "Kornegay, Nick" <NKornegay@doc.gov>, Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>

Congratulations, Stacey, John, Mark, Corinne and Alvin!!!! I nominated you for a NOAA General Counsel team award as "The Freedom of Information Act Support Team." See attached booklet on p6. Very big thanks for everything that you do!

:) Caroline

----- Forwarded message -----

From: **Marilou Shanefelt - NOAA Federal** <marilou.shanefelt@noaa.gov>
Date: Thu, Aug 24, 2017 at 5:05 PM
Subject: NOAA GC AWARDS
To: _HDQ ALL GC <all.gc@noaa.gov>

The NOAA Office of General Counsel is pleased to recognize the following NOAA GC employees, along with NOAA line and staff office personnel, and federal employees from other agencies, for their exceptional performance and contributions to the work of NOAA GC during the last calendar year. The "Of the Year" Award recipients for 2016-2017 are:

Manager of the Year:

Adam Issenberg

Lindy S. Johnson Attorney of the Year:

Ruth Ann Lowery

Paralegal of the Year:

Brittany Pugh

Administrative Professional of the Year:

Kaili Sams

NOAA GC is also pleased to recognize Russell Callender as a **NOAA Senior Leader**. Russell has displayed notable leadership in fulfilling NOAA's mission during a period of transition.

We also take this opportunity to recognize the special contributions of a number of individuals who went above and beyond the call of duty to provide exceptional service, as well as the outstanding work of several teams on matters of importance to NOAA GC and to the agency.

Finally, we acknowledge our employees with Length of Service certificates for milestone anniversaries in 2017. Their dedication and commitment to public service is inspiring. For all those celebrating milestones, we thank you for your service to NOAA and to the nation.

The attached booklet provides a full listing of our honorees. We will be holding an award ceremony in Silver Spring on September 29, 2017. Awardees in the Regional Offices will receive their award or Length of Service certificate through the mail. We encourage each Regional Office to hold their own event to recognize their honorees. Congratulations to all of our awardees!

In closing, we extend a heart-felt thank you to every member of NOAA GC for your hard work and commitment to excellence throughout the year. We appreciate all that you do.

Sincerely,

Jeff and Kristen

--

Caroline Park
Deputy Section Chief, Fisheries and Protected Resources Section
NOAA Office of General Counsel
U.S. Department of Commerce
Phone: [\(301\) 713-9675](tel:3017139675)
Fax: [\(301\) 713-0658](tel:3017130658)

NOAA Office of the General Counsel



*2016-2017
Awards*

AWARD RECIPIENTS

MANAGER OF THE YEAR

Adam Issenberg, Fisheries and Protected Resources Section

Adam Issenberg is being recognized for his outstanding contributions to the NOAA General Counsel's Office during a time of transition. He served as Acting Deputy General Counsel through early 2016 and has provided invaluable support and advice to two new deputies. He has played a key role in coordinating views across multiple NOAA GC Sections on cross-cutting legal issues, like designation of critical habitat. He has served as a knowledgeable resource and sounding board on a host of thorny matters under the Magnuson-Stevens Act. Adam has also taken a lead role in developing and promoting the Attorney Honors Program, including facilitating the process for the selection and rotation of NOAA GC's 2017 class.

LINDY S. JOHNSON ATTORNEY OF THE YEAR

Ruth Ann Lowery, Fisheries and Protected Resources Section

Ruth Ann is being recognized for consistently providing outstanding legal advice and support to the NOAA Office of General Counsel. She is widely respected as NOAA GC's foremost expert on section 4 of the Endangered Species Act and the application of its very complex and technical provisions for listing threatened and endangered species and the designation of critical habitat. She has played a crucial role in guiding and advising NMFS on the development of several interagency interpretive policies and rules for improving implementation of ESA section 4, including a rule interpreting the phrase "destruction or adverse modification of critical habitat," and a rule providing important guidance on the process for designating critical habitat. She also serves as lead agency counsel for the Judicial Watch climate change FOIA and other climate-related FOIAs and associated litigation, navigating the difficult tasks of responding to the FOIAs and providing valuable input and astute legal advice to the Department of Justice in the development of briefs and agency declarations.

PARALEGAL OF THE YEAR

Brittany Pugh, Northwest Section

Brittany is recognized for going well beyond the call of duty month after month by effectively and timely performing her paralegal duties while simultaneously providing administrative support while the Northwest Section's administrative assistant position was vacant. Brittany demonstrated high levels of initiative in order to gain mastery of the many and varied additional tasks, including time and attendance, property management, and maintenance of office equipment. She maintained a positive and constructive attitude while balancing the two jobs, taking a mature and pragmatic approach to supporting the interests of the office and the agency. Her willingness and ability to assist with expanded duties during a time of transition meant that the Northwest Section and its attorneys were able to continue functioning at a high level.

AWARD RECIPIENTS

ADMINISTRATIVE PROFESSIONAL OF THE YEAR

Kaili Sams, Natural Resources Section

Kaili is recognized for her extraordinary support of the Natural Resource Section and its attorneys located across the country. Kaili has become an integral part of the Natural Resources Section, and has earned the highest degree of respect and confidence in her abilities to handle the Section's complex needs, including tracking hundreds of billing codes, managing dozens of travel requests, and ensuring timely production of documentation in response to internal case audits. Her contributions, however, extend well beyond the Natural Resources Section. Over the past year, Kaili has spent extended periods covering administrative duties for several other Sections that lacked administrative professional support. She took on these extra duties with enthusiasm and received unanimous praise for the quality of her assistance.

SENIOR LEADER OF THE YEAR

Russell Callender, National Ocean Service

Dr. Russell Callender has become a model for how NOAA leadership can work collaboratively and productively with legal counsel, carefully including counsel early and often when considering significant issues, and thoughtfully applying the legal advice he receives. The benefits of his approach are demonstrated by his strong leadership establishing a compliance program at the National Ocean Service, improving the protection of NOAA trust resources resulting from NOAA actions and decision making.

GENERAL INDIVIDUAL AWARDS

Branden Blum, Natural Resources Section

For exceptional work in support of the closeout of the Deepwater Horizon natural resource damages assessment, including his outstanding efforts to resolve issues involving the disposal of dolphin, whale and sea turtle carcasses collected during the assessment (and retained for years under a court-issued preservation order) and his sound advice on dealing with the payment of certain unresolved costs related to the assessment.

Jonelle Dilley, Oceans and Coasts Section

For exhibiting outstanding leadership and providing thoughtful legal advice instrumental to the National Ocean Service (NOS) in its development and execution of its environmental compliance strategy and program. Jonelle's in-depth knowledge and coordination across nine NOS program offices on broad legal and policy issues ensured consistent NOS-wide resolutions, and helped the client more effectively serve its science and resource-protection mission.

Christopher Fontecchio, Northwest Section

For professional and effective handling of litigation challenging NMFS' distribution of Mitchell Act funds for fish-hatchery programs, developing a litigation strategy, carefully evaluating the relevant record, coordinating internally and with the Department of Justice, and, overall, demonstrating an exemplary level of competence and engagement, which led to significant agency success.

AWARD RECIPIENTS

Britta Hinrichsen, Natural Resources Section

For excellent input and support on a variety of projects related to improving the operational performance of the Damage Assessment, Restoration, and Remediation Program, including the development of a comprehensive communications plan, integration of the DIVER computer system, and refinement of the case-closeout process. Britta is also recognized for her outstanding work as lead attorney on the Bay Long pipeline rupture.

Dan Hytrek, Southwest Section

For outstanding contributions to the completion of immensely complex agreements, biological opinions, a recovery plan, and regional guidance. In particular, Dan is recognized for going above and beyond the call of duty to provide exceptional service to his client in the development and review of the California Water Fix biological opinion. Under an extremely demanding schedule, Dan labored tirelessly to consistently provide timely and highly valued legal advice. Dan has worked effectively with the National Marine Fisheries Service, other Federal agencies, State agencies, and private interests to advance NOAA's interests in protecting and recovering marine resources.

Amy Kauffman, Alaska Section

For exemplary support in the Alaska Section, as well as assisting NOAA GC Sections beyond Alaska, by preparing numerous travel authorizations and vouchers, tracking spending and preparing budget reports, and training new administrative staff. Amy is also recognized for her superb assistance with the 2017 Attorney Honors Program, creating spreadsheets for tracking applicants and interviews, while continuing her outstanding performance of her regular job responsibilities.

Pamela Lawrence, Fisheries and Protected Resources Section

For outstanding work negotiating the terms of the Memorandum of Understanding on the extension of an existing Settlement Agreement with the California American Water Company regarding its withdrawals from the Carmel River, which affect South Central California Coast steelhead, a matter involving sensitive issues and significant enforcement equities. Pam did a great job coordinating with other sections, briefing headquarters, and thinking about creative solutions to impediments.

Laurie Lee, Natural Resources Section

For great professionalism, efficiency, and attention to detail, in her support of the leadership of NOAA's Damage Assessment, Restoration and Remediation Program, and standing as the go-to person for advice on a broad range of significant issues, including overall management and oversight of a 200-case docket; development of a new case closure manual; oversight of the preparation of the annual DARRP Leadership Group report; and leadership of the Section's planning efforts for oil spill response and assessment in the Arctic region. On top of all this, Laurie maintains a sizeable personal caseload, including one of NOAA's most complicated and high-profile Superfund cases.

Mara Levy, Southeast Section

For leadership in several complicated legal challenges to various Gulf of Mexico red snapper regulations, providing extensive support to the Department of Justice, and directly contributing to (1) litigation victories in two cases and a partial victory in another case, and (2) added certainty to NOAA Fisheries in its interpretation of the Magnuson-Stevens Act section 407(d) for red snapper, including the authority to establish separate groups within their individual quotas within the recreational fishing sector and the authority to make changes to quota allocations within the red snapper fishery.

AWARD RECIPIENTS

Charles McLeod, Headquarters (Detailed)

For vital support of the NOAA Office of General Counsel from October 2016 – January 2017. Charles provided timely and succinct coordination in a myriad of areas to ensure uninterrupted flow of personnel actions. Charles quickly became familiar with GC's sections and their requirements for recruitments and retirements, and met challenges head-on despite the agency's transition from one personnel system to another.

Corinna McMackin, Natural Resources Section

For exceptional work as the lead NOAA attorney for the "Alabama Lodge" case, a federal district court lawsuit challenging the selection of a Deepwater Horizon early restoration project. In response to a Court injunction order and under an extremely compressed timeline, Corinna worked tirelessly to oversee completion of a revised restoration plan and evaluation of a range of project alternatives under the National Environmental Policy Act and the Oil Pollution Act.

Aarin Phillips, National Marine Fisheries Service

For exceptional and enthusiastic IT support for NOAA General Counsel's Alaska Section, consistently responding to requests for help with updating software for computer programs and mobile devices, fixing computer glitches, and smoothly transitioning new employees and temporary law clerks into the AKR network.

Loren Remsberg, Enforcement Section

For taking on a large additional portfolio on Highly Migratory Species to cover for a colleague who was away on detail for over a year. Loren expertly handled the heavy workflow, which included, among many other things, numerous rulemakings, permit holder letters, and essential fish habitat permits, and often required legal review on a time-sensitive basis.

Jackie Rolleri, Oceans and Coasts Section

For outstanding contributions in the bankruptcy proceedings of RMS Titanic, the company that has salvage rights to the Titanic. Jackie has played an instrumental role in drafting legal briefs and working with the Department of Justice to draft motions and other required court filings to capably advocate for the protection of the full set of Titanic artifacts.

GENERAL TEAM AWARDS

Atlantic Sturgeon Critical Habitat Final Rule Team

David Bernhart, National Marine Fisheries Service

Stephania Bolden, National Marine Fisheries Service

Deirdre Casey, Northeast Section

Julie Crocker, National Marine Fisheries Service

Kimberly Damon-Randall, National Marine Fisheries Service

Andrew Herndon, National Marine Fisheries Service

Lynn Lankshear, National Marine Fisheries Service

Lisa Manning, National Marine Fisheries Service

Marta Nammack, National Marine Fisheries Service

Cheryl Scannell, Southeast Section

For creative problem solving and outstanding performance to further NOAA's mission. Separate final rules to designate critical habitat for Atlantic sturgeon were developed and drafted by protected resource personnel in NOAA Fisheries' Greater Atlantic and Southeast Regional Offices, with the

AWARD RECIPIENTS

assistance of NOAA General Counsel regional attorneys. Once NOAA Fisheries determined it was appropriate to combine these two lengthy rules into one final rule, these team members worked above and beyond the call of duty in a short period of time to ensure the combined rule complied with all applicable law and was internally consistent. The high performance of this team under challenging circumstances is an exceptional example of furthering the mission, goals and objectives of NOAA.

Bearded Seal Appellate Litigation Team

Peter Boveng, National Marine Fisheries Service
Dr. Michael F. Cameron, National Marine Fisheries Service
Meredith L. Flax, U.S. Department of Justice
Katherine W. Hazard, U.S. Department of Justice
Mary E. Hollingsworth, U.S. Department of Justice
Amy Kauffman, Alaska Section
Jon Kurland, National Marine Fisheries Service
Joe McCabe, Alaska Section
Tammy Olsen, National Marine Fisheries Service
Demian Schane, Alaska Section
Robert P. Stockman, U.S. Department of Justice

For exceptional work successfully appealing a trial court's decision that had vacated NOAA's listing of the Beringia distinct population segment of bearded seals as threatened under the Endangered Species Act. NOAA determined the bearded seal population is threatened by the effects of future sea-ice habitat loss resulting from global climate change over the foreseeable future, but the trial court found that the evidence of the threats and the population's response to those threats was too speculative. On appeal, the Team's exceptional legal and scientific work, thorough preparation of legal arguments and court briefs, cogent explanation of the scientific basis for NOAA's determination, and clear and persuasive oral argument at the hearing were instrumental in the appeals court's reversal of the lower court's decision. The appeals court's favorable ruling is a significant judicial acknowledgment of NOAA's scientific expertise and reasoned exercise of discretion when making difficult conservation and management decisions on the frontiers of climate science.

The Freedom of Information Act Support Team

John Almeida, Northeast Section
Corinne Brown, National Marine Fisheries Service
Alvin Chua, DoC General Counsel's Office
Mark G. Graff, Chief Information Office
Stacey Nathanson, Fisheries and Protected Resources Section

For outstanding support and coordination efforts, which have ensured that NOAA fulfills obligations under the Freedom of Information Act and successfully resolves FOIA-related litigation. Over the past year, NOAA has received numerous FOIA requests that involve large volumes of potentially responsive documents, often generated from several offices. The Team's expertise with Clearwell, FOIA procedure, and the legal bases for withholding documents has been invaluable to program offices and NOAA General Counsel attorneys as they navigate the FOIA process and tackle the management and review of large numbers of documents. Members of the Team have also successfully resolved a number of cases filed against the agency under FOIA. The Team's commitment and dedication to assisting program staff and attorneys demonstrates the best aspects of cross-agency collaboration and significantly furthers the success of NOAA's mission.

AWARD RECIPIENTS

ICCAT Compliance Committee Team

Kimberly Blankenbeker, National Marine Fisheries Service
Derek Campbell, International Section
Todd Dubois, Office of Law Enforcement
Meggan Engelke-Ros, Enforcement Section
Terra Lederhouse, National Marine Fisheries Service
Erika Nunez, Office of Law Enforcement
Staci Rijal, National Marine Fisheries Service
Oriana Villar, National Marine Fisheries Service
Megan Walline, Fisheries and Protected Resources Section

For outstanding contributions to the International Convention for the Conservation of Atlantic Tunas (ICCAT) Compliance Committee's ability to effectively review and improve member compliance, including through the development and advancement of new procedures for reviewing compliance, addressing non-compliance, and member reporting on implementation of ICCAT requirements as well as effective chairing of the Committee. The Team's efforts demonstrably advance the fulfillment of ICCAT's responsibility to conserve Atlantic tuna.

Klamath River Basin Agreements Team

Matt Baun, U.S. Fish and Wildlife Service
Jon Bezdek, U.S. Department of the Interior
Steve Edmondson, National Marine Fisheries Service
Jennifer Frozena, U.S. Department of the Interior
Dan Hytrek, Southwest Section
Kristen Johnson, U.S. Department of the Interior
Irma Lagomarsino, U.S. Department of the Interior
Dennis Lynch, U.S. Geological Survey
Richard Welsh, U.S. Bureau of Reclamation

For negotiating substantial amendments to the Klamath Hydroelectric Settlement Agreement and a new Klamath Power and Facilities Agreement to continue progress toward removal of four dams on the Klamath River, and to maintain the coalition of diverse stakeholders seeking resolution of longstanding resource disputes in the Klamath River Basin. When it became apparent that Congress would not pass legislation necessary to fully implement three Klamath River Basin agreements, including the Klamath Hydroelectric Settlement Agreement, the team participated in complex and controversial negotiations to substantially amend the Klamath Hydroelectric Settlement Agreement to implement dam removal through an administrative process before the Federal Energy Regulatory Commission that would not require authorizing legislation. The Team also developed the new Klamath Power and Facilities Agreement to serve as a bridge from the Klamath Basin Restoration Agreement that terminated due to Congress' failure to pass necessary authorizing legislation. These agreements will advance NOAA's interests in fisheries resources and stakeholder coordination in the Klamath River Basin.

Navy SURTASS LFA Rule Team

John Armor, National Ocean Service
Deborah Ben-David, Fisheries and Protected Resources Section
Briana Dema, Fisheries and Protected Resources Section
Jolie Harrison, National Marine Fisheries Services
Leila Hatch, National Ocean Service

For outstanding work on the SURTASS LFA III litigation remand and settlement, and on the development of the subsequent SURTASS LFA IV regulation. Over a period of several months, team members worked tirelessly to assist NOAA and the Department of Justice to make a decision about whether to appeal an unfavorable judicial opinion and, thereafter, to reach a favorable settlement agreement with plaintiffs that avoided further litigation on the existing LFA III regulation and allowed

AWARD RECIPIENTS

the U.S. Navy to continue its crucial training without the need to seek a National Defense Exemption. The team subsequently worked – in careful coordination with the Department of Justice and the Department of the Interior – to develop regulatory language explaining how the agency interprets “least practical adverse impact” under the MMPA in a manner that thoroughly and persuasively sets forth the basis for the agency’s interpretation.

Pacific Choice Litigation Team

Mariam McCall, Northwest Section
Martha McCoy, Oceans and Coasts Section
Bridget McNeil, U.S. Department of Justice
Maggie Smith, Northwest Section
Melissa Hooper, National Marine Fisheries Service

For masterfully handling litigation over the ownership control limits adopted for the West Coast groundfish trawl rationalization program in the case Pacific Choice Seafoods v. Ross. The Team briefed a motion to dismiss early in the case that – although it was not ultimately successful – helped frame the issues and advance the court’s understanding. The Team subsequently handled a protracted disagreement with plaintiffs over the administrative record that was ultimately resolved in NOAA’s favor. When the NOAA GC lead attorney was out of the office for parental leave, the other team members stepped up to capably handle the remainder of the litigation, including a very challenging mediation session and summary judgment briefing raising novel legal issues. Overall, the Team’s effort was an excellent example of team work at its finest and most effective.

LENGTH OF SERVICE RECOGNITION

10 YEARS OF FEDERAL SERVICE

Laurie Beale
Derek Campbell
Jonelle Dilley
Adam Dilts
Charles Green
Britta Hinrichsen
Demian Schane

15 YEARS OF FEDERAL SERVICE

Ginger Bennett
Alexa Cole
Ruth Ann Lowery

20 YEARS OF FEDERAL SERVICE

Brian McTague
Gladys Miles
Holly Wheeler
Julia Williams

25 YEARS OF FEDERAL SERVICE

Frederick Tucher

AWARD RECIPIENTS

30 YEARS OF FEDERAL SERVICE

Gene Martin

B. Michael McLemore

Ole Varmer

40 YEARS OF FEDERAL SERVICE

Craig O'Connor

Zachary Goldstein - NOAA Federal

From: Zachary Goldstein - NOAA Federal
Sent: Monday, August 28, 2017 5:11 PM
To: Benjamin Friedman - NOAA Federal; CIO All Hands; _NOAA Assistant CIOs; Jeff Flick - NOAA Federal; Tony Lavoie - NOAA Federal; Nancy Jackson; Ed Kearns - NOAA Federal
Subject: OCIO Weekly Message - August 28, 2017



Below is information on NOAA OCIO activities

NOAA HPC Award for Increased Capacity

NOAA has awarded \$10 million to the Northern Gulf Institute at Mississippi State University for high-performance computing resources support of NOAA research and development activities. This award will provide computing to run larger, more complex, and more detailed environmental models while advancing the historical and ongoing relationships between Northern Gulf Institute scientists and personnel in NOAA Labs and other Cooperative Institutes.

POC: Brian Gross, brian.gross@noaa.gov

Privacy Impact Assessments Backlog Eliminated

With the approval of the Privacy Impact Assessment (PIA) of the NOAA0520 NOAA Environmental Security Computing Center system, NOAA has eliminated the backlog of systems in the FISMA inventory operating without a PIA as they were identified in January, 2016. This is a significant advancement, and results from a tremendous effort from the Staff and Line Offices. NOAA Privacy continues to review FISMA systems for Personally Identifiable Information (PII) not previously identified in historical Privacy Threshold Analyses.

POC: Mark Graff, mark.graff@noaa.gov

FOIA Litigation

The District Court of the District of Columbia issued an order upholding NOAA's use of Freedom of Information Act (FOIA) Exemption (b)(5) Deliberative Process Privilege to protect the scientific peer review of the climate hiatus paper drafted by NOAA scientists within NESDIS/National Centers for Environmental Information. The Court also ruled that there was no NOAA misconduct. This represents a significant victory for NOAA, and validates NOAA's FOIA practices as they relate to determining what can be released to the public and the application of statutory exemptions from release.

POC: Mark Graff, mark.graff@noaa.gov

OCIO Windows 10 Deployment

The OCIO Service Delivery Division (SDD) will begin transitioning PCs from the Windows 7 Operating System (OS) to Windows 10 OS in a phased approach in FY18. SDD will also upgrade from Microsoft Office 2010 to Microsoft Office 2016. The deployment schedule is as follows:

- Pilot Phase - Ongoing now with selected customers using and providing feedback on Windows 10/Office 2016.
- Phase I - Starting September 30, 2017, all new PCs arriving for imaging and configuration will have Windows 10 and Office 2016.
- Phase II - Starting in January 2018, the 13 sites supported by SDD across the U.S. will schedule existing PCs to be upgraded to Windows 10/Office 2016 if the PC meets the minimum requirements.
- Phase III - All training, loaner, and travel PC's will be upgraded to Windows 10/Office 2016.

POC: Tonya Banks, tonya.b.banks@noaa.gov

E2 End of Year Travel Guidance

NOAA Finance Office Director, Kim Darling, sent an email to all travelers on July 31st with End of Year (EOY) guidance. Please follow the Detailed E2 Fiscal Year End Travel Guidance that was referenced in her memo and can be found at the link below to prepare your EOY travel. It covers travel that starts in FY17 but ends in FY17 or FY18, and travel that starts and ends in FY18 but is mission critical and needs to be booked in FY17.

<http://www.corporateservices.noaa.gov/finance/docs/E2/DetailedE2SolutionsFiscalYearEndTravelGuidance.pdf>

POC: Trena Simon, trena.a.simon@noaa.gov

OCIO Purchase Card Cutoff Date for FY17

The OCIO FY17 cutoff date for use of purchase cards is Friday, September 8, 2017. Please plan your final orders now to ensure completion by this date. If you have an emergency order that must be placed after this date, you will need to obtain approval from your Division Chief and the Resource Management Division Chief, Daria Webb.

POC: Vanessa Rini-Lopez, vanessa.rini-lopez@noaa.gov

--

Zachary G. Goldstein

Chief Information Officer and Director, High Performance Computing and Communications
National Oceanic and Atmospheric Administration

Dennis Morgan - NOAA Federal

From: Dennis Morgan - NOAA Federal
Sent: Monday, August 28, 2017 5:30 PM
To: Brabson Sarah; Graff Mark; Lola Stith - NOAA Affiliate
Cc: OCIO/OPPA; Morgan Dennis
Subject: Fwd: OCIO Weekly Message - August 28, 2017

Fantastic PIA success!!!

----- Forwarded message -----

From: **Zachary Goldstein - NOAA Federal** <zachary.goldstein@noaa.gov>
Date: Mon, Aug 28, 2017 at 5:11 PM
Subject: OCIO Weekly Message - August 28, 2017
To: Benjamin Friedman - NOAA Federal <Benjamin.Friedman@noaa.gov>, CIO All Hands <cio.allhands@noaa.gov>, _NOAA Assistant CIOs <assistant.cios@noaa.gov>, Jeff Flick - NOAA Federal <jeff.flick@noaa.gov>, Tony Lavoie - NOAA Federal <tony.lavoie@noaa.gov>, Nancy Jackson <nancy.jackson@noaa.gov>, Ed Kearns - NOAA Federal <ed.kearns@noaa.gov>



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POC: Trena Simon, trena.a.simon@noaa.gov

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POC: Vanessa Rini-Lopez, vanessa.rini-lopez@noaa.gov

--

Zachary G. Goldstein

Chief Information Officer and Director, High Performance Computing and Communications
National Oceanic and Atmospheric Administration

Dennis Morgan - NOAA Federal

From: Dennis Morgan - NOAA Federal
Sent: Monday, August 28, 2017 5:37 PM
To: Graff Mark; Lola Stith - NOAA Affiliate
Cc: OCIO/OPPA; Morgan Dennis
Subject: Fwd: OCIO Weekly Message - August 28, 2017

NOAA FOIA Program rocks!!

----- Forwarded message -----

From: Zachary Goldstein - NOAA Federal <zachary.goldstein@noaa.gov>
Date: Mon, Aug 28, 2017 at 5:11 PM
Subject: OCIO Weekly Message - August 28, 2017
To: Benjamin Friedman - NOAA Federal <Benjamin.Friedman@noaa.gov>, CIO All Hands <cio.allhands@noaa.gov>, _NOAA Assistant CIOs <assistant.cios@noaa.gov>, Jeff Flick - NOAA Federal <jeff.flick@noaa.gov>, Tony Lavoie - NOAA Federal <tony.lavoie@noaa.gov>, Nancy Jackson <nancy.jackson@noaa.gov>, Ed Kearns - NOAA Federal <ed.kearns@noaa.gov>



Below is information on NOAA OCIO activities

NOAA HPC Award for Increased Capacity

NOAA has awarded \$10 million to the Northern Gulf Institute at Mississippi State University for high-performance computing resources support of NOAA research and development activities. This award will provide computing to run larger, more complex, and more detailed environmental models while advancing the historical and ongoing relationships between Northern Gulf Institute scientists and personnel in NOAA Labs and other Cooperative Institutes.

POC: Brian Gross, brian.gross@noaa.gov

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POC: Mark Graff, mark.graff@noaa.gov

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review of the climate hiatus paper drafted by NOAA scientists within NESDIS/National Centers for Environmental Information. The Court also ruled that there was no NOAA misconduct. This represents a significant victory for NOAA, and validates NOAA's FOIA practices as they relate to determining what can be released to the public and the application of statutory exemptions from release.

POC: Mark Graff, mark.graff@noaa.gov

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- Phase III - All training, loaner, and travel PC's will be upgraded to Windows 10/Office 2016.

POC: Tonya Banks, tonya.b.banks@noaa.gov

E2 End of Year Travel Guidance

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<http://www.corporateservices.noaa.gov/finance/docs/E2/DetailedE2SolutionsFiscalYearEndTravelGuidance.pdf>

POC: Trena Simon, trena.a.simon@noaa.gov

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POC: Vanessa Rini-Lopez, vanessa.rini-lopez@noaa.gov

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Zachary G. Goldstein

Chief Information Officer and Director, High Performance Computing and Communications
National Oceanic and Atmospheric Administration

From: Cybersecurity & Privacy Law360
Sent: Tuesday, August 29, 2017 4:57 AM
To: mark.graff@noaa.gov
Subject: Aetna Hit With Class Action Over HIV Drug Disclosure



CYBERSECURITY & PRIVACY

Tuesday, August 29, 2017



TOP NEWS

Aetna Hit With Class Action Over HIV Drug Disclosure

Aetna Inc. unlawfully exposed confidential HIV-related information by using partly transparent envelopes to mail instructions about obtaining HIV medication to roughly 12,000 people, current and former policyholders claim in a proposed class action filed Monday in Pennsylvania federal court. [Read more »](#)

9th Circ. Says CIA FOIA Request Wrongly Rejected Over Form

The Ninth Circuit on Monday revived a Freedom of Information Act suit seeking access to Central Intelligence Agency records regarding employees that engaged in torture, saying a district court had wrongly decided the case based on the form of the request, rather than on its merits. [Read more »](#)

Chinese National Charged In Trading OPM Hack Malware

A Chinese national is facing charges of conspiracy and computer hacking related to allegations he dealt in a rare malicious software tool linked to major breaches at the U.S. Office of Personnel Management and Anthem, according to court documents unsealed last week in California federal court. [Read more »](#)

CFO Who Hacked Ex-Worker's Email Hit With Ethics Charges

An executive for an Illinois precious metal refinery has been charged by state disciplinary authorities with breaking into the personal email of a former employee who is suing the company and then lying about it under oath, according to a recently served complaint. [Read more »](#)

POLICY & REGULATION

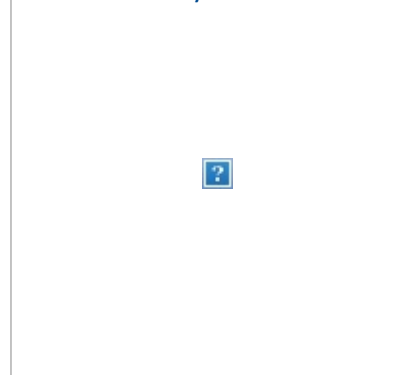
IRS Says New Email Scam Links To Bogus FBI Questionnaire

The IRS warned the public on Monday to beware of a new email phishing scam that poses as a notice from the IRS and FBI in order to trick users into downloading ransomware, the latest effort from the tax agency to address a spike in internet schemes targeting taxpayers and professionals. [Read more »](#)

Singapore Draft Cybersecurity Law Too Rigid, Biz Groups Say

The U.S. Chamber of Commerce and several other business groups are pushing for more flexibility in Singapore's draft cybersecurity legislation, arguing that the law needs to align with existing global best practices and

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Gibson Dunn
GrayRobinson
Holland & Knight
Jackson Walker
Kirkland & Ellis
Kyros Law Offices
Legal Action Center
Littler Mendelson
Norton Rose Fulbright

cannot impose prescriptive standards that expose companies that have suffered data breaches to criminal liability. [Read more »](#)

LITIGATION

Uber Says Revamped Data Breach Suit Still Fails

Uber Technologies Inc. has urged a California federal judge to axe a proposed class action over a 2014 data breach that compromised drivers' personal information, arguing that the pair leading the suit took almost two years to offer revamped allegations but still fail to allege any injuries stemming from the incident. [Read more »](#)

Journalist, Site Operator Can't Exit Marketing Co.'s Suit

A marketing firm's suit against a journalist and the operator of a website that published his story alleging that the firm was operating a spam operation has survived a dismissal bid, with a federal judge in Washington state ruling Monday that more discovery is needed to determine if the court has jurisdiction. [Read more »](#)

Online Travel Agency Secretly Records Calls, Suit Says

Fare Depot LLC was hit with a proposed class action Saturday in California federal court alleging the online travel agency, which focuses on helping travelers secure cheap flights, secretly recorded consumers' phone calls without getting their permission. [Read more »](#)

Waffle House Applicants Want Job-Screening Suits Combined

The job applicants behind two putative class suits over Waffle House's allegedly secretive background checks asked a Florida federal judge Monday to consolidate the cases for efficiency. [Read more »](#)

EXPERT ANALYSIS

Takeaways From Split DC Circ. Ruling On Cellphone Warrant

Even though the incriminating evidence at stake in Griffith was a firearm, the D.C. Circuit's majority and dissenting opinions provide insight into several issues related to execution of a search warrant seeking a cellphone, say Thomas Zeno and Caleb Barker of Squire Patton Boggs LLP. [Read more »](#)

FTC's First Foray Into Gig Economy Data Security

The Federal Trade Commission's recent action against Uber reflects its untested but expansive interpretation of "consumer" under the FTC Act to include not only the users in the shared economy, but also at least some service providers. It also highlights the agency's tightened expectations of what is required to "reasonably" secure data from internal users, say attorneys with Ropes & Gray LLP. [Read more »](#)

Self-Collection In E-Discovery — Risks Vs. Rewards

As judges become better educated about the complexities of collecting electronically stored information, in particular the inefficacy of keyword searching, they are increasingly skeptical of self-collection. And yet, for many good reasons (and a few bad ones), custodian self-collection is still prevalent in cases of all sizes and in all jurisdictions, says Alex Khoury of Balch & Bingham LLP. [Read more »](#)

LEGAL INDUSTRY

The Best Firms For Women And Minority Attorneys

Out of 329 U.S. law firms surveyed for both our Diversity Snapshot and Glass Ceiling Report, 18 have above-average racial and gender diversity

Pacific Trial Attorneys
Porter Hedges
Ropes & Gray
Squire Patton Boggs
Thompson & Knight
Troutman Sanders
Vinson & Elkins
WilmerHale
Winston & Cashatt
Winston & Strawn

COMPANIES

ASUSTeK Computer Inc.
Aetna Inc.
American Bar Association
American Civil Liberties Union
American Red Cross
Anthem Inc.
Facebook
Genpact Limited
Google Inc.
Human Rights Campaign
Information Technology Industry Council
International Data Group
Lambda Legal Defense & Educational Fund
Land O'Lakes Inc.
Lone Star Legal Aid
Newsweek/Daily Beast Co. LLC
Patheon Inc.
U.S. Chamber of Commerce
Uber Technologies Inc.
Waffle House Inc.
West Bend Mutual Insurance Co.
Yahoo! Inc.

GOVERNMENT AGENCIES

Attorney Registration and Disciplinary Commission
Bureau of Labor Statistics
Central Intelligence Agency
Congressional Research Service
Department of Commerce
Federal Bureau of Investigation
Federal Trade Commission
Internal Revenue Service
National Institute of Standards and Technology
National Oceanic and Atmospheric Administration
U.S. Army

throughout their ranks. These are the firms — including two of the country's largest — that rise above the rest when it comes to overall diversity.

[Read more »](#)

Analysis

4 Things To Know About Crowdfunding Your Next Case

BigLaw continues to rack up pro bono and public interest wins, but not every client can get a free ride on legal bills. Crowdfunding legal fees is emerging as a popular alternative, but those campaigns aren't without ethical pitfalls. Here, Law360 looks at four things to know before launching a legal crowdfund drive. [Read more »](#)

Harvey's Floodwaters Shutter Houston Law Offices, Courts

The historic flooding from Hurricane Harvey that has killed at least eight people and displaced thousands has also forced courthouses and law firms in Houston to close their doors, with some offices in what's normally one of the state's busiest legal markets likely to remain closed through the week as more dangerous weather is expected. [Read more »](#)

BigLaw Joins Fight Against Transgender Military Ban

President Donald Trump's transgender military service ban is facing more heat with the Monday filing of two new federal court challenges by civil rights groups, including the American Civil Liberties Union and Lambda Legal, and law firms Kirkland & Ellis LLP and Covington & Burling LLP, which are aiding the rights groups pro bono. [Read more »](#)

Trump's First Judicial Nominees Not So Diverse, Report Says

Out of President Donald J. Trump's first 26 federal court nominees, only one was nonwhite, and six were women, and compared to his three predecessors, he made the most nominations from private practice, according to a recent Congressional Research Service report. [Read more »](#)

JOBS

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Natalie Smith - NOAA Federal

From: Natalie Smith - NOAA Federal
Sent: Tuesday, August 29, 2017 6:31 AM
To: Graff Mark; Lola Stith - NOAA Affiliate
Cc: OCIO/OPPA
Subject: Re: OCIO Weekly Message - August 28, 2017

It is the GREATEST!!!?????

On Mon, Aug 28, 2017 at 5:37 PM, Dennis Morgan - NOAA Federal <dennis.morgan@noaa.gov> wrote:
NOAA FOIA Program rocks!!

----- Forwarded message -----

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Date: Mon, Aug 28, 2017 at 5:11 PM
Subject: OCIO Weekly Message - August 28, 2017
To: Benjamin Friedman - NOAA Federal <Benjamin.Friedman@noaa.gov>, CIO All Hands <cio.allhands@noaa.gov>, _NOAA Assistant CIOs <assistant.cios@noaa.gov>, Jeff Flick - NOAA Federal <jeff.flick@noaa.gov>, Tony Lavoie - NOAA Federal <tony.lavoie@noaa.gov>, Nancy Jackson <nancy.jackson@noaa.gov>, Ed Kearns - NOAA Federal <ed.kearns@noaa.gov>



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Zachary G. Goldstein

Chief Information Officer and Director, High Performance Computing and Communications

--

Natalie D. Smith
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
(301) 628-5750 (office)
www.cio.noaa.gov

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Peaches Hodge-Tonic - NOAA Federal

From: Peaches Hodge-Tonic - NOAA Federal
Sent: Tuesday, August 29, 2017 11:28 AM
To: Mark Graff - NOAA Federal; Lola Stith - NOAA Affiliate
Cc: Peaches Hodge-Tonic; NMFS HQ PR FOIA Requests - NOAA Service Account
Subject: Fwd: Consultation Tasker
Attachments: 17-001740_tasker_consultation.pdf

Hi Mark and Lola,

(b)(5)

----- Forwarded message -----

From: Daniel Bess - NOAA Federal <daniel.bess@noaa.gov>
Date: Tue, Aug 29, 2017 at 10:27 AM
Subject: Re: Consultation Tasker
To: Peaches Hodge-Tonic - NOAA Federal <peaches.hodge-tonic@noaa.gov>
Cc: NMFS HQ PR FOIA Requests - NOAA Service Account <nmfs.hq.pr.foia@noaa.gov>

Peaches (b)(5) ?

On Tue, Aug 29, 2017 at 8:24 AM, Peaches Hodge-Tonic - NOAA Federal <peaches.hodge-tonic@noaa.gov> wrote:

Danie (b)(5).

Thanks

Peaches Tonic
Acting FOIA Coordinator
Office of Protected Resources
301-427-8482

--
Daniel Bess
Chief, Planning and Program Coordination Division
Office of Protected Resources
National Marine Fisheries Services
[\(301\)427-8472](tel:3014278472)

--

Peaches Tonic
Acting FOIA Coordinator
Office of Protected Resources
301-427-8482

(b)(5)

James LeDuc - NOAA Federal

From: James LeDuc - NOAA Federal
Sent: Tuesday, August 29, 2017 12:57 PM
To: Mark Graff - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Devin Brakob - NOAA Federal
Subject: RE: DOC-OS-2017-001150

Hi Mark,

(b)(5)

Jim LeDuc
NOAA HCHB Room 58020
Office 202-482-0965
Ce (b)(6)

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Monday, August 21, 2017 3:29 PM
To: James LeDuc - NOAA Federal
Cc: Lola Stith - NOAA Affiliate
Subject: Fwd: DOC-OS-2017-001150

Hi Jim,

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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From: FOIA Office - NOAA Service Account <foia@noaa.gov>
Date: Mon, Aug 21, 2017 at 2:41 PM

Subject: Fwd: DOC-OS-2017-001150

To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Hi Mark (b)(5)

Lola

----- Forwarded message -----

From: **James LeDuc - NOAA Federal** <james.leduc@noaa.gov>

Date: Thu, Aug 17, 2017 at 11:56 AM

Subject: DOC-OS-2017-001150

To: FOIA Office - NOAA Service Account <foia@noaa.gov>

Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Mark Graff - NOAA Federal <mark.graff@noaa.gov>, Devin Brakob - NOAA Federal <devin.r.brakob@noaa.gov>

(b)(5) ?

This is a request under the Freedom of Information Act. 5 U.S.C. § 552 et. seq. The materials requested relate to presidential designations of national monuments . As such, I request all records relating to, or consisting of, communications — in any format — generated or received by the Department of Commerce related to: a. Any public communication to the Department of Commerce and/or its Bureaus on or since January 20, 2017 requesting a review of the national monuments identified in President Trump’s Executive Order dated April 26, 2017. A list of the monuments at issue is found in the DOI fact sheet on the Executive Order. That memo can be found here. <https://morningconsult.com/wp-content/uploads/2017/05/Executive-Order-Fact-Sheet-Reviewing-Abuses-of-the-Antiquities-Act-of-19....pdf> b. Any Department of Commerce data or studies on the impacts to local, regional, and national economies produced by the monuments at issue. These requests are not meant to be exclusive of any other records that, although not specifically requested, have a reasonable relationship to the subject matter of this request. If you or your office has destroyed or determines to withhold any documents 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.

Jim LeDuc

NOAA HCHB Room 58020

Office [202-482-0965](tel:202-482-0965)

Ce (b)(6)

James LeDuc - NOAA Federal

From: James LeDuc - NOAA Federal
Sent: Tuesday, August 29, 2017 1:17 PM
To: Mark Graff - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Devin Brakob - NOAA Federal; Samuel Dixon - NOAA Affiliate
Subject: RE: DOC-OS-2017-001150

(b)(5) [REDACTED] ?

Jim LeDuc
NOAA HCHB Room 58020
Office 202-482-0965
Ce (b)(6) [REDACTED]

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Tuesday, August 29, 2017 1:10 PM
To: James LeDuc - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Devin Brakob - NOAA Federal; Samuel Dixon - NOAA Affiliate
Subject: Re: DOC-OS-2017-001150

Hi Jim,

(b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) [REDACTED] (C)

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On Tue, Aug 29, 2017 at 12:57 PM, James LeDuc - NOAA Federal <james.leduc@noaa.gov> wrote:
Hi Mark,

(b)(5) [REDACTED]

Jim LeDuc
NOAA HCHB Room 58020

Office [202-482-0965](tel:202-482-0965)

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Hi Mark (b)(5)

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Jim LeDuc
NOAA HCHB Room 58020
Office [202-482-0965](tel:202-482-0965)
Ce (b)(6) [REDACTED]

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Subject: Re: DOC-OS-2017-001150

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(301) 628-5658 (O)

(b)(6) (C)

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On Tue, Aug 29, 2017 at 12:57 PM, James LeDuc - NOAA Federal <james.leduc@noaa.gov> wrote:

Hi Mark,

(b)(5)



Jim LeDuc

NOAA HCHB Room 58020

Office [202-482-0965](tel:202-482-0965)

Ce (b)(6)

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]

Sent: Monday, August 21, 2017 3:29 PM
To: James LeDuc - NOAA Federal
Cc: Lola Stith - NOAA Affiliate
Subject: Fwd: DOC-OS-2017-001150

Hi Jim,

(b)(5)

?

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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----- Forwarded message -----

From: **FOIA Office - NOAA Service Account** <foia@noaa.gov>

Date: Mon, Aug 21, 2017 at 2:41 PM

Subject: Fwd: DOC-OS-2017-001150

To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Hi Mark (b)(5)

?

Lola

----- Forwarded message -----

From: **James LeDuc - NOAA Federal** <james.leduc@noaa.gov>

Date: Thu, Aug 17, 2017 at 11:56 AM

Subject: DOC-OS-2017-001150

To: FOIA Office - NOAA Service Account <foia@noaa.gov>

Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Mark Graff - NOAA Federal <mark.graff@noaa.gov>, Devin Brakob - NOAA Federal <devin.r.brakob@noaa.gov>

(b)(5) [REDACTED] ?

This is a request under the Freedom of Information Act, 5 U.S.C. § 552 et. seq. The materials requested relate to presidential designations of national monuments. As such, I request all records relating to, or consisting of, communications — in any format — generated or received by the Department of Commerce related to: a. Any public communication to the Department of Commerce and/or its Bureaus on or since January 20, 2017 requesting a review of the national monuments identified in President Trump's Executive Order dated April 26, 2017. A list of the monuments at issue is found in the DOI fact sheet on the Executive Order. That memo can be found here. <https://morningconsult.com/wp-content/uploads/2017/05/Executive-Order-Fact-Sheet-Reviewing-Abuses-of-the-Antiquities-Act-of-19....pdf> b. Any Department of Commerce data or studies on the impacts to local, regional, and national economies produced by the monuments at issue. These requests are not meant to be exclusive of any other records that, although not specifically requested, have a reasonable relationship to the subject matter of this request. If you or your office has destroyed or determines to withhold any documents 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.

Jim LeDuc

NOAA HCHB Room 58020

Office [202-482-0965](tel:202-482-0965)

Ce (b)(6) [REDACTED]

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Tuesday, August 29, 2017 1:52 PM
To: Deanna Harwood - NOAA Federal
Cc: Ana Liza Malabanan; Robert Hogan
Subject: Re: 9th Cir. ruling re. FOIA

Thanks Deanna--

(b)(5)

██████████.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Tue, Aug 29, 2017 at 1:35 PM, Deanna Harwood - NOAA Federal <deanna.harwood@noaa.gov> wrote:

FYI.

Deanna Harwood
Deputy Chief, Southwest Section
NOAA, Office of General Counsel
U.S. Department of Commerce
501 W. Ocean Blvd., Suite 4470
Long Beach, CA 90802
[\(562\) 980-4068](tel:(562)980-4068)

----- Forwarded message -----

From: Niel Moeller - NOAA Federal <niel.moeller@noaa.gov>
Date: Mon, Aug 28, 2017 at 11:02 AM
Subject: 9th Cir. ruling re. FOIA
To: noaa.gcwc@noaa.gov
Cc: Paul Ortiz <Paul.Ortiz@noaa.gov>, Robert J Hogan <Robert.J.Hogan@noaa.gov>

Issued today (8/28/17): <http://cdn.ca9.uscourts.gov/datastore/opinions/2017/08/28/15-55442.pdf>

Summary

(b)(5)

[Redacted text block 1]

[Redacted text block 2]

[Redacted text block 3]

[Redacted text block 4]

--
Niel Moeller Regional Enforcement Attorney Enforcement Section (Northwest) NOAA General Counsel
Office U.S. Department of Commerce [\(206\) 526-6238](tel:206-526-6238)

Yee, Marsha (USADC)

From: Yee, Marsha (USADC)
Sent: Tuesday, August 29, 2017 4:15 PM
To: Bogomolny, Michael (Federal)
Cc: Allison-Holman, Roxie (Federal); Graff, Mark (Federal); Vieira, Rodney (Federal)
Subject: RE: Judicial Watch v. Dept. of Commerce, DDC No. 17-1283
Attachments: JW v DOC - Answer - MWY 8-29-2017.pdf; Cleaned-JW v DOC - Answer - MWY 8-29-2017.docx
Importance: High

Thank you for the draft answer.

(b)(5)

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Marsha W. Yee
Assistant United States Attorney
U.S. Attorney's Office for the
District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20530
Telephone: (202) 252-2539
Fax: (202) 252-2599
Email: Marsha.Yee@usdoj.gov

From: Bogomolny, Michael (Federal) [mailto:MBogomolny@doc.gov]
Sent: Friday, August 18, 2017 4:42 PM
To: Yee, Marsha (USADC) <MYee2@usa.doj.gov>
Cc: Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>
Subject: RE: Judicial Watch v. Dept. of Commerce, DDC No. 17-1283

Marsha,

(b)(5)

Have a good weekend!

Sincerely,
bogo

Michael Bogomolny

Acting Chief, Information Law Division
mbogomolny@doc.gov (202) 482-0703
United States Department of Commerce
Office of the General Counsel

From: Yee, Marsha (USADC) [<mailto:Marsha.Yee@usdoj.gov>]
Sent: Monday, August 14, 2017 2:53 PM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Cc: Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>
Subject: RE: Judicial Watch v. Dept. of Commerce, DDC No. 17-1283
Importance: High

(b)(5)

From: Yee, Marsha (USADC)
Sent: Monday, August 14, 2017 1:14 PM
To: 'Bogomolny, Michael (Federal)' <MBogomolny@doc.gov>
Cc: 'Allison-Holman, Roxie (Federal)' <Roxie.Allison-Holman@noaa.gov>; 'Graff, Mark (Federal)' <Mark.Graff@noaa.gov>; 'Vieira, Rodney (Federal)' <Rod.Vieira@noaa.gov>
Subject: RE: Judicial Watch v. Dept. of Commerce, DDC No. 17-1283
Importance: High

(b)(5)

From: Yee, Marsha (USADC)
Sent: Tuesday, August 8, 2017 4:48 PM
To: 'Bogomolny, Michael (Federal)' <MBogomolny@doc.gov>
Cc: Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>
Subject: RE: Judicial Watch v. Dept. of Commerce, DDC No. 17-1283

(b)(5)

From: Bogomolny, Michael (Federal) [<mailto:MBogomolny@doc.gov>]

Sent: Tuesday, August 8, 2017 4:14 PM

To: Yee, Marsha (USADC) <MYee2@usa.doj.gov>

Cc: Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>; Graff, Mark (Federal) <Mark.Graff@noaa.gov>; Vieira, Rodney (Federal) <Rod.Vieira@noaa.gov>

Subject: RE: Judicial Watch v. Dept. of Commerce, DDC No. 17-1283

Marsha,

(b)(5)

-bogo

From: Yee, Marsha (USADC) [<mailto:Marsha.Yee@usdoj.gov>]

Sent: Tuesday, August 08, 2017 3:47 PM

To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>

Subject: FW: Judicial Watch v. Dept. of Commerce, DDC No. 17-1283

FYI (b)(5)

From: Chris Fedeli [<mailto:CFedeli@JUDICIALWATCH.ORG>]

Sent: Tuesday, August 8, 2017 3:20 PM

To: Yee, Marsha (USADC) <MYee2@usa.doj.gov>

Subject: RE: Judicial Watch v. Dept. of Commerce, DDC No. 17-1283

Okay, consented to your notice of correction. We oppose your request for a 90 day extension to answer. I can give consent to a two week extension, though.

Chris Fedeli | **Judicial Watch, Inc.**

425 Third Street, SW | Washington, DC 20024

Tel: (202) 646-5185 | CFedeli@judicialwatch.org

Website: www.judicialwatch.org

Areas of Law: www.judicialwatch.org/amicus-briefs



From: Yee, Marsha (USADC) [<mailto:Marsha.Yee@usdoj.gov>]

Sent: Tuesday, August 08, 2017 2:58 PM

To: Chris Fedeli <CFedeli@JUDICIALWATCH.ORG>

Subject: Judicial Watch v. Dept. of Commerce, DDC No. 17-1283

As you may know, the docket report for the above-referenced case indicates that defendant's response to the complaint is due by tomorrow, August 9, 2017.

The package that was addressed to my office appears to have been delivered to the Pentagon on July 10, 2017, and then forwarded to my office. The Civil Process Clerk received the package with the summons and complaint for the above-referenced case on July 18, 2017, which means that defendant's response to the complaint is due by August 17, 2017.

Please let me know whether plaintiff will consent to correcting defendant's deadline for responding to the complaint to August 17, 2017. If yes, I will file a notice with the court regarding the correct date of service.

In addition, the agency has advised that it is continuing to process and release non-exempt, responsive records, and would like to know whether plaintiff will agree to a 90-day extension of time for defendant to file its response to the complaint.

Marsha W. Yee
Assistant United States Attorney
U.S. Attorney's Office for the
District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20530
Telephone: (202) 252-2539
Fax: (202) 252-2599
Email: Marsha.Yee@usdoj.gov

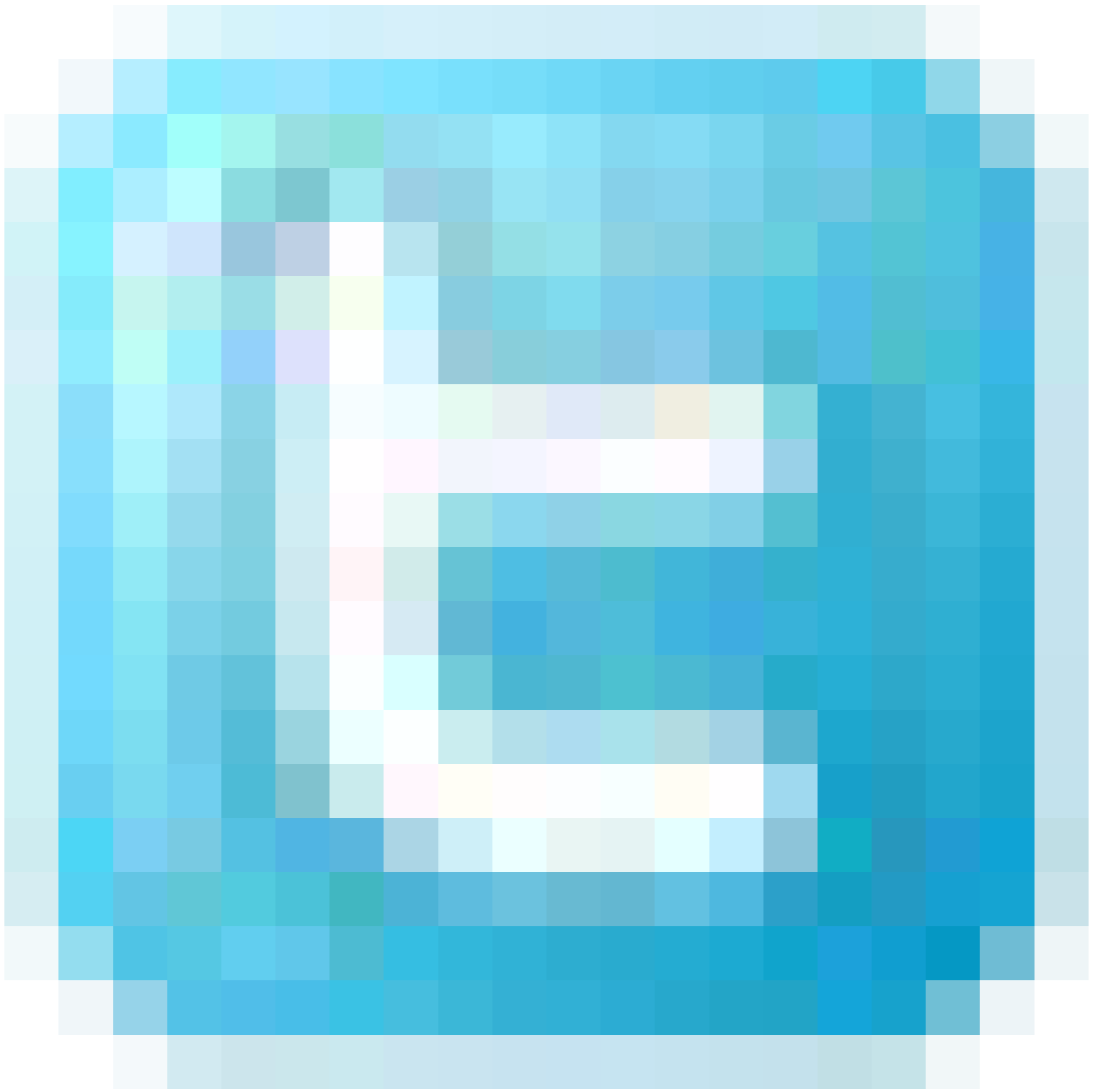
(b)(5)

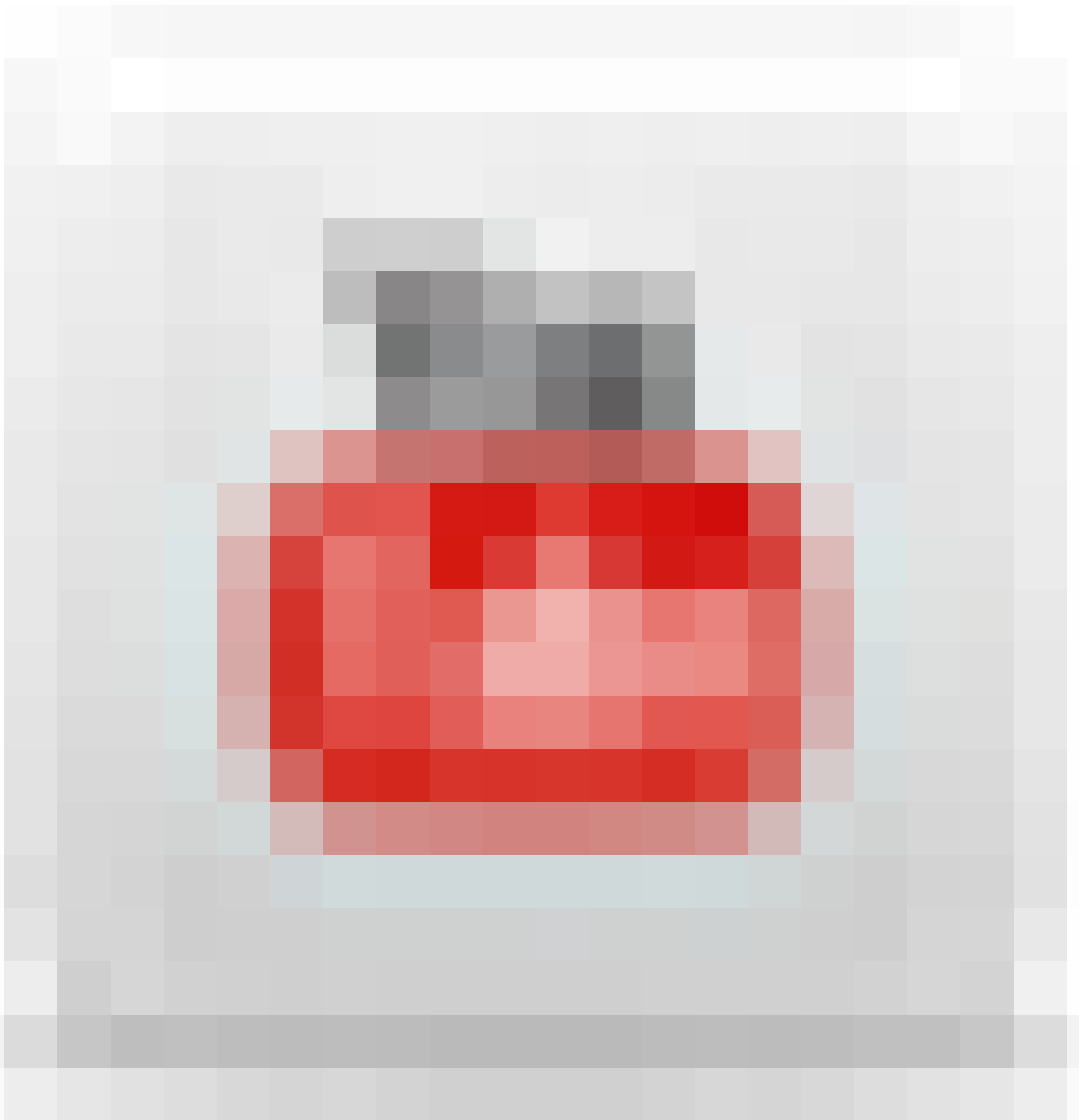
(b)(5)

(b)(5)

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(b) (5)

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(b)(5)

(b)(5)

Lola Stith - NOAA Affiliate

From: Lola Stith - NOAA Affiliate
Sent: Wednesday, August 30, 2017 10:10 AM
To: James LeDuc - NOAA Federal
Cc: Mark Graff - NOAA Federal; Devin Brakob - NOAA Federal; Samuel Dixon - NOAA Affiliate
Subject: Re: DOC-OS-2017-001150

Good morning Jim (b)(5)

R/
Lola

On Tue, Aug 29, 2017 at 1:17 PM, James LeDuc - NOAA Federal <james.leduc@noaa.gov> wrote:

(b)(5)

Jim LeDuc

NOAA HCHB Room 58020

Office [202-482-0965](tel:202-482-0965)

Ce (b)(6)

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Tuesday, August 29, 2017 1:10 PM
To: James LeDuc - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Devin Brakob - NOAA Federal; Samuel Dixon - NOAA Affiliate
Subject: Re: DOC-OS-2017-001150

Hi Jim,

(b)(5)

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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On Tue, Aug 29, 2017 at 12:57 PM, James LeDuc - NOAA Federal <james.leduc@noaa.gov> wrote:

Hi Mark,

(b)(5)

Jim LeDuc

NOAA HCHB Room 58020

Office [202-482-0965](tel:2024820965)

Ce (b)(6)

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]

Sent: Monday, August 21, 2017 3:29 PM

To: James LeDuc - NOAA Federal

Cc: Lola Stith - NOAA Affiliate

Subject: Fwd: DOC-OS-2017-001150

Hi Jim,

(b)(5)

(b)(5)

?

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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From: **FOIA Office - NOAA Service Account** <foia@noaa.gov>

Date: Mon, Aug 21, 2017 at 2:41 PM

Subject: Fwd: DOC-OS-2017-001150

To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Hi Mark (b)(5)

?

Lola

----- Forwarded message -----

From: **James LeDuc - NOAA Federal** <james.leduc@noaa.gov>

Date: Thu, Aug 17, 2017 at 11:56 AM

Subject: DOC-OS-2017-001150

To: FOIA Office - NOAA Service Account <foia@noaa.gov>

Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Mark Graff - NOAA Federal <mark.graff@noaa.gov>, Devin Brakob - NOAA Federal <devin.r.brakob@noaa.gov>

(b)(5)

?

This is a request under the Freedom of Information Act. 5 U.S.C. § 552 et. seq. The materials requested relate to presidential designations of national monuments . As such, I request all records relating to, or consisting of, communications — in any format — generated or received by the Department of Commerce related to: a. Any public communication to the Department of Commerce and/or its Bureaus on or since January 20, 2017 requesting a review of the national monuments identified in President Trump’s Executive Order dated April 26, 2017. A list of the monuments at issue is found in the DOI fact sheet on the Executive Order. That memo can be found here. <https://morningconsult.com/wp-content/uploads/2017/05/Executive-Order-Fact-Sheet-Reviewing-Abuses-of-the-Antiquities-Act-of-19....pdf> b. Any Department of Commerce data or studies on the impacts to local, regional, and national economies produced by the monuments at issue. These requests are not meant to be exclusive of any other records that, although not specifically requested, have a reasonable relationship to the subject matter of this request. If you or your office has destroyed or determines to withhold any documents 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.

Jim LeDuc

NOAA HCHB Room 58020

Office [202-482-0965](tel:202-482-0965)

Ce (b)(6)

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6)

lola.m.stith@noaa.gov

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, August 30, 2017 10:08 AM
To: Stephen Lipps - NOAA Federal; Holmes, Colin; Robert Moller - NOAA Federal; Scott Smullen - NOAA Federal; Jeff Dillen - NOAA Federal; Kristen Gustafson - NOAA Federal; Robert Hogan; _DUS Staff
Cc: Tom Taylor; Kimberly Katzenbarger - NOAA FEDERAL; Charles; Dennis Morgan - NOAA Federal; Stacey Nathanson - NOAA Federal; Robert Swisher - NOAA Federal; Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate; Lola Stith - NOAA Affiliate; Zachary Goldstein - NOAA Federal; Douglas Perry - NOAA Federal; Nkolika Ndubisi - NOAA Federal; Jeri Dockett - NOAA Affiliate; Cc: OCIO/OPPA; Lawrence Charters - NOAA Federal; Allison Soussi-Tanani - NOAA Federal; Bogomolny, Michael (Federal); Roxie Allison-Holman - NOAA Federal; John Almeida - NOAA Federal; Michael Weiss - NOAA Federal
Subject: Weekly FOIA Incoming and High Visibility Requests
Attachments: Weekly FOIA Incoming and High Visibility Requests 08.23.17 - 08.29.17.xls; NRDC v. EPA_ Complaint.pdf; Re-Filed JW v. DOC Complaint.pdf; JW v. DOC Opinion and Order.pdf

Good Morning,

Attached is the weekly report.

Notably, Jeff Tollefson, a reporter with the Nature scientific journal, has requested all emails that contain the word "climate" or the word "charter" or the phrase "advisory committee" from the email accounts of the Acting Administrator Ben Friedman, his Senior Advisor, Special Assistant, Chief of Staff, Deputy Chief of Staff and Policy Director from July 1, 2017 to the present. (DOC-NOAA-2017-001756).

In the *NRDC v. NOAA* litigation, following the status conference of August 15, the Court has asked the parties to submit a proposed schedule by September 6. The underlying request sought communications between the then-President-elect transition team and several Federal agencies. NOAA is one of a list of Defendants in that lawsuit, including EPA, OMB, FWS, and DOJ. A copy of the original Complaint, filed in SDNY, is attached.

In the second *Judicial Watch v. DOC* litigation (b)(5) [REDACTED] The original request sought all records of communications between NOAA Scientist Tom Karl and OSTP Director John Holdren. A copy of the complaint is attached.

This second Judicial Watch case referenced above is a separate matter from the first Judicial Watch FOIA lawsuit in which NOAA recently prevailed. The first Judicial Watch lawsuit had sought the records and peer review material related to the Hiatus paper published in Science magazine. A copy of the favorable opinion and order from that first Judicial Watch lawsuit is also attached.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration

(301) 628-5658 (O)

(b)(6) (C)

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Case No. 15-cv-2088 (CRC)

OPINION AND ORDER

Plaintiff Judicial Watch brought this Freedom of Information Act (“FOIA”) suit seeking documents in the possession of the National Oceanographic and Atmospheric Administration (“NOAA”) related to a study (the “Hiatus Paper”) by several NOAA scientists that was published in the journal *Science*. NOAA withheld three sets of documents—drafts of the Hiatus Paper, internal correspondence among NOAA scientists concerning the Hiatus Paper, and outside peer reviewer comments—under Exemption 5 of FOIA. The parties have filed cross-motions for summary judgment regarding this withholding. For the reasons below, the court grants the Department of Commerce’s motion for summary judgment and denies Judicial Watch’s cross-motion.¹

Summary judgment is appropriate when the “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “FOIA cases typically and appropriately are decided on motions for summary judgment.” Cavezza v. Dep’t of Justice, 113 F. Supp. 3d 271, 275 (D.D.C. 2015).

¹ Judicial Watch has withdrawn its challenges to the adequacy of the Department’s search for records and the Department’s withholding of other information under Exemption 6. Pl.’s Mem. of Law in Supp. of Pl.’s Opp’n to Def’s Mot. for Summ. J. 2 n.1.

Exemptions to FOIA are to be narrowly construed and the agency bears the burden of proving that any withheld records fall within the scope of an exemption to FOIA. AquAlliance v. U.S. Bureau of Reclamation, 856 F.3d 101, 102–03 (D.C. Cir. 2017). Exemption 5 of FOIA, which NOAA has invoked, permits the withholding of “inter-agency or intra-agency memorandums or letters that 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). As relevant here, this includes documents protected by the deliberative process privilege. See, e.g., Formaldehyde Inst. v. Dep’t of Health & Human Servs., 889 F.2d 1118, 1121 (D.C. Cir. 1989). To qualify for the deliberative process privilege, an inter-agency or intra-agency document must be “predecisional,” meaning that it was “generated before the adoption of an agency policy,” and “deliberative,” meaning that it “reflects the give-and-take of the consultative process.” Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

Judicial Watch first contends that the documents withheld here cannot fall within the scope of Exemption 5 because they concern science, rather than policy. Unfortunately for Judicial Watch, the D.C. Circuit has already resolved that question in the Department’s favor. In Formaldehyde Institute, the D.C. Circuit held that a peer review letter sent to agency scientists regarding a possible publication was covered by Exemption 5. 889 F.2d at 1120. The Court explained that the letter was “predecisional because it preceded the agency’s decision whether and in what form to publish” the article and it was deliberative because “the agency secured review commentary in order to make that decision.” Id.; see also Hooker v. Dep’t of Health & Human Servs., 887 F. Supp. 2d 40, 57–58 (D.D.C. 2012) (holding that peer review comments, draft manuscripts, and communications discussing draft manuscripts fell within the scope of Exemption 5).

Judicial Watch offers no basis on which to distinguish Formaldehyde Institute. The drafts of the Hiatus Paper, the NOAA scientists' deliberations, and the peer review materials are equally predecisional because they involve drafts and "recommendation[s] (with suggestions) regarding an article's suitability for publication," Formaldehyde Inst., 889 F.2d at 1123. These documents are likewise deliberative because they form part of "the deliberative decision about whether and in what form to publish" the Hiatus Paper, id. at 1124. And finally, NOAA (and its *amici*) put forth un rebutted evidence that disclosure here would harm the deliberative process, such as by creating a "chilling effect on . . . the candor of potential reviewers of government-submitted articles," id. at 1125. See Spinrad Decl. ¶¶ 23–26. The drafts of the Hiatus Paper, internal deliberations, and peer reviewer comments thus fall within the scope of Exemption 5.

Next, Judicial Watch contends that alleged misconduct by the NOAA scientists who prepared the Hiatus Paper overrides Exemption 5. While the D.C. Circuit has never held that government misconduct can abrogate the deliberative process privilege in a FOIA case, some decisions from this District have so held. See, e.g., Neighborhood Assistance Corp. of Am. v. Dep't of Hous. & Urban Dev., 19 F. Supp. 3d 1, 13–14 (D.D.C. 2013); Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs., 903 F. Supp. 2d 59, 67 (D.D.C. 2012). But see Judicial Watch, Inc. v. Dep't of State, 2017 WL 1078544, at *6 (D.D.C. Mar. 20, 2017) (refusing to apply government misconduct exception to FOIA case); Wright v. Admin. for Children & Families, 2016 WL 5922293, at * 11 (D.D.C. Oct. 16, 2016) (same).

Regardless of whether such an exception exists in the FOIA context, it would not be applicable here. Since the very purpose of FOIA is to help uncover government misconduct, if any allegation of misconduct sufficed to pierce the deliberative process privilege, the exception would soon swallow the privilege whole. Rather, as the cases applying the exception have

explained, the misconduct alleged must be particularly severe, as where “the ‘policy discussions’ sought to be protected . . . were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government.” ICM Registry, LLC v. Dep’t of Commerce, 538 F. Supp. 2d 130, 132–33 (D.D.C. 2008).

Judicial Watch presents no evidence sufficient to raise the specter of such nefarious government misconduct. It cites to a single article in a British tabloid reporting, based on a former employee’s allegation, that the Hiatus Paper was based on “misleading” data and was not subjected to NOAA’s “rigorous internal evaluation process.” Pl.’s Mem. of Law in Supp. of Pl.’s Opp’n to Def’s Mot. for Summ. J. 4. But this article, alone, does not meet that narrow standard. Nor does Judicial Watch put forth any evidence evincing a connection between the withheld discussions of the paper itself and the alleged deficiencies in the underlying, publicly available data on which the paper relies. For these reasons, it fails to show that the narrow government misconduct exception would be applicable here.

Finally, Judicial Watch challenges the withholding on the ground that the Department failed to properly release segregable information. However, the Department is “entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material.” Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C. Cir. 2007). The Department’s affidavits adequately allege that the agency released all reasonably segregable material and Judicial Watch provides no evidence to contradict these affidavits or to otherwise rebut that presumption.

For the foregoing reasons, it is hereby

ORDERED that [16] Defendant's Motion for Summary Judgment is GRANTED. It is further **ORDERED** that [22] Plaintiff's Cross-Motion for Summary Judgment is DENIED.

SO ORDERED.



CHRISTOPHER R. COOPER
United States District Judge

Date: August 21, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY; U.S. FOOD AND DRUG
ADMINISTRATION; NATIONAL
OCEANIC AND ATMOSPHERIC
ADMINISTRATION; WHITE HOUSE
OFFICE OF MANAGEMENT AND
BUDGET; U.S. DEPARTMENT OF THE
INTERIOR; BUREAU OF LAND
MANAGEMENT; BUREAU OF
RECLAMATION; U.S. FISH AND
WILDLIFE SERVICE; OFFICE OF
SURFACE MINING RECLAMATION
AND ENFORCEMENT; U.S. FOREST
SERVICE; and U.S. DEPARTMENT OF
JUSTICE,

Defendants.

Case No. 17-cv-4084
ECF Case

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff Natural Resources Defense Council, Inc. (NRDC) brings this suit to compel the federal government to disclose communications between then-President-elect Donald Trump's transition team and several federal agencies charged with safeguarding the environment and public health. The defendant agencies' failure to release responsive records violates the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and deprives the public of critical information regarding the administration's policies with respect to implementation and enforcement of bedrock health and environmental laws.

2. The transition of power from one President to another is a pivotal time in our democratic system. During this period, the incoming administration sets the foundation for future policymaking, integrates the new President's likely appointees, and ensures the continuation of vital federal functions. The transition is primarily paid for by American taxpayers.

3. Between the November 2016 election and Trump's inauguration in January 2017, members of Trump's transition team communicated with federal agency officials to gather information and lay the groundwork for the new administration's policy priorities. In early December 2016, the Washington Post reported that the transition team asked the Department of Energy for a list of names of employees who had participated in international climate talks or worked

on domestic efforts to cut carbon output.¹ Approximately a week after that, the Post reported that the Trump transition team requested that the Department of State report how much money the department contributes annually to “international environmental organizations in which the department participates.”²

4. The press has also reported that the Trump transition team included “secret” members who played a role in defining the Trump administration’s priorities and producing an “action plan” for the U.S. Environmental Protection Agency.³ Climate change denier and JunkScience.com attorney-blogger Steve Milloy was one of the “secret” members.⁴

5. To date, most of the activities of Trump’s transition team and the list of “secret” members comprising the team have not been publicly disclosed.

6. On December 22 and 23, 2016, NRDC submitted FOIA requests to several federal agencies seeking records of their communications with Trump’s transition team. These agencies include: U.S. Environmental Protection Agency; U.S. Food and Drug Administration; National Oceanic and Atmospheric Administration; White House Office of Management and Budget; U.S. Department

¹ Steven Mufson & Juliet Eilperin, *Trump transition team for Energy Department seeks names of employees involved in climate meetings*, Wash. Post (Dec. 9, 2016), http://wapo.st/2hbSDU0?tid=ss_tw&utm_term=.605e7ffea158.

² Juliet Eilperin & Carol Morello, *Trump team asks State Dept. what it spends on international environmental efforts*, Wash. Post (Dec. 20, 2016), http://wapo.st/2hnfZpb?tid=ss_tw&utm_term=.4a2e9aed48f4.

³ Sean Reilly & Amanda Reilly, *Trump team kept some transition members secret*, E&E News (Feb. 24, 2017), <https://www.eenews.net/stories/1060050546/>.

⁴ *Id.*

of the Interior and certain of its components and agencies; U.S. Forest Service; and U.S. Department of Justice.

7. The agencies' responses to NRDC's FOIA requests are past due. Agencies are generally required to respond to FOIA requests within twenty working days. *See* 5 U.S.C. § 552(a)(6)(A)(i). The twentieth working day following NRDC's submission of its FOIA requests was January 24, 2017 (for requests sent by e-mail on December 22, 2016); January 25, 2017 (for requests sent by e-mail on December 23, 2016); or January 27, 2017 (for a request sent by certified mail on December 22, 2016, and received by the agency on December 28, 2016).

8. In "unusual circumstances," an agency may extend this time limit by up to ten working days. *Id.* § 552(a)(6)(B)(i). The thirtieth working day following NRDC's submission of its FOIA requests was February 7, 2017 (for requests sent by e-mail on December 22, 2016); February 8, 2017 (for requests sent by e-mail on December 23, 2016); or February 10, 2017 (for a request sent by certified mail on December 22, 2016, and received by the agency on December 28, 2016). In some "unusual circumstances," an agency may ask that a FOIA requester narrow a request or agree to a longer response schedule. *See id.* § 552(a)(6)(B)(ii). NRDC has not agreed to a longer schedule with any of the agencies, and no unusual circumstances justify the agencies' continuing failure to provide final responses.

9. Long after these statutory deadlines passed, only one of the defendant agencies has started to produce responsive records. None of the defendant agencies

has provided a final response indicating whether and why records are being withheld.

10. The public has a pressing interest in the Trump administration's efforts to redirect the activities of federal agencies. The failure to release responsive records violates FOIA and deprives the public of critical information regarding the administration's assaults on the nation's bedrock health and environmental laws.

11. NRDC is entitled to immediate processing of its FOIA requests and the release of all responsive records.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

13. Venue is proper in this district because plaintiff NRDC resides and has its principal place of business in this judicial district. 5 U.S.C. § 552(a)(4)(B).

PARTIES

14. Plaintiff NRDC is a national, not-for-profit environmental and public health membership organization with hundreds of thousands of members nationwide. NRDC engages in research, advocacy, public education, and litigation related to protecting public health and the environment. NRDC also publishes in several media channels, including online and in print, and regularly communicates newsworthy information to the public, including information obtained under FOIA.

15. Defendant U.S. Environmental Protection Agency (EPA) is an agency within the meaning of 5 U.S.C. §§ 551(1), 552(f)(1), and has possession or control of documents NRDC seeks.

16. Defendant U.S. Food and Drug Administration (FDA) is an agency within the meaning of 5 U.S.C. §§ 551(1), 552(f)(1), and has possession or control of documents NRDC seeks.

17. Defendant National Oceanic and Atmospheric Administration (NOAA) is an agency within the meaning of 5 U.S.C. §§ 551(1), 552(f)(1), and has possession or control of documents NRDC seeks.

18. Defendant White House Office of Management and Budget (OMB) is an agency within the meaning of 5 U.S.C. §§ 551(1), 552(f)(1), and has possession or control of documents NRDC seeks.

19. Defendant U.S. Department of the Interior (DOI) is an agency within the meaning of 5 U.S.C. §§ 551(1), 552(f)(1), and has possession or control of documents NRDC seeks. The Office of the Secretary of the Department of the Interior is a component of DOI. The Office of the Solicitor of the Department of the Interior is a component of DOI.

20. Defendant Bureau of Land Management (BLM) is an agency within the meaning of 5 U.S.C. §§ 551(1), 552(f)(1), and has possession or control of documents NRDC seeks.

21. Defendant Bureau of Reclamation (Reclamation) is an agency within the meaning of 5 U.S.C. §§ 551(1), 552(f)(1), and has possession or control of documents NRDC seeks.

22. Defendant U.S. Fish and Wildlife Service (Wildlife Service) is an agency within the meaning of 5 U.S.C. §§ 551(1), 552(f)(1), and has possession or control of documents NRDC seeks.

23. Defendant Office of Surface Mining Reclamation and Enforcement (Surface Mining) is an agency within the meaning of 5 U.S.C. §§ 551(1), 552(f)(1), and has possession or control of documents NRDC seeks.

24. Defendant U.S. Forest Service (Forest Service) is an agency within the meaning of 5 U.S.C. §§ 551(1), 552(f)(1), and has possession or control of documents NRDC seeks.

25. Defendant U.S. Department of Justice (DOJ) is an agency within the meaning of 5 U.S.C. §§ 551(1), 552(f)(1), and has possession or control of documents NRDC seeks. The Environment and Natural Resources Division of the Department of Justice is a component of DOJ.

FACTUAL BACKGROUND

26. On December 22, 2016, as detailed below, NRDC filed FOIA requests with EPA, FDA, NOAA, and OMB, for records in each agency's possession, custody, or control that are, include, or reflect communications between agency staff and any member of the transition team of President-elect Donald Trump or Vice-President-elect Mike Pence. Each request explained that "transition team(s)" includes, but is

not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 *note*. These requests were submitted via an online FOIA portal or sent by certified mail, in accordance with each agency's FOIA regulations and guidance.

27. NRDC submitted a FOIA request to EPA via EPA's online FOIA portal on December 22, 2016 (Att. A). EPA's final response was due by January 24, 2017. 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a). EPA granted NRDC's fee waiver request on December 29, 2016. On January 17, 2017, EPA notified NRDC that it needed an extension until February 13 for its response. On February 9, 2017, EPA notified NRDC that EPA needed another extension of time. NRDC did not agree to either request. EPA's February 9, 2017 email stated that "it is difficult to predict with certainty how many records may be involved," but "EPA estimates it will be able to complete an initial records search and retrieval for your request by 31 March 2017" and that "[o]f course, we will be working diligently on the request and will provide information to you on a rolling basis, if necessary." In a letter dated March 1, 2017, and transmitted to NRDC by email on March 6, 2017, EPA produced certain materials and reiterated its estimate that it would complete its records search and retrieval by March 31, 2017. EPA's online FOIA portal continues to list March 31, 2017, as the agency's "estimated date of completion."⁵ Almost two months after that date, EPA still has not provided a final response to NRDC's FOIA request.

⁵ *See* FOIA Online, <https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d2810b9e80#> (last accessed May 31, 2017).

28. NRDC submitted a FOIA request to FDA via the agency's online FOIA portal on December 22, 2016 (Att. B). FDA's final response was due by January 24, 2017. 5 U.S.C. § 552(a)(6)(A)(i); 21 C.F.R. § 20.41(b). FDA has not sent a final response to NRDC's FOIA request or produced any records.

29. NRDC submitted a FOIA request to NOAA via the agency's online FOIA portal on December 22, 2016 (Att. C). NOAA's final response was due by January 24, 2017. 5 U.S.C. § 552(a)(6)(A)(i); 15 C.F.R. § 4.6(b). NOAA granted NRDC's fee waiver request on January 5, 2017. On February 21, 2017, NOAA sent NRDC an email indicating that the tracking number for the FOIA request had been changed, "which is normally due to the request being transferred to another agency." Neither NOAA nor the Department of Commerce, the cabinet-level agency under which NOAA is housed, has sent a final response to NRDC's request or produced any records.

30. NRDC submitted a FOIA request to OMB via certified mail on December 22, 2016 (Att. D). OMB received the request on December 28, 2016 (Att. E), and its final response was due by January 27, 2017. 5 U.S.C. § 552(a)(6)(A)(i); 5 C.F.R. § 1303.10(c). (The U.S. Postal Service confirmed delivery on December 28, 2016. The certified mail return receipt is signed January 12, 2017 (Att. F).) On January 13, 2017, OMB sent NRDC an e-mail indicating that the FOIA request had been logged. OMB has not sent a final response to NRDC's request or produced any records.

31. On December 23, 2016, as detailed below, NRDC filed FOIA requests with the Department of the Interior and several of its components and agencies (including BLM, Reclamation, Wildlife Service, Surface Mining, and the Office of the Solicitor), the Forest Service, and DOJ, for records in each agency's possession, custody, or control that are, include, or reflect communications between agency staff and any member of the transition team of President-elect Donald Trump or Vice-President-elect Mike Pence. Each request explained that "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 *note*. These FOIA requests were sent by e-mail or certified mail, in accordance with each agency's FOIA regulations and guidance.

32. NRDC submitted a FOIA request to BLM via e-mail on December 23, 2016 (Att. G). BLM's final response was due by January 25, 2017. 5 U.S.C. § 552(a)(6)(A)(i); 43 C.F.R. § 2.16. On December 28, 2016, BLM informed NRDC that the FOIA request was designated as "Normal track," meaning it "can be processed in six to twenty workdays." BLM has not sent a final response to NRDC's request or produced any records. *See* 43 C.F.R. § 2.24.

33. NRDC submitted a FOIA request to Reclamation via e-mail on December 23, 2016 (Att. H). Reclamation's final response was due by January 25, 2017. 5 U.S.C. § 552(a)(6)(A)(i); 43 C.F.R. § 2.16. On December 28, 2016, Reclamation informed NRDC that the request was placed on the "Complex" track for processing "in twenty-one to sixty workdays." On January 25, 2017, Reclamation

informed NRDC that the FOIA request was being consolidated with others and referred to the DOI Office of the Secretary. Neither Reclamation nor the DOI Office of the Secretary has sent a final response to NRDC's request or produced any records. *See* 43 C.F.R. §§ 2.13, 2.16(b).

34. NRDC submitted a FOIA request to Wildlife Service via e-mail on December 23, 2016 (Att. I). Wildlife Service's final response was due by January 25, 2017. 5 U.S.C. § 552(a)(6)(A)(i); 43 C.F.R. § 2.16. On December 27, 2016, Wildlife Service informed NRDC that the FOIA request was being consolidated with others and referred to the DOI Office of the Secretary. Neither Wildlife Service nor the DOI Office of the Secretary has sent a final response to NRDC's request or produced any records. *See* 43 C.F.R. §§ 2.13, 2.16(b).

35. NRDC submitted a FOIA request to Surface Mining via e-mail on December 23, 2016 (Att. J). Surface Mining's final response was due by January 25, 2017. 5 U.S.C. § 552(a)(6)(A)(i); 43 C.F.R. § 2.16. Surface Mining has not sent a final response to NRDC's request or produced any records.

36. NRDC submitted a FOIA request to the DOI Office of the Solicitor (DOI-Solicitor) via e-mail on December 23, 2016 (Att. K). DOI-Solicitor's final response was due by January 25, 2017. 5 U.S.C. § 552(a)(6)(A)(i); 43 C.F.R. § 2.16. DOI-Solicitor notified NRDC on December 28, 2016, that NRDC was being classified as an "other use" requester under 43 C.F.R. § 2.39, and that the agency may charge for duplication fees but would not charge review costs. On January 6, 2017, DOI-Solicitor informed NRDC that the DOI Office of the Secretary would be responding

on its behalf to this request. Neither DOI-Solicitor nor the DOI Office of the Secretary has sent a final response to NRDC's request or produced any records. *See id.* § 2.24.

37. NRDC submitted a FOIA request to the Forest Service via e-mail on December 23, 2016 (Att. L). The Forest Service's final response was due by January 25, 2017. 5 U.S.C. § 552(a)(6)(A)(i); 7 C.F.R. § 1.7(a). On January 6, 2017, the Forest Service notified NRDC that the agency was referring the request to the U.S. Department of Agriculture's FOIA Service Center. NRDC exchanged several e-mails with a U.S. Department of Agriculture employee in January and February, clarifying the scope of the FOIA request. Neither the Forest Service nor the U.S. Department of Agriculture has sent a final response to NRDC's request or produced any records.

38. NRDC submitted a FOIA request to DOJ, through DOJ's Environment and Natural Resources Division, via e-mail on December 23, 2016 (Att. M). DOJ's final response was due by January 25, 2017. 5 U.S.C. § 552(a)(6)(A)(i); 28 C.F.R. § 16.5(c). DOJ has not sent a final response to NRDC's request or produced any records.

39. With each of these FOIA requests, NRDC sought from each agency a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest because it is "likely to contribute significantly to public understanding of the operations or activities of the government" and is not in NRDC's commercial interest. 5 U.S.C. § 552(a)(4)(A)(iii);

see also 40 C.F.R. § 2.107(*l*) (EPA); 21 C.F.R. § 20.46 (FDA); 15 C.F.R. 4.11(*l*) (NOAA); 5 C.F.R. § 1303.70 (OMB); 43 C.F.R. § 2.45 (DOI); 7 C.F.R. pt. 1, subpart A, app. A, § 6 (Forest Service); 28 C.F.R. § 16.10(k) (DOJ).

40. NRDC also sought a fee waiver because it qualifies as a “representative of the news media” and the records are not for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 40 C.F.R. § 2.107(b)(6), (c)(1)(iii) (EPA); 21 C.F.R. § 20.45(a)(2) (FDA); 15 C.F.R. § 4.11(b)(6), (c) (NOAA); 5 C.F.R. § 1303.50(c) (OMB); 43 C.F.R. §§ 2.39, 2.70 (DOI); 7 C.F.R. pt. 1, subpart A, app. A, § 5(c) (Forest Service); 28 C.F.R. § 16.10(b)(6), (c) (DOJ).

CLAIM FOR RELIEF

41. Plaintiff incorporates by reference all preceding paragraphs.

42. NRDC has a statutory right under FOIA to obtain immediately all records responsive to its requests that are not exempt from disclosure.

43. Each defendant agency has violated its statutory duty under FOIA, 5 U.S.C. § 552(a), and the applicable implementing regulations, to release all non-exempt, responsive records to NRDC.

44. Each defendant agency has violated its statutory duty under FOIA, 5 U.S.C. § 552(a)(3)(C), to make a reasonable effort to search for responsive records.

45. Because the defendant agencies failed to comply with FOIA’s statutory deadlines, NRDC has a right to obtain responsive records without being assessed any search or duplication fees. 5 U.S.C. § 552(a)(4)(A)(viii)(I).

REQUEST FOR RELIEF

NRDC respectfully requests that the Court enter judgment against the defendant agencies as follows:

- A. Declaring that the agencies have violated FOIA by failing to produce non-exempt records responsive to NRDC's FOIA requests by the statutory deadlines;
- B. Ordering the agencies to disclose the requested records to NRDC without further delay, and without charging search or duplication costs;
- C. Ordering defendants FDA, OMB, BLM, Reclamation, Wildlife Service, Surface Mining, Forest Service, and DOJ, to grant NRDC's fee waiver requests;
- D. Retaining jurisdiction over this case to rule on any assertions by any agency that certain responsive records are exempt from disclosure;
- E. Ordering the agencies to produce an index identifying any documents or parts thereof that the agencies withheld and the basis for the withholding, in the event that any agency determines that certain responsive records are exempt from disclosure;
- F. Awarding NRDC its costs and reasonable attorneys' fees; and
- G. Granting such other relief that the Court considers just and proper.

Dated: May 31, 2017

Respectfully submitted,

/s/ Vivian H.W. Wang

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Attachment A

NRDC

December 22, 2016

Via FOIA Online

Re: FOIA request for communications between the President-elect's transition team and EPA staff

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and applicable Environmental Protection Agency (EPA) regulations at 40 C.F.R. § 2.100-2.406.

I. Description of Records Sought

Please produce records¹ in EPA's possession, custody, or control that are, include, or reflect communications between EPA staff and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Scott Pruitt, Myron Ebell, David Kreutzer, Austin Lipari, David Schnare, David Stevenson, George Sugiyama, Amy Oliver Cooke, Christopher Horner, and Harlan Watson.

II. Request for a Fee Waiver

NRDC requests that EPA waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without 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 the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1). The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as "a representative of the news media" entitled

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any EPA office, including, but not limited to, EPA Headquarters offices, and specifically including EPA offices in possession of responsive records.

to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 40 C.F.R. § 2.107(c)(1)(iii).

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 40 C.F.R. § 2.107(l)(2).

1. Subject of the request

The records requested here reflect communications between EPA and the President-elect’s transition team after a presidential election. The requested records thus directly concern “the operations or activities of the government.” 40 C.F.R. § 2.107(l)(2)(i).

2. Informative value of the information to be disclosed

The requested records are “likely to contribute to” the public’s understanding of government operations and activities. 40 C.F.R. § 2.107(l)(2)(ii). The public does not currently possess comprehensive information regarding the transition of power within the agency. There is more than a reasonable likelihood that these records have informative value to the public because, for example, the President-elect sent a questionnaire to Department of Energy staff asking about involvement in specific areas of research and attendance at climate-related conferences. *See* “Climate Change Conversations Are Targeted in Questionnaire to Energy Department,” Coral Davenport, *New York Times*, Dec. 9, 2016, <http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html? r=0>. There may be similar communications with EPA that would similarly have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

We believe that the records requested are not currently in the public domain. Their disclosure would thus meaningfully inform public understanding with respect to the transition at EPA, as further discussed below. However, if EPA were to conclude that some of the requested records are publicly available, NRDC would like to discuss that conclusion and might agree to exclude such records from this request.

3. Contribution to an understanding of the subject by the public is likely to result from disclosure

Because NRDC is a “representative of the news media,” as explained in Part II.C below, EPA must presume that this disclosure is likely to contribute to public understanding of its subject. 40 C.F.R. § 2.107(l)(2)(iii).

However, even if NRDC were not a media requester, NRDC’s expertise in matters concerning EPA staffing and policy, extensive communications capabilities, and proven history

of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability to and will use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are "a broad audience of persons interested in the subject" of the transition of power at EPA, 40 C.F.R. § 2.107(l)(2)(iii), and when combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly "reasonably broad." 40 C.F.R. § 2.107(l)(2)(iii). As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. As of June 2016, these include, but are not limited to the following:

- NRDC's website, available at <http://www.nrdc.org> (homepage at Att. 1), is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. (sample email at Att. 2) This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions> (Att. 3).
- *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter> (Att. 4).
- NRDC updates and maintains several social media accounts: Facebook (565,530 followers) (Att. 5), Twitter (195,426 followers) (Att. 6), Instagram (37,868 followers) (Att. 7), YouTube (19,518 subscribers) (Att. 8), and LinkedIn (9,108 followers) (Att. 9). We also use Medium as another distribution channel for our content (1,478 followers).

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*, narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post (Att. 10); and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, “The requirement to rebuild US fish stocks: Is it working?” *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell) (Att. 11);
- Issue brief, “The Untapped Potential of California’s Water Supply: Efficiency, Reuse, and Stormwater,” June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann) (Att. 12); *see also* “Saving Water in California,” *N.Y. Times*, July 9, 2014 (discussing the report’s estimates) (Att. 13);
- Article, “Waves of phony charges over new clean water safeguards,” *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner) (Att. 14);
- Article, “Don’t Buy the Smear of the EPA,” *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke) (Att. 15);
- Transcript, “Conservationists Call For Quiet: The Ocean Is Too Loud!” Nat’l Pub. Radio, *All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny) (Att. 16);
- Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012 (Att. 17);
- Article, “Pollution Still a Hazard to U.S. Beaches,” CBS, *CBS NEWS*, July 29, 2009 (featuring former NRDC Water Program Co-Director Nancy Stoner) (Att. 18);
- Conference brochure, “World Business Summit on Climate Change,” May 24-26, 2009 (featuring former NRDC Director for Market Innovation Rick Duke at 9) (Att. 19);
- Article, “Is there a ‘proper level’ of compliance with environmental law?” *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall) (Att. 20);
- NRDC Document Bank, <http://docs.nrdc.org/> (Att. 21).

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe” (Att. 22). *See also* Kimberly Kindy, “Are secret, dangerous ingredients in your food?” *Wash. Post*, Apr. 7, 2014 (discussing NRDC’s report) (Att. 23).

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- (3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA's decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (Apr. 2010) (update to 2009 report) (Att. 26); *see also* William Souder, "It's Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?" *Harper's Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC) (Att. 27).
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As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public's understanding of the subject.

4. *Significance of the contribution to public understanding*

The records requested shed light on a matter of considerable public interest and concern: the transition of power at EPA and the communications between the President-elect's transition team and EPA staff.

Public understanding of the transition would be significantly enhanced by disclosure of the requested records. Disclosure would help the public to more effectively evaluate the transition and determine whether there have been requests such as the one made to the Department of Energy staff regarding involvement in climate-change issues. Disclosure would also help the public to better understand and evaluate EPA's response to any such requests. Thus, disclosure here would significantly contribute to the public's understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2)(iv).

² There are numerous other examples of national news articles that were based in part on documents NRDC obtained through FOIA. See, e.g., Felicity Barringer, "Science Panel Issues Report on Exposure to Pollutant," *N.Y. Times*, Jan. 11, 2005 (Att. 37); Katharine Q. Seelye, "Draft of Air Rule is Said to Exempt Many Old Plants," *N.Y. Times*, Aug. 22, 2003 (Att. 38); Don Van Natta, Jr., "E-Mail Suggests Energy Official Encouraged Lobbyist on Policy," *N.Y. Times*, Apr. 27, 2002 (Att. 39).

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1), (3). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the transition. As noted at Part II.A, any work done by EPA on the transition relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the transition.

C. NRDC Is a Media Requester

Even if EPA denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and EPA's FOIA regulations, 40 C.F.R. § 2.107(c)(1)(iii); see also 40 C.F.R. § 2.107(b)(6) (defining “[r]epresentative of the news media”). A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); see also *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep't of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 40) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. As described earlier in this request, NRDC publishes original reporting of environmental news stories on its website, <http://www.nrdc.org>. Previously, NRDC published stories like these in its magazine, *OnEarth*, which has won numerous news media awards, including the Independent Press Award for Best Environmental Coverage and for General Excellence, a Gold Eddie Award for editorial excellence among magazines, and the Phillip D. Reed Memorial Award for Outstanding Writing on the Southern Environment. NRDC also publishes a regular newsletter for its more than one million members and online activists; issues other electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. See 40 C.F.R. § 2.107(b)(6) (“Examples of news media include . . . publishers of periodicals.”). NRDC maintains a significant additional communications presence on the internet through its staff blogs on <http://www.nrdc.org>, which are updated regularly and feature writing about current environmental issues, through daily news messaging on “Twitter” and “Facebook,” and through content distributed to outlets such as Medium. See OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”). The aforementioned publications and

media sources routinely include information about current events of interest to the readership and the public. To publish and transmit this news content, NRDC employs more than fifty staff members dedicated full-time to communications with the public, including accomplished journalists and editors. These staff members rely on information acquired under FOIA and through other means. Public interest organizations meeting the requirements “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union).³

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by NRDC to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of NRDC’s publications or other suitable media channels. NRDC staff gather information from a variety of sources—including documents provided pursuant to FOIA requests—to write original articles and reports that are featured on its website, in its newsletters and blogs, and on other media outlets. *See Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”). NRDC seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with EPA’s FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv) for all or a portion of the requested records. *See* 40 C.F.R. § 2.107(l)(4). Please contact me before doing anything that would cause the fee to exceed \$250. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; EPA’s search for—or deliberations concerning—certain records should not delay the production of others that EPA has already retrieved and elected to produce. *See generally* 40 C.F.R. § 2.104. If EPA concludes that any of the records requested here are publicly available, please let me know.

³ To be a representative of the news media, an organization need not *exclusively* perform news gathering functions. If that were required, major news and entertainment entities like the National Broadcasting Company (NBC) would not qualify as representatives of the news media. This country has a long history, dating back to its founding, of news organizations engaging in public advocacy.

Please do not hesitate to call or email with questions.

Thank you.

Sincerely,

Jaclyn H. Prange
Staff Attorney
Natural Resources Defense Council, Inc.
111 Sutter St., 21st Floor
San Francisco, CA 94104
jprange@nrdc.org
415-875-6184

Enclosures (sent via FOIA Online):

Attachments 1 through 42 (single .pdf file)

Attachment B



December 22, 2016

Via Online FDA FOIA Portal

Re: FOIA request for communications between the President-elect's transition team and FDA staff

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and applicable Food and Drug Administration (FDA) regulations at 21 C.F.R. § 20.1-20.120.

I. Description of Records Sought

Please produce records¹ in FDA's possession, custody, or control that are, include, or reflect communications between FDA staff in the Office of Foods and Veterinary Medicine (including the Center for Food Safety and Applied Nutrition and the Center for Veterinary Medicine) and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Peter Thiel, Marie Meszaros, John Brooks, Andrew Bremberg, Renee Amooore, Scott Gottlieb, Eric Hargan, Nina Owcharenko Schaefer, Kamran Daravi, Ed Haislmaier, Maggie Wynne, and Paula Stannard.

II. Request for a Fee Waiver

NRDC requests that FDA waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without 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 the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 21 C.F.R. § 20.46(a). The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as "a representative of the news media" entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 21 C.F.R. § 20.45(a)(2).

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any FDA office, including, but not limited to, FDA Headquarters offices, and specifically including FDA offices in possession of responsive records.

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 21 C.F.R. § 20.46(a)(1). Each of the four factors used by FDA to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 21 C.F.R. § 20.46(b).

1. Subject of the request

The records requested here reflect communications between FDA and the President-elect’s transition team after a presidential election. The requested records thus directly concern “the operations or activities of the government.” 21 C.F.R. § 20.46(b)(1).

2. Informative value of the information to be disclosed

The requested records would “reveal any meaningful information about Government operations or activities that is not already public knowledge.” 21 C.F.R. § 20.46(b)(2). The public does not currently possess comprehensive information regarding the transition of power within the agency. There is more than a reasonable likelihood that these records have informative value to the public because, for example, the President-elect sent a questionnaire to Department of Energy staff asking about involvement in specific areas of research and attendance at climate-related conferences. *See* “Climate Change Conversations Are Targeted in Questionnaire to Energy Department,” Coral Davenport, *New York Times*, Dec. 9, 2016, <http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html? r=0>. There may be similar communications with FDA that would similarly have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

We believe that the records requested are not currently in the public domain. Their disclosure would thus meaningfully inform public understanding with respect to the transition at FDA, as further discussed below. However, if FDA were to conclude that some of the requested records are publicly available, NRDC would like to discuss that conclusion and might agree to exclude such records from this request.

3. Contribution to an understanding of the subject by the public is likely to result from disclosure

Because NRDC is a “representative of the news media,” as explained in Part II.C below, that is sufficient evidence that this disclosure is likely to contribute to public understanding of its subject. 21 C.F.R. § 20.46(b)(3).

However, even if NRDC were not a media requester, NRDC’s expertise in matters concerning FDA staffing and policy, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability to and will use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the

records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request. *See* 21 C.F.R. § 20.46(b)(3).

NRDC has the ability to disseminate information collected from this FOIA request through many channels. As of June 2016, these include, but are not limited to the following:

- NRDC's website, available at <http://www.nrdc.org> (homepage at Att. 1), is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. (sample email at Att. 2) This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions> (Att. 3).
- *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter> (Att. 4).
- NRDC updates and maintains several social media accounts: Facebook (565,530 followers) (Att. 5), Twitter (195,426 followers) (Att. 6), Instagram (37,868 followers) (Att. 7), YouTube (19,518 subscribers) (Att. 8), and LinkedIn (9,108 followers) (Att. 9). We also use Medium as another distribution channel for our content (1,478 followers).

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*, narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post (Att. 10); and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, “The requirement to rebuild US fish stocks: Is it working?” *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell) (Att. 11);
- Issue brief, “The Untapped Potential of California’s Water Supply: Efficiency, Reuse, and Stormwater,” June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann) (Att. 12); *see also* “Saving Water in California,” *N.Y. Times*, July 9, 2014 (discussing the report’s estimates) (Att. 13);
- Article, “Waves of phony charges over new clean water safeguards,” *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner) (Att. 14);
- Article, “Don’t Buy the Smear of the EPA,” *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke) (Att. 15);
- Transcript, “Conservationists Call For Quiet: The Ocean Is Too Loud!” Nat’l Pub. Radio, *All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny) (Att. 16);
- Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012 (Att. 17);
- Article, “Pollution Still a Hazard to U.S. Beaches,” CBS, *CBS NEWS*, July 29, 2009 (featuring former NRDC Water Program Co-Director Nancy Stoner) (Att. 18);
- Conference brochure, “World Business Summit on Climate Change,” May 24-26, 2009 (featuring former NRDC Director for Market Innovation Rick Duke at 9) (Att. 19);
- Article, “Is there a ‘proper level’ of compliance with environmental law?” *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall) (Att. 20);
- NRDC Document Bank, <http://docs.nrdc.org/> (Att. 21).

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Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 21 C.F.R. § 20.46(c). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res.*

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C. NRDC Is a Media Requester

Even if FDA denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and FDA's FOIA regulations, 21 C.F.R. § 20.45(a)(2). A representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a "non-profit public interest organization" qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep't of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 40) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. As described earlier in this request, NRDC publishes original reporting of environmental news stories on its website, <http://www.nrdc.org>. Previously, NRDC published stories like these in its magazine, *OnEarth*, which has won numerous news media awards, including the Independent Press Award for Best Environmental Coverage and for General Excellence, a Gold Eddie Award for editorial excellence among magazines, and the Phillip D. Reed Memorial Award for Outstanding Writing on the Southern Environment. NRDC also publishes a regular newsletter for its more than one million members and online activists; issues other electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. NRDC maintains a significant additional communications presence on the internet through its staff blogs on <http://www.nrdc.org>, which are updated regularly and feature writing about current environmental issues, through daily news messaging on "Twitter" and "Facebook," and through content distributed to outlets such as Medium. *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that "as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities"). The aforementioned publications and media sources routinely include information about current events of interest to the readership and the public. To publish and transmit this news content, NRDC employs more than fifty staff members dedicated full-time to communications with the public, including accomplished journalists and editors. These staff members rely on information acquired under FOIA and through other means. Public interest organizations meeting the requirements "are regularly

granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the ACLU).³

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by NRDC to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of NRDC’s publications or other suitable media channels. NRDC staff gather information from a variety of sources—including documents provided pursuant to FOIA requests—to write original articles and reports that are featured on its website, in its newsletters and blogs, and on other media outlets. *See Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”). NRDC seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with FDA’s FOIA regulations for all or a portion of the requested records. *See* 21 C.F.R. § 20.45. Please contact me before doing anything that would cause the fee to exceed \$250. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; FDA’s search for—or deliberations concerning—certain records should not delay the production of others that FDA has already retrieved and elected to produce. *See generally* 21 C.F.R. § 20.22, 20.43. If FDA concludes that any of the records requested here are publicly available, please let me know.

Please do not hesitate to call or email with questions. Thank you.

Sincerely,

Jaclyn H. Prange, Staff Attorney
Natural Resources Defense Council, Inc.
111 Sutter St., 21st Floor
San Francisco, CA 94104
jprange@nrdc.org, 415-875-6184

Enclosures (sent via FOIA Online): Attachments 1 through 42 (single .pdf file)

³ To be a representative of the news media, an organization need not *exclusively* perform news gathering functions. If that were required, major news and entertainment entities like the National Broadcasting Company (NBC) would not qualify as representatives of the news media.

Attachment C



December 22, 2016

Via FOIA Online

Re: FOIA request for communications between the President-elect's transition team and NOAA staff

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and applicable Department of Commerce regulations at 15 C.F.R. § 4.1-4.11.

I. Description of Records Sought

Please produce records¹ the Department of Commerce's possession, custody, or control that are, include, or reflect communications between National Oceanic and Atmospheric Administration's (NOAA's) staff and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Wilbur Ross, Ray Washburne, David Bohigian, Joan Maginnis, George Sifakis, William Gaynor, A. Mark Neuman, and Tom Leppert.

II. Request for a Fee Waiver

NRDC requests that NOAA waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without 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 the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 15 C.F.R. § 4.11(l). The requested disclosure would meet both of these

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any NOAA office, including, but not limited to, NOAA Headquarters offices, and specifically including NOAA offices in possession of responsive records.

requirements. In addition, NRDC qualifies as “a representative of the news media” entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 15 C.F.R. § 4.11(c)(1), (d).

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 15 C.F.R. § 4.11(l)(1)(i). Each of the four factors used by NOAA to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 15 C.F.R. § 4.11(l)(2).

1. *Subject of the request*

The records requested here reflect communications between NOAA and the President-elect’s transition team after a presidential election. The requested records thus directly concern “the operations or activities of the government.” 15 C.F.R. § 4.11(l)(2)(i).

2. *Informative value of the information to be disclosed*

The requested records are “likely to contribute to” the public’s understanding of government operations and activities. 15 C.F.R. § 4.11(l)(2)(ii). The public does not currently possess comprehensive information regarding the transition of power within the agency. There is more than a reasonable likelihood that these records have informative value to the public because, for example, the President-elect sent a questionnaire to Department of Energy staff asking about involvement in specific areas of research and attendance at climate-related conferences. *See* “Climate Change Conversations Are Targeted in Questionnaire to Energy Department,” Coral Davenport, *New York Times*, Dec. 9, 2016, <http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html? r=0>. There may be similar communications with NOAA that would similarly have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

We believe that the records requested are not currently in the public domain. Their disclosure would thus meaningfully inform public understanding with respect to the transition at NOAA, as further discussed below. However, if NOAA were to conclude that some of the requested records are publicly available, NRDC would like to discuss that conclusion and might agree to exclude such records from this request.

3. *Contribution to an understanding of the subject by the public is likely to result from disclosure*

Because NRDC is a “representative of the news media,” as explained in Part II.C below, NOAA must presume that this disclosure is likely to contribute to public understanding of its subject. 15 C.F.R. § 4.11(l)(2)(iii).

However, even if NRDC were not a media requester, NRDC’s expertise in matters concerning NOAA staffing and policy, extensive communications capabilities, and proven

history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability to and will use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are "a broad audience of persons interested in the subject" of the transition of power at NOAA, and when combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly "reasonably broad." 15 C.F.R. § 4.11(l)(2)(iii). As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. As of June 2016, these include, but are not limited to the following:

- NRDC's website, available at <http://www.nrdc.org> (homepage at Att. 1), is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. (sample email at Att. 2) This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions> (Att. 3).
- *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter> (Att. 4).
- NRDC updates and maintains several social media accounts: Facebook (565,530 followers) (Att. 5), Twitter (195,426 followers) (Att. 6), Instagram (37,868 followers) (Att. 7), YouTube (19,518 subscribers) (Att. 8), and LinkedIn (9,108 followers) (Att. 9). We also use Medium as another distribution channel for our content (1,478 followers).

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*, narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post (Att. 10); and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, “The requirement to rebuild US fish stocks: Is it working?” *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell) (Att. 11);
- Issue brief, “The Untapped Potential of California’s Water Supply: Efficiency, Reuse, and Stormwater,” June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann) (Att. 12); *see also* “Saving Water in California,” *N.Y. Times*, July 9, 2014 (discussing the report’s estimates) (Att. 13);
- Article, “Waves of phony charges over new clean water safeguards,” *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner) (Att. 14);
- Article, “Don’t Buy the Smear of the EPA,” *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke) (Att. 15);
- Transcript, “Conservationists Call For Quiet: The Ocean Is Too Loud!” Nat’l Pub. Radio, *All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny) (Att. 16);
- Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012 (Att. 17);
- Article, “Pollution Still a Hazard to U.S. Beaches,” CBS, *CBS NEWS*, July 29, 2009 (featuring former NRDC Water Program Co-Director Nancy Stoner) (Att. 18);
- Conference brochure, “World Business Summit on Climate Change,” May 24-26, 2009 (featuring former NRDC Director for Market Innovation Rick Duke at 9) (Att. 19);
- Article, “Is there a ‘proper level’ of compliance with environmental law?” *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall) (Att. 20);
- NRDC Document Bank, <http://docs.nrdc.org/> (Att. 21).

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe” (Att. 22). *See also* Kimberly Kindy, “Are secret, dangerous ingredients in your food?” *Wash. Post*, Apr. 7, 2014 (discussing NRDC’s report) (Att. 23).

- (2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled *Playing Chicken with Antibiotics*, which is based on the documents obtained, and reveals decades of hesitancy on FDA's part to ensure the safety of these drug additives (Att. 24). *See also* P.J. Huffstutter and Brian Grow, "Drug critic slams FDA over antibiotic oversight in meat production," *Reuters*, Jan. 27, 2014 (discussing NRDC's report) (Att. 25).
- (3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA's decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (Apr. 2010) (update to 2009 report) (Att. 26); *see also* William Souder, "It's Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?" *Harper's Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC) (Att. 27).
- (4) NRDC incorporated information obtained through FOIA into a report, available at <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of military sonar and other industrial noise pollution on marine life. *See Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report) (Att. 28). The report also relied upon and synthesized information from other sources. Since the report's publication, the sonar issue has continued to attract widespread public attention. *See, e.g.*, "Protest Raised over New Tests of Naval Sonar," *Nat'l Pub. Radio, All Things Considered*, July 24, 2007 (transcript at Att. 29).
- (5) NRDC scientists have used information obtained through FOIA to publish analyses of the United States' and other nations' nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States' plans to deploy a ballistic missile system and the implications for global security. *See* Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists*, Mar./Apr. 2004 (Att. 30).
- (6) NRDC obtained through FOIA, and made public, records of the operations of the Bush administration's Energy Task Force, along with analysis of selected excerpts and links to the administration's index of withheld documents (Att. 31). NRDC's efforts cast light on an issue of considerable public interest. *See, e.g.*, Elizabeth Shogren, "Bush Gets One-Two Punch on Energy," *L.A. Times*, Mar. 28, 2002, at A22 (Att. 32).

- (7) Through FOIA, NRDC obtained a memorandum by ExxonMobil, advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration's decision to replace Dr. Robert Watson. See NRDC Press Release and attached Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," Apr. 3, 2002 (Att. 33); Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19 (Att. 34).
- (8) Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000), available in print and online at <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp> (Att. 35). The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; see also Steve LaRue, "EPA Aims to Cut Levels of Arsenic in Well Water," *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report) (Att. 36).²

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public's understanding of the subject.

4. *Significance of the contribution to public understanding*

The records requested shed light on a matter of considerable public interest and concern: the transition of power at NOAA and the communications between the President-elect's transition team and NOAA staff.

Public understanding of the transition would be significantly enhanced by disclosure of the requested records. Disclosure would help the public to more effectively evaluate the transition and determine whether there have been requests such as the one made to the Department of Energy staff regarding involvement in climate-change issues. Disclosure would also help the public to better understand and evaluate NOAA's response to any such requests. Thus, disclosure here would significantly contribute to the public's understanding of government operations or activities. See 15 C.F.R. § 4.11(l)(2)(iv).

² There are numerous other examples of national news articles that were based in part on documents NRDC obtained through FOIA. See, e.g., Felicity Barringer, "Science Panel Issues Report on Exposure to Pollutant," *N.Y. Times*, Jan. 11, 2005 (Att. 37); Katharine Q. Seelye, "Draft of Air Rule is Said to Exempt Many Old Plants," *N.Y. Times*, Aug. 22, 2003 (Att. 38); Don Van Natta, Jr., "E-Mail Suggests Energy Official Encouraged Lobbyist on Policy," *N.Y. Times*, Apr. 27, 2002 (Att. 39).

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 15 C.F.R. § 4.11(l)(1)(ii). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the transition. As noted at Part II.A, any work done by NOAA on the transition relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the transition.

C. NRDC Is a Media Requester

Even if NOAA denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and the Department of Commerce FOIA regulations, 15 C.F.R. § 4.11(c), (d); see also 15 C.F.R. § 4.11(b)(6) (defining “[r]epresentative of the news media”). A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); see also *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep't of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 40) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. As described earlier in this request, NRDC publishes original reporting of environmental news stories on its website, <http://www.nrdc.org>. Previously, NRDC published stories like these in its magazine, *OnEarth*, which has won numerous news media awards, including the Independent Press Award for Best Environmental Coverage and for General Excellence, a Gold Eddie Award for editorial excellence among magazines, and the Phillip D. Reed Memorial Award for Outstanding Writing on the Southern Environment. NRDC also publishes a regular newsletter for its more than one million members and online activists; issues other electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. See 15 C.F.R. § 4.11(b)(6) (stating that examples of news media include . . . publishers of periodicals). NRDC maintains a significant additional communications presence on the internet through its staff blogs on <http://www.nrdc.org>, which are updated regularly and feature writing about current environmental issues, through daily news messaging on “Twitter” and “Facebook,” and through content distributed to outlets such as Medium. See OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”). The aforementioned publications and

media sources routinely include information about current events of interest to the readership and the public. To publish and transmit this news content, NRDC employs more than fifty staff members dedicated full-time to communications with the public, including accomplished journalists and editors. These staff members rely on information acquired under FOIA and through other means. Public interest organizations meeting the requirements “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union).³

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by NRDC to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of NRDC’s publications or other suitable media channels. NRDC staff gather information from a variety of sources—including documents provided pursuant to FOIA requests—to write original articles and reports that are featured on its website, in its newsletters and blogs, and on other media outlets. *See Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”). NRDC seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with the Department of Commerce’s FOIA regulations for all or a portion of the requested records. *See* 15 C.F.R. § 4.11. Please contact me before doing anything that would cause the fee to exceed \$250. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; NOAA’s search for—or deliberations concerning—certain records should not delay the production of others that NOAA has already retrieved and elected to produce. *See generally* 15 C.F.R. § 4.7. If NOAA concludes that any of the records requested here are publicly available, please let me know.

³ To be a representative of the news media, an organization need not *exclusively* perform news gathering functions. If that were required, major news and entertainment entities like the National Broadcasting Company (NBC) would not qualify as representatives of the news media. This country has a long history, dating back to its founding, of news organizations engaging in public advocacy.

Please do not hesitate to call or email with questions. Thank you.

Sincerely,

Jaclyn H. Prange
Staff Attorney
Natural Resources Defense Council, Inc.
111 Sutter St., 21st Floor
San Francisco, CA 94104
jprange@nrdc.org
415-875-6184

Enclosures (sent via FOIA Online):

Attachments 1 through 42 (single .pdf file)

Attachment D



December 22, 2016

Via Certified Mail

Dionne Hardy, FOIA Officer
Office of Management and Budget
725 17th Street NW, Room 9026
Washington, DC 20503

Re: FOIA request for communications between the President-elect's transition team and OMB staff

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and applicable Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1303.1-1303.70.

I. Description of Records Sought

Please produce records¹ in OMB's possession, custody, or control that are, include, or reflect communications between OMB staff and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Edwin Meese, Dan Kowalski, Russ Vought, Justin Bogie, Karen Evans, Pat Pizzella, Mark Robbins, Paul Winfree, Linda Springer, and David Burton.

II. Request for a Fee Waiver

NRDC requests that OMB waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without 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 the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 5 C.F.R. § 1303.70. The requested disclosure would meet both of these

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any OMB office, including, but not limited to, OMB Headquarters offices, and specifically including OMB offices in possession of responsive records.

requirements. In addition, NRDC qualifies as “a representative of the news media” entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 5 C.F.R. § 1303.50(c).

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 5 C.F.R. § 1303.70.

1. Subject of the request

The records requested here reflect communications between OMB and the President-elect’s transition team after a presidential election. The requested records thus directly concern “the operations or activities of the Government.” 5 C.F.R. § 1303.70.

2. Informative value of the information to be disclosed

The requested records are “likely to contribute significantly to” the public’s understanding of government operations and activities. 5 C.F.R. § 1303.70. The public does not currently possess comprehensive information regarding the transition of power within the agency. There is more than a reasonable likelihood that these records have informative value to the public because, for example, the President-elect sent a questionnaire to Department of Energy staff asking about involvement in specific areas of research and attendance at climate-related conferences. *See* “Climate Change Conversations Are Targeted in Questionnaire to Energy Department,” Coral Davenport, *New York Times*, Dec. 9, 2016, <http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html? r=0>. There may be similar communications with OMB that would similarly have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

We believe that the records requested are not currently in the public domain. Their disclosure would thus meaningfully inform public understanding with respect to the transition at OMB, as further discussed below. However, if OMB were to conclude that some of the requested records are publicly available, NRDC would like to discuss that conclusion and might agree to exclude such records from this request.

3. Contribution to an understanding of the subject by the public is likely to result from disclosure

NRDC’s expertise in matters concerning OMB staffing and policy, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability to and will use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a

requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are a broad audience of persons interested in the subject of the transition of power at OMB. As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. As of June 2016, these include, but are not limited to the following:

- NRDC's website, available at <http://www.nrdc.org> (homepage at Att. 1), is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. (sample email at Att. 2) This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions> (Att. 3).
- *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter> (Att. 4).
- NRDC updates and maintains several social media accounts: Facebook (565,530 followers) (Att. 5), Twitter (195,426 followers) (Att. 6), Instagram (37,868 followers) (Att. 7), YouTube (19,518 subscribers) (Att. 8), and LinkedIn (9,108 followers) (Att. 9). We also use Medium as another distribution channel for our content (1,478 followers).

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*, narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post (Att. 10); and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, "The requirement to rebuild US fish stocks: Is it working?" *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell) (Att. 11);

- Issue brief, “The Untapped Potential of California’s Water Supply: Efficiency, Reuse, and Stormwater,” June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann) (Att. 12); *see also* “Saving Water in California,” *N.Y. Times*, July 9, 2014 (discussing the report’s estimates) (Att. 13);
- Article, “Waves of phony charges over new clean water safeguards,” *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner) (Att. 14);
- Article, “Don’t Buy the Smear of the EPA,” *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke) (Att. 15);
- Transcript, “Conservationists Call For Quiet: The Ocean Is Too Loud!” Nat’l Pub. Radio, *All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny) (Att. 16);
- Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012 (Att. 17);
- Article, “Pollution Still a Hazard to U.S. Beaches,” CBS, *CBS NEWS*, July 29, 2009 (featuring former NRDC Water Program Co-Director Nancy Stoner) (Att. 18);
- Conference brochure, “World Business Summit on Climate Change,” May 24-26, 2009 (featuring former NRDC Director for Market Innovation Rick Duke at 9) (Att. 19);
- Article, “Is there a ‘proper level’ of compliance with environmental law?” *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall) (Att. 20);
- NRDC Document Bank, <http://docs.nrdc.org/> (Att. 21).

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe” (Att. 22). *See also* Kimberly Kindy, “Are secret, dangerous ingredients in your food?” *Wash. Post*, Apr. 7, 2014 (discussing NRDC’s report) (Att. 23).
- (2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled *Playing Chicken with Antibiotics*, which is based on the documents obtained, and reveals decades of hesitancy on FDA’s part to ensure the safety of these drug additives (Att. 24). *See also* P.J. Huffstutter and Brian Grow, “Drug critic slams FDA over antibiotic oversight in meat production,” *Reuters*, Jan. 27, 2014 (discussing NRDC’s report) (Att. 25).

- (3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA's decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. See *Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (Apr. 2010) (update to 2009 report) (Att. 26); see also William Souder, "It's Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?" *Harper's Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC) (Att. 27).
- (4) NRDC incorporated information obtained through FOIA into a report, available at <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of military sonar and other industrial noise pollution on marine life. See *Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report) (Att. 28). The report also relied upon and synthesized information from other sources. Since the report's publication, the sonar issue has continued to attract widespread public attention. See, e.g., "Protest Raised over New Tests of Naval Sonar," Nat'l Pub. Radio, *All Things Considered*, July 24, 2007 (transcript at Att. 29).
- (5) NRDC scientists have used information obtained through FOIA to publish analyses of the United States' and other nations' nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States' plans to deploy a ballistic missile system and the implications for global security. See Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists*, Mar./Apr. 2004 (Att. 30).
- (6) NRDC obtained through FOIA, and made public, records of the operations of the Bush administration's Energy Task Force, along with analysis of selected excerpts and links to the administration's index of withheld documents (Att. 31). NRDC's efforts cast light on an issue of considerable public interest. See, e.g., Elizabeth Shogren, "Bush Gets One-Two Punch on Energy," *L.A. Times*, Mar. 28, 2002, at A22 (Att. 32).
- (7) Through FOIA, NRDC obtained a memorandum by ExxonMobil, advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration's decision to replace Dr. Robert Watson. See NRDC Press Release and attached Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," Apr. 3, 2002 (Att. 33); Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19 (Att. 34).

- (8) Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000), available in print and online at <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp> (Att. 35). The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; see also Steve LaRue, “EPA Aims to Cut Levels of Arsenic in Well Water,” *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report) (Att. 36).²

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public’s understanding of the subject.

4. Significance of the contribution to public understanding

The records requested shed light on a matter of considerable public interest and concern: the transition of power at OMB and the communications between the President-elect’s transition team and OMB staff.

Public understanding of the transition would be significantly enhanced by disclosure of the requested records. Disclosure would help the public to more effectively evaluate the transition and determine whether there have been requests such as the one made to the Department of Energy staff regarding involvement in climate-change issues. Disclosure would also help the public to better understand and evaluate OMB’s response to any such requests. Thus, disclosure here would significantly contribute to the public’s understanding of government operations or activities. See 5 C.F.R. § 1303.70.

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 5 C.F.R. § 1303.70. NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Envtl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the transition. As noted at Part II.A, any work done by OMB on the transition relates to a matter

² There are numerous other examples of national news articles that were based in part on documents NRDC obtained through FOIA. See, e.g., Felicity Barringer, “Science Panel Issues Report on Exposure to Pollutant,” *N.Y. Times*, Jan. 11, 2005 (Att. 37); Katharine Q. Seelye, “Draft of Air Rule is Said to Exempt Many Old Plants,” *N.Y. Times*, Aug. 22, 2003 (Att. 38); Don Van Natta, Jr., “E-Mail Suggests Energy Official Encouraged Lobbyist on Policy,” *N.Y. Times*, Apr. 27, 2002 (Att. 39).

of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the transition.

C. NRDC Is a Media Requester

Even if OMB denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and OMB's FOIA regulations, 5 C.F.R. § 1303.50(c); *see also* 5 C.F.R. § 1303.30(j) (defining “[r]epresentative of the news media”). A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, U.S. Dep’t of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 40) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. As described earlier in this request, NRDC publishes original reporting of environmental news stories on its website, <http://www.nrdc.org>. Previously, NRDC published stories like these in its magazine, *OnEarth*, which has won numerous news media awards, including the Independent Press Award for Best Environmental Coverage and for General Excellence, a Gold Eddie Award for editorial excellence among magazines, and the Phillip D. Reed Memorial Award for Outstanding Writing on the Southern Environment. NRDC also publishes a regular newsletter for its more than one million members and online activists; issues other electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. *See* 5 C.F.R. § 1303.30(j) (“Examples of news media include . . . publishers of periodicals.”). NRDC maintains a significant additional communications presence on the internet through its staff blogs on <http://www.nrdc.org>, which are updated regularly and feature writing about current environmental issues, through daily news messaging on Twitter and Facebook, and through content distributed to outlets such as Medium. *See* OPEN Gov’t Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”). The aforementioned publications and media sources routinely include information about current events of interest to the readership and the public. To publish and transmit this news content, NRDC employs more than fifty staff members dedicated full-time to communications with the public, including accomplished journalists and editors. These staff members rely on information acquired under FOIA and through other means. Public interest organizations meeting the requirements “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (accord[ing] media requester status to the ACLU).³

³ To be a representative of the news media, an organization need not *exclusively* perform news gathering functions. If that were required, major news and entertainment entities like the National Broadcasting Company (NBC) would not qualify as representatives of the news media.

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by NRDC to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of NRDC's publications or other suitable media channels. NRDC staff gather information from a variety of sources—including documents provided pursuant to FOIA requests—to write original articles and reports that are featured on its website, in its newsletters and blogs, and on other media outlets. *See Cause of Action v. Fed. Trade Comm'n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”). NRDC seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with OMB's FOIA regulations for all or a portion of the requested records. *See* 5 C.F.R. § 1303.40. Please contact me before doing anything that would cause the fee to exceed \$250. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; OMB's search for—or deliberations concerning—certain records should not delay the production of others that OMB has already retrieved and elected to produce. If OMB concludes that any of the records requested here are publicly available, please let me know.

Please do not hesitate to call or email with questions. Thank you.

Sincerely,

Jaclyn H. Prange
Staff Attorney
Natural Resources Defense Council, Inc.
111 Sutter St., 21st Floor
San Francisco, CA 94104
jprange@nrdc.org
415-875-6184

Enclosures (sent via FOIA Online): Attachments 1 through 42 (single .pdf file)

Attachment E

USPS Tracking® Results

FAQs > (<http://faq.usps.com/?articleId=220900>)

Track Another Package +

Remove X

Tracking Number: 70161970000023486185



Delivered

Updated Delivery Day: Wednesday, December 28, 2016 ⓘ

Product & Tracking Information

[See Available Actions](#)

Postal Product:
Priority Mail™

Features:
Certified Mail™
Return Receipt
Up to \$50 insurance included
Restrictions Apply ⓘ

See tracking for related item:
[9590940304065163920575 \(/go/TrackConfirmAction?tLabels=9590940304065163920575\)](#)

DATE & TIME

STATUS OF ITEM

LOCATION

**December 28, 2016, 4:25
am**

Delivered

WASHINGTON, DC 20500



Your item was delivered at 4:25 am on December 28, 2016 in WASHINGTON, DC 20500.

December 27, 2016, 11:18
am

Available for Pickup

WASHINGTON, DC 20500

DATE & TIME	STATUS OF ITEM	LOCATION
December 27, 2016, 10:53 am	Arrived at Unit	WASHINGTON, DC 20018
December 25, 2016, 10:17 pm	In Transit to Destination	

[See More](#) 

Available Actions

[See Less](#) 

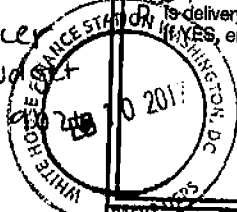
Can't find what you're looking for?

Go to our FAQs section to find answers to your tracking questions.

[FAQs \(http://faq.usps.com/?articleId=220900\)](http://faq.usps.com/?articleId=220900)

Attachment F

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> ■ Complete items 1, 2, and 3. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 	A. Signature X <i>Dionne Hardy</i>	<input type="checkbox"/> Agent <input type="checkbox"/> Addressee
1. Article Addressed to: Dionne Hardy, FOIA Officer Office of Management + Budget 725 19th St. NW, Room 6185 Washington, DC 20503	B. Received by (Printed Name) DIONNE HARDY	C. Date of Delivery 01/12/17
 9590 9403 0406 5163 9205 75	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
2. (Transfer from service label) 7016 1970 0000 2348 6185	Service Type <input type="checkbox"/> Adult Signature <input type="checkbox"/> Adult Signature Restricted Delivery <input checked="" type="checkbox"/> Certified Mail® <input type="checkbox"/> Certified Mail Restricted Delivery <input type="checkbox"/> Collect on Delivery <input type="checkbox"/> Collect on Delivery Restricted Delivery <input type="checkbox"/> Insured Mail <input type="checkbox"/> Insured Mail Restricted Delivery <input type="checkbox"/> Priority Mail Express® <input type="checkbox"/> Registered Mail™ <input type="checkbox"/> Registered Mail Restricted Delivery <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Signature Confirmation™ <input type="checkbox"/> Signature Confirmation Restricted Delivery	
PS Form 3811, April 2015 PSN 7530-02-000-9033		Domestic Return Receipt



UNITED STATES POSTAL SERVICE
SAN FRANCISCO DISTRICT
MD 207
30 FEB '17
PM 3 1



First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4® in this box•
Jackie Prange
NRDC
111 Sutter St, 21st Floor
San Francisco, CA 94104

USPS TRACKING#



9590 9403 0406 5163 9205 75

Attachment G

NRDC

December 23, 2016

Via email

blm_wo_foia@blm.gov

Re: FOIA request for communications between the President-elect's transition team and DOI staff

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and applicable Department of Interior (DOI) regulations at 43 C.F.R. § 2.1-2.290.

I. Description of Records Sought

Please produce records¹ in DOI's possession, custody, or control that are, include, or reflect communications between DOI staff in the Bureau of Land Management and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Ryan Zinke, Doug Domenech, David Bernhardt, Scott Cameron, Daniel Jorjani, Kathy Benedetto, Mary Bomar, Karen Budd-Falen, and Ned Mamula.

II. Request for a Fee Waiver

NRDC requests that DOI waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without 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 the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45. The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as "a representative of the news media" entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 43 C.F.R. § 2.39.

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any DOI office, including, but not limited to, DOI Headquarters offices, and specifically including DOI offices in possession of responsive records.

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(1). Each of the factors used by DOI to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 43 C.F.R. § 2.48.

1. Subject of the request

The records requested here reflect communications between DOI and the President-elect’s transition team after a presidential election. The requested records thus directly concern “the operations or activities of the government.” 43 C.F.R. § 2.48(a)(1).

2. Informative value of the information to be disclosed

The requested records are “likely to contribute to” the public’s understanding of government operations and activities. 43 C.F.R. § 2.48(a)(2). The public does not currently possess comprehensive information regarding the transition of power within the agency. There is more than a reasonable likelihood that these records have informative value to the public because, for example, the President-elect sent a questionnaire to Department of Energy staff asking about involvement in specific areas of research and attendance at climate-related conferences. *See* “Climate Change Conversations Are Targeted in Questionnaire to Energy Department,” Coral Davenport, *New York Times*, Dec. 9, 2016, <http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html? r=0>. There may be similar communications with DOI that would similarly have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

As described below in section II.A.3, disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject, and NRDC’s identity, vocation, qualifications, and expertise regarding the requested information explain how NRDC plans to disclose the information to a broad audience of persons. Further, because NRDC is a “representative of the news media,” as explained in Part II.C below, DOI must presume that NRDC has the ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject. 43 C.F.R. § 2.48(a)(2)(v).

3. Contribution to an understanding of the subject by the public is likely to result from disclosure

NRDC’s expertise in matters concerning DOI staffing and policy, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability to and will use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject

matter. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are a broad audience of persons interested in the subject of the transition of power at DOI, and when combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly "reasonably broad." 43 C.F.R. § 2.48(a)(3). As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. As of June 2016, these include, but are not limited to the following:

- NRDC's website, available at <http://www.nrdc.org> (homepage at Att. 1), is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
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NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe” (Att. 22). *See also* Kimberly Kindy, “Are secret, dangerous ingredients in your food?” *Wash. Post*, Apr. 7, 2014 (discussing NRDC’s report) (Att. 23).
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As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public’s understanding of the subject.

We believe that the records requested are not currently in the public domain. Their disclosure would thus meaningfully inform public understanding with respect to the transition at DOI, as further discussed below. However, if DOI were to conclude that some of the requested records are publicly available, NRDC would like to discuss that conclusion and might agree to exclude such records from this request.

4. *Significance of the contribution to public understanding*

The records requested shed light on a matter of considerable public interest and concern: the transition of power at DOI and the communications between the President-elect’s transition team and DOI staff.

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² There are numerous other examples of national news articles that were based in part on documents NRDC obtained through FOIA. See, e.g., Felicity Barringer, “Science Panel Issues Report on Exposure to Pollutant,” *N.Y. Times*, Jan. 11, 2005 (Att. 37); Katharine Q. Seelye, “Draft of Air Rule is Said to Exempt Many Old Plants,” *N.Y. Times*, Aug. 22, 2003 (Att. 38); Don Van Natta, Jr., “E-Mail Suggests Energy Official Encouraged Lobbyist on Policy,” *N.Y. Times*, Apr. 27, 2002 (Att. 39).

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.48(b). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the transition. As noted at Part II.A, any work done by DOI on the transition relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the transition.

Also, because NRDC is a representative of the news media, as described below, DOI must presume that the public interest outweighs any commercial interest. 43 C.F.R. § 2.48(b)(3)(ii).

C. NRDC Is a Media Requester

Even if DOI denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and DOI's FOIA regulations, 43 C.F.R. § 2.39; see also 43 C.F.R. § 2.70 (defining “[r]epresentative of the news media”). A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); see also *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep't of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 40) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. As described earlier in this request, NRDC publishes original reporting of environmental news stories on its website, <http://www.nrdc.org>. Previously, NRDC published stories like these in its magazine, *OnEarth*, which has won numerous news media awards, including the Independent Press Award for Best Environmental Coverage and for General Excellence, a Gold Eddie Award for editorial excellence among magazines, and the Phillip D. Reed Memorial Award for Outstanding Writing on the Southern Environment. NRDC also publishes a regular newsletter for its more than one million members and online activists; issues other electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. See 43 C.F.R. § 2.70 (“Examples of news media [include] . . . publishers of periodicals.”). NRDC maintains a significant additional communications presence on the internet through its staff blogs on <http://www.nrdc.org>, which are updated regularly and feature writing about current environmental issues, through daily news messaging on “Twitter” and “Facebook,” and through content distributed to outlets such as Medium. See OPEN Government

Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”). The aforementioned publications and media sources routinely include information about current events of interest to the readership and the public. To publish and transmit this news content, NRDC employs more than fifty staff members dedicated full-time to communications with the public, including accomplished journalists and editors. These staff members rely on information acquired under FOIA and through other means. Public interest organizations meeting the requirements “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union).³

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by NRDC to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of NRDC’s publications or other suitable media channels. NRDC staff gather information from a variety of sources—including documents provided pursuant to FOIA requests—to write original articles and reports that are featured on its website, in its newsletters and blogs, and on other media outlets. *See Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”). NRDC seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with DOI’s FOIA regulations for all or a portion of the requested records. *See* 43 C.F.R. § 2.38-2.44. Please contact me before doing anything that would cause the fee to exceed \$250. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; DOI’s search for—or deliberations concerning—certain records should not delay the production of others that DOI has already retrieved and elected to produce. *See generally* 43 C.F.R. § 2.21-2.25. If DOI concludes that any of the records requested here are publicly available, please let me know.

³ To be a representative of the news media, an organization need not *exclusively* perform news gathering functions. If that were required, major news and entertainment entities like the National Broadcasting Company (NBC) would not qualify as representatives of the news media. This country has a long history, dating back to its founding, of news organizations engaging in public advocacy.

Please do not hesitate to call or email with questions.

Thank you.

Sincerely,

Jaclyn H. Prange
Staff Attorney
Natural Resources Defense Council, Inc.
111 Sutter St., 21st Floor
San Francisco, CA 94104
jprange@nrdc.org
415-875-6184

Enclosures:

Attachments 1 through 42 (in two emails)

Attachment H

NRDC

December 23, 2016

Via email
bor_foia@usbr.gov

Re: FOIA request for communications between the President-elect's transition team and DOI staff

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and applicable Department of Interior (DOI) regulations at 43 C.F.R. § 2.1-2.290.

I. Description of Records Sought

Please produce records¹ in DOI's possession, custody, or control that are, include, or reflect communications between DOI staff in the Bureau of Reclamation (BOR) and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Ryan Zinke, Doug Domenech, David Bernhardt, Scott Cameron, Daniel Jorjani, Kathy Benedetto, Mary Bomar, Karen Budd-Falen, and Ned Mamula.

II. Request for a Fee Waiver

NRDC requests that DOI waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without 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 the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45. The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as "a representative of the news media" entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 43 C.F.R. § 2.39.

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any DOI office, including, but not limited to, DOI Headquarters offices, and specifically including DOI offices in possession of responsive records.

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(1). Each of the factors used by DOI to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 43 C.F.R. § 2.48.

1. Subject of the request

The records requested here reflect communications between DOI and the President-elect’s transition team after a presidential election. The requested records thus directly concern “the operations or activities of the government.” 43 C.F.R. § 2.48(a)(1).

2. Informative value of the information to be disclosed

The requested records are “likely to contribute to” the public’s understanding of government operations and activities. 43 C.F.R. § 2.48(a)(2). The public does not currently possess comprehensive information regarding the transition of power within the agency. There is more than a reasonable likelihood that these records have informative value to the public because, for example, the President-elect sent a questionnaire to Department of Energy staff asking about involvement in specific areas of research and attendance at climate-related conferences. *See* “Climate Change Conversations Are Targeted in Questionnaire to Energy Department,” Coral Davenport, *New York Times*, Dec. 9, 2016, http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html?_r=0. There may be similar communications with DOI that would similarly have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

As described below in section II.A.3, disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject, and NRDC’s identity, vocation, qualifications, and expertise regarding the requested information explain how NRDC plans to disclose the information to a broad audience of persons. Further, because NRDC is a “representative of the news media,” as explained in Part II.C below, DOI must presume that NRDC has the ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject. 43 C.F.R. § 2.48(a)(2)(v).

3. Contribution to an understanding of the subject by the public is likely to result from disclosure

NRDC’s expertise in matters concerning DOI staffing and policy, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability to and will use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject

matter. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are a broad audience of persons interested in the subject of the transition of power at DOI, and when combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly "reasonably broad." 43 C.F.R. § 2.48(a)(3). As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. As of June 2016, these include, but are not limited to the following:

- NRDC's website, available at <http://www.nrdc.org> (homepage at Att. 1), is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. (sample email at Att. 2) This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions> (Att. 3).
- *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter> (Att. 4).
- NRDC updates and maintains several social media accounts: Facebook (565,530 followers) (Att. 5), Twitter (195,426 followers) (Att. 6), Instagram (37,868 followers) (Att. 7), YouTube (19,518 subscribers) (Att. 8), and LinkedIn (9,108 followers) (Att. 9). We also use Medium as another distribution channel for our content (1,478 followers).

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*, narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post (Att. 10); and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, “The requirement to rebuild US fish stocks: Is it working?” *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell) (Att. 11);
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² There are numerous other examples of national news articles that were based in part on documents NRDC obtained through FOIA. See, e.g., Felicity Barringer, “Science Panel Issues Report on Exposure to Pollutant,” *N.Y. Times*, Jan. 11, 2005 (Att. 37); Katharine Q. Seelye, “Draft of Air Rule is Said to Exempt Many Old Plants,” *N.Y. Times*, Aug. 22, 2003 (Att. 38); Don Van Natta, Jr., “E-Mail Suggests Energy Official Encouraged Lobbyist on Policy,” *N.Y. Times*, Apr. 27, 2002 (Att. 39).

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Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.48(b). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the transition. As noted at Part II.A, any work done by DOI on the transition relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the transition.

Also, because NRDC is a representative of the news media, as described below, DOI must presume that the public interest outweighs any commercial interest. 43 C.F.R. § 2.48(b)(3)(ii).

C. NRDC Is a Media Requester

Even if DOI denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and DOI's FOIA regulations, 43 C.F.R. § 2.39; see also 43 C.F.R. § 2.70 (defining “[r]epresentative of the news media”). A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); see also *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep't of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 40) (granting NRDC media requester status).

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Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by NRDC to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of NRDC’s publications or other suitable media channels. NRDC staff gather information from a variety of sources—including documents provided pursuant to FOIA requests—to write original articles and reports that are featured on its website, in its newsletters and blogs, and on other media outlets. *See Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”). NRDC seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with DOI’s FOIA regulations for all or a portion of the requested records. *See* 43 C.F.R. § 2.38-2.44. Please contact me before doing anything that would cause the fee to exceed \$250. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; DOI’s search for—or deliberations concerning—certain records should not delay the production of others that DOI has already retrieved and elected to produce. *See generally* 43 C.F.R. § 2.21-2.25. If DOI concludes that any of the records requested here are publicly available, please let me know.

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Please do not hesitate to call or email with questions.

Thank you.

Sincerely,

Jaclyn H. Prange
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415-875-6184

Enclosures:

Attachments 1 through 42 (in two emails)

Attachment I



December 23, 2016

Via email
fwhq.foia@fws.gov

Re: FOIA request for communications between the President-elect's transition team and DOI staff

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and applicable Department of Interior (DOI) regulations at 43 C.F.R. § 2.1-2.290.

I. Description of Records Sought

Please produce records¹ in DOI's possession, custody, or control that are, include, or reflect communications between DOI staff in the United States Fish and Wildlife Service (FWS) and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Ryan Zinke, Doug Domenech, David Bernhardt, Scott Cameron, Daniel Jorjani, Kathy Benedetto, Mary Bomar, Karen Budd-Falen, and Ned Mamula.

II. Request for a Fee Waiver

NRDC requests that DOI waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without 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 the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45. The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as "a representative of the news media" entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 43 C.F.R. § 2.39.

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any DOI office, including, but not limited to, DOI Headquarters offices, and specifically including DOI offices in possession of responsive records.

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(1). Each of the factors used by DOI to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 43 C.F.R. § 2.48.

1. Subject of the request

The records requested here reflect communications between DOI and the President-elect’s transition team after a presidential election. The requested records thus directly concern “the operations or activities of the government.” 43 C.F.R. § 2.48(a)(1).

2. Informative value of the information to be disclosed

The requested records are “likely to contribute to” the public’s understanding of government operations and activities. 43 C.F.R. § 2.48(a)(2). The public does not currently possess comprehensive information regarding the transition of power within the agency. There is more than a reasonable likelihood that these records have informative value to the public because, for example, the President-elect sent a questionnaire to Department of Energy staff asking about involvement in specific areas of research and attendance at climate-related conferences. *See* “Climate Change Conversations Are Targeted in Questionnaire to Energy Department,” Coral Davenport, *New York Times*, Dec. 9, 2016, http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html?_r=0. There may be similar communications with DOI that would similarly have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

As described below in section II.A.3, disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject, and NRDC’s identity, vocation, qualifications, and expertise regarding the requested information explain how NRDC plans to disclose the information to a broad audience of persons. Further, because NRDC is a “representative of the news media,” as explained in Part II.C below, DOI must presume that NRDC has the ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject. 43 C.F.R. § 2.48(a)(2)(v).

3. Contribution to an understanding of the subject by the public is likely to result from disclosure

NRDC’s expertise in matters concerning DOI staffing and policy, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability to and will use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject

matter. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are a broad audience of persons interested in the subject of the transition of power at DOI, and when combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly "reasonably broad." 43 C.F.R. § 2.48(a)(3). As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. As of June 2016, these include, but are not limited to the following:

- NRDC's website, available at <http://www.nrdc.org> (homepage at Att. 1), is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. (sample email at Att. 2) This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions> (Att. 3).
- *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter> (Att. 4).
- NRDC updates and maintains several social media accounts: Facebook (565,530 followers) (Att. 5), Twitter (195,426 followers) (Att. 6), Instagram (37,868 followers) (Att. 7), YouTube (19,518 subscribers) (Att. 8), and LinkedIn (9,108 followers) (Att. 9). We also use Medium as another distribution channel for our content (1,478 followers).

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*, narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post (Att. 10); and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, “The requirement to rebuild US fish stocks: Is it working?” *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell) (Att. 11);
- Issue brief, “The Untapped Potential of California’s Water Supply: Efficiency, Reuse, and Stormwater,” June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann) (Att. 12); *see also* “Saving Water in California,” *N.Y. Times*, July 9, 2014 (discussing the report’s estimates) (Att. 13);
- Article, “Waves of phony charges over new clean water safeguards,” *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner) (Att. 14);
- Article, “Don’t Buy the Smear of the EPA,” *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke) (Att. 15);
- Transcript, “Conservationists Call For Quiet: The Ocean Is Too Loud!” Nat’l Pub. Radio, *All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny) (Att. 16);
- Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012 (Att. 17);
- Article, “Pollution Still a Hazard to U.S. Beaches,” CBS, *CBS NEWS*, July 29, 2009 (featuring former NRDC Water Program Co-Director Nancy Stoner) (Att. 18);
- Conference brochure, “World Business Summit on Climate Change,” May 24-26, 2009 (featuring former NRDC Director for Market Innovation Rick Duke at 9) (Att. 19);
- Article, “Is there a ‘proper level’ of compliance with environmental law?” *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall) (Att. 20);
- NRDC Document Bank, <http://docs.nrdc.org/> (Att. 21).

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe” (Att. 22). *See also* Kimberly Kindy, “Are secret, dangerous ingredients in your food?” *Wash. Post*, Apr. 7, 2014 (discussing NRDC’s report) (Att. 23).
- (2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled *Playing Chicken with Antibiotics*, which is based on the documents obtained, and reveals decades of hesitancy on FDA’s part to ensure

the safety of these drug additives (Att. 24). *See also* P.J. Huffstutter and Brian Grow, “Drug critic slams FDA over antibiotic oversight in meat production,” *Reuters*, Jan. 27, 2014 (discussing NRDC’s report) (Att. 25).

- (3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA’s decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (Apr. 2010) (update to 2009 report) (Att. 26); *see also* William Souder, “It’s Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?” *Harper’s Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC) (Att. 27).
- (4) NRDC incorporated information obtained through FOIA into a report, available at <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of military sonar and other industrial noise pollution on marine life. *See Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report) (Att. 28). The report also relied upon and synthesized information from other sources. Since the report’s publication, the sonar issue has continued to attract widespread public attention. *See, e.g.*, “Protest Raised over New Tests of Naval Sonar,” Nat’l Pub. Radio, *All Things Considered*, July 24, 2007 (transcript at Att. 29).
- (5) NRDC scientists have used information obtained through FOIA to publish analyses of the United States’ and other nations’ nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States’ plans to deploy a ballistic missile system and the implications for global security. *See* Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, “The Protection Paradox,” *Bulletin of Atomic Scientists*, Mar./Apr. 2004 (Att. 30).
- (6) NRDC obtained through FOIA, and made public, records of the operations of the Bush administration’s Energy Task Force, along with analysis of selected excerpts and links to the administration’s index of withheld documents (Att. 31). NRDC’s efforts cast light on an issue of considerable public interest. *See, e.g.*, Elizabeth Shogren, “Bush Gets One-Two Punch on Energy,” *L.A. Times*, Mar. 28, 2002, at A22 (Att. 32).
- (7) Through FOIA, NRDC obtained a memorandum by ExxonMobil, advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration’s decision to replace Dr. Robert Watson. *See* NRDC Press Release and attached Exxon memorandum, “Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from

International Global Warming Panel,” Apr. 3, 2002 (Att. 33); Elizabeth Shogren, “Charges Fly Over Science Panel Pick,” *L.A. Times*, Apr. 4, 2002, at A19 (Att. 34).

- (8) Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000), available in print and online at <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp> (Att. 35). The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; see also Steve LaRue, “EPA Aims to Cut Levels of Arsenic in Well Water,” *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report) (Att. 36).²

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public’s understanding of the subject.

We believe that the records requested are not currently in the public domain. Their disclosure would thus meaningfully inform public understanding with respect to the transition at DOI, as further discussed below. However, if DOI were to conclude that some of the requested records are publicly available, NRDC would like to discuss that conclusion and might agree to exclude such records from this request.

4. Significance of the contribution to public understanding

The records requested shed light on a matter of considerable public interest and concern: the transition of power at DOI and the communications between the President-elect’s transition team and DOI staff.

Public understanding of the transition would be significantly enhanced by disclosure of the requested records. Disclosure would help the public to more effectively evaluate the transition and determine whether there have been requests such as the one made to the Department of Energy staff regarding involvement in climate-change issues. Disclosure would also help the public to better understand and evaluate DOI’s response to any such requests. Thus, disclosure of these records would contribute significantly to the public’s understanding of the subject in question. See 43 C.F.R. § 2.48(a)(4).

² There are numerous other examples of national news articles that were based in part on documents NRDC obtained through FOIA. See, e.g., Felicity Barringer, “Science Panel Issues Report on Exposure to Pollutant,” *N.Y. Times*, Jan. 11, 2005 (Att. 37); Katharine Q. Seelye, “Draft of Air Rule is Said to Exempt Many Old Plants,” *N.Y. Times*, Aug. 22, 2003 (Att. 38); Don Van Natta, Jr., “E-Mail Suggests Energy Official Encouraged Lobbyist on Policy,” *N.Y. Times*, Apr. 27, 2002 (Att. 39).

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Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; DOI’s search for—or deliberations concerning—certain records should not delay the production of others that DOI has already retrieved and elected to produce. *See generally* 43 C.F.R. § 2.21-2.25. If DOI concludes that any of the records requested here are publicly available, please let me know.

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Please do not hesitate to call or email with questions.

Thank you.

Sincerely,

Jaclyn H. Prange
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Natural Resources Defense Council, Inc.
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415-875-6184

Enclosures:

Attachments 1 through 42 (in two emails)

Attachment J

NRDC

December 23, 2016

Via email

osm-foia@osmre.gov

Re: FOIA request for communications between the President-elect's transition team and DOI staff

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and applicable Department of Interior (DOI) regulations at 43 C.F.R. § 2.1-2.290.

I. Description of Records Sought

Please produce records¹ in DOI's possession, custody, or control that are, include, or reflect communications between DOI staff in the Office of Surface Mining Reclamation and Enforcement (OSMRE) and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Ryan Zinke, Doug Domenech, David Bernhardt, Scott Cameron, Daniel Jorjani, Kathy Benedetto, Mary Bomar, Karen Budd-Falen, and Ned Mamula.

II. Request for a Fee Waiver

NRDC requests that DOI waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without 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 the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45. The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as "a representative of the news media" entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 43 C.F.R. § 2.39.

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any DOI office, including, but not limited to, DOI Headquarters offices, and specifically including DOI offices in possession of responsive records.

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(1). Each of the factors used by DOI to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 43 C.F.R. § 2.48.

1. Subject of the request

The records requested here reflect communications between DOI and the President-elect’s transition team after a presidential election. The requested records thus directly concern “the operations or activities of the government.” 43 C.F.R. § 2.48(a)(1).

2. Informative value of the information to be disclosed

The requested records are “likely to contribute to” the public’s understanding of government operations and activities. 43 C.F.R. § 2.48(a)(2). The public does not currently possess comprehensive information regarding the transition of power within the agency. There is more than a reasonable likelihood that these records have informative value to the public because, for example, the President-elect sent a questionnaire to Department of Energy staff asking about involvement in specific areas of research and attendance at climate-related conferences. *See* “Climate Change Conversations Are Targeted in Questionnaire to Energy Department,” Coral Davenport, *New York Times*, Dec. 9, 2016, <http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html? r=0>. There may be similar communications with DOI that would similarly have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

As described below in section II.A.3, disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject, and NRDC’s identity, vocation, qualifications, and expertise regarding the requested information explain how NRDC plans to disclose the information to a broad audience of persons. Further, because NRDC is a “representative of the news media,” as explained in Part II.C below, DOI must presume that NRDC has the ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject. 43 C.F.R. § 2.48(a)(2)(v).

3. Contribution to an understanding of the subject by the public is likely to result from disclosure

NRDC’s expertise in matters concerning DOI staffing and policy, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability to and will use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject

matter. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are a broad audience of persons interested in the subject of the transition of power at DOI, and when combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly "reasonably broad." 43 C.F.R. § 2.48(a)(3). As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. As of June 2016, these include, but are not limited to the following:

- NRDC's website, available at <http://www.nrdc.org> (homepage at Att. 1), is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
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- Article, “Waves of phony charges over new clean water safeguards,” *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner) (Att. 14);
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- Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012 (Att. 17);
- Article, “Pollution Still a Hazard to U.S. Beaches,” CBS, *CBS NEWS*, July 29, 2009 (featuring former NRDC Water Program Co-Director Nancy Stoner) (Att. 18);
- Conference brochure, “World Business Summit on Climate Change,” May 24-26, 2009 (featuring former NRDC Director for Market Innovation Rick Duke at 9) (Att. 19);
- Article, “Is there a ‘proper level’ of compliance with environmental law?” *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall) (Att. 20);
- NRDC Document Bank, <http://docs.nrdc.org/> (Att. 21).

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe” (Att. 22). *See also* Kimberly Kindy, “Are secret, dangerous ingredients in your food?” *Wash. Post*, Apr. 7, 2014 (discussing NRDC’s report) (Att. 23).
- (2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled *Playing Chicken with Antibiotics*, which is based on the documents obtained, and reveals decades of hesitancy on FDA’s part to ensure

the safety of these drug additives (Att. 24). *See also* P.J. Huffstutter and Brian Grow, “Drug critic slams FDA over antibiotic oversight in meat production,” *Reuters*, Jan. 27, 2014 (discussing NRDC’s report) (Att. 25).

- (3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA’s decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (Apr. 2010) (update to 2009 report) (Att. 26); *see also* William Souder, “It’s Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?” *Harper’s Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC) (Att. 27).
- (4) NRDC incorporated information obtained through FOIA into a report, available at <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of military sonar and other industrial noise pollution on marine life. *See Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report) (Att. 28). The report also relied upon and synthesized information from other sources. Since the report’s publication, the sonar issue has continued to attract widespread public attention. *See, e.g.*, “Protest Raised over New Tests of Naval Sonar,” Nat’l Pub. Radio, *All Things Considered*, July 24, 2007 (transcript at Att. 29).
- (5) NRDC scientists have used information obtained through FOIA to publish analyses of the United States’ and other nations’ nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States’ plans to deploy a ballistic missile system and the implications for global security. *See* Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, “The Protection Paradox,” *Bulletin of Atomic Scientists*, Mar./Apr. 2004 (Att. 30).
- (6) NRDC obtained through FOIA, and made public, records of the operations of the Bush administration’s Energy Task Force, along with analysis of selected excerpts and links to the administration’s index of withheld documents (Att. 31). NRDC’s efforts cast light on an issue of considerable public interest. *See, e.g.*, Elizabeth Shogren, “Bush Gets One-Two Punch on Energy,” *L.A. Times*, Mar. 28, 2002, at A22 (Att. 32).
- (7) Through FOIA, NRDC obtained a memorandum by ExxonMobil, advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration’s decision to replace Dr. Robert Watson. *See* NRDC Press Release and attached Exxon memorandum, “Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from

International Global Warming Panel,” Apr. 3, 2002 (Att. 33); Elizabeth Shogren, “Charges Fly Over Science Panel Pick,” *L.A. Times*, Apr. 4, 2002, at A19 (Att. 34).

- (8) Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000), available in print and online at <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp> (Att. 35). The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; see also Steve LaRue, “EPA Aims to Cut Levels of Arsenic in Well Water,” *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report) (Att. 36).²

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public’s understanding of the subject.

We believe that the records requested are not currently in the public domain. Their disclosure would thus meaningfully inform public understanding with respect to the transition at DOI, as further discussed below. However, if DOI were to conclude that some of the requested records are publicly available, NRDC would like to discuss that conclusion and might agree to exclude such records from this request.

4. *Significance of the contribution to public understanding*

The records requested shed light on a matter of considerable public interest and concern: the transition of power at DOI and the communications between the President-elect’s transition team and DOI staff.

Public understanding of the transition would be significantly enhanced by disclosure of the requested records. Disclosure would help the public to more effectively evaluate the transition and determine whether there have been requests such as the one made to the Department of Energy staff regarding involvement in climate-change issues. Disclosure would also help the public to better understand and evaluate DOI’s response to any such requests. Thus, disclosure of these records would contribute significantly to the public’s understanding of the subject in question. See 43 C.F.R. § 2.48(a)(4).

² There are numerous other examples of national news articles that were based in part on documents NRDC obtained through FOIA. See, e.g., Felicity Barringer, “Science Panel Issues Report on Exposure to Pollutant,” *N.Y. Times*, Jan. 11, 2005 (Att. 37); Katharine Q. Seelye, “Draft of Air Rule is Said to Exempt Many Old Plants,” *N.Y. Times*, Aug. 22, 2003 (Att. 38); Don Van Natta, Jr., “E-Mail Suggests Energy Official Encouraged Lobbyist on Policy,” *N.Y. Times*, Apr. 27, 2002 (Att. 39).

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.48(b). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the transition. As noted at Part II.A, any work done by DOI on the transition relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the transition.

Also, because NRDC is a representative of the news media, as described below, DOI must presume that the public interest outweighs any commercial interest. 43 C.F.R. § 2.48(b)(3)(ii).

C. NRDC Is a Media Requester

Even if DOI denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and DOI's FOIA regulations, 43 C.F.R. § 2.39; see also 43 C.F.R. § 2.70 (defining “[r]epresentative of the news media”). A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); see also *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep't of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 40) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. As described earlier in this request, NRDC publishes original reporting of environmental news stories on its website, <http://www.nrdc.org>. Previously, NRDC published stories like these in its magazine, *OnEarth*, which has won numerous news media awards, including the Independent Press Award for Best Environmental Coverage and for General Excellence, a Gold Eddie Award for editorial excellence among magazines, and the Phillip D. Reed Memorial Award for Outstanding Writing on the Southern Environment. NRDC also publishes a regular newsletter for its more than one million members and online activists; issues other electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. See 43 C.F.R. § 2.70 (“Examples of news media [include] . . . publishers of periodicals.”). NRDC maintains a significant additional communications presence on the internet through its staff blogs on <http://www.nrdc.org>, which are updated regularly and feature writing about current environmental issues, through daily news messaging on “Twitter” and “Facebook,” and through content distributed to outlets such as Medium. See OPEN Government

Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”). The aforementioned publications and media sources routinely include information about current events of interest to the readership and the public. To publish and transmit this news content, NRDC employs more than fifty staff members dedicated full-time to communications with the public, including accomplished journalists and editors. These staff members rely on information acquired under FOIA and through other means. Public interest organizations meeting the requirements “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union).³

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by NRDC to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of NRDC’s publications or other suitable media channels. NRDC staff gather information from a variety of sources—including documents provided pursuant to FOIA requests—to write original articles and reports that are featured on its website, in its newsletters and blogs, and on other media outlets. *See Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”). NRDC seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with DOI’s FOIA regulations for all or a portion of the requested records. *See* 43 C.F.R. § 2.38-2.44. Please contact me before doing anything that would cause the fee to exceed \$250. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; DOI’s search for—or deliberations concerning—certain records should not delay the production of others that DOI has already retrieved and elected to produce. *See generally* 43 C.F.R. § 2.21-2.25. If DOI concludes that any of the records requested here are publicly available, please let me know.

³ To be a representative of the news media, an organization need not *exclusively* perform news gathering functions. If that were required, major news and entertainment entities like the National Broadcasting Company (NBC) would not qualify as representatives of the news media. This country has a long history, dating back to its founding, of news organizations engaging in public advocacy.

Please do not hesitate to call or email with questions.

Thank you.

Sincerely,

Jaclyn H. Prange
Staff Attorney
Natural Resources Defense Council, Inc.
111 Sutter St., 21st Floor
San Francisco, CA 94104
jprange@nrdc.org
415-875-6184

Enclosures:

Attachments 1 through 42 (in two emails)

Attachment K

NRDC

December 23, 2016

Via email

sol.foia@sol.doi.gov

Re: FOIA request for communications between the President-elect's transition team and DOI staff

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and applicable Department of Interior (DOI) regulations at 43 C.F.R. § 2.1-2.290.

I. Description of Records Sought

Please produce records¹ in DOI's possession, custody, or control that are, include, or reflect communications between DOI staff in the Office of the Solicitor (SOL) and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Ryan Zinke, Doug Domenech, David Bernhardt, Scott Cameron, Daniel Jorjani, Kathy Benedetto, Mary Bomar, Karen Budd-Falen, and Ned Mamula.

II. Request for a Fee Waiver

NRDC requests that DOI waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without 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 the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45. The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as "a representative of the news media" entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 43 C.F.R. § 2.39.

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any DOI office, including, but not limited to, DOI Headquarters offices, and specifically including DOI offices in possession of responsive records.

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.45(1). Each of the factors used by DOI to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 43 C.F.R. § 2.48.

1. Subject of the request

The records requested here reflect communications between DOI and the President-elect’s transition team after a presidential election. The requested records thus directly concern “the operations or activities of the government.” 43 C.F.R. § 2.48(a)(1).

2. Informative value of the information to be disclosed

The requested records are “likely to contribute to” the public’s understanding of government operations and activities. 43 C.F.R. § 2.48(a)(2). The public does not currently possess comprehensive information regarding the transition of power within the agency. There is more than a reasonable likelihood that these records have informative value to the public because, for example, the President-elect sent a questionnaire to Department of Energy staff asking about involvement in specific areas of research and attendance at climate-related conferences. *See* “Climate Change Conversations Are Targeted in Questionnaire to Energy Department,” Coral Davenport, *New York Times*, Dec. 9, 2016, http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html?_r=0. There may be similar communications with DOI that would similarly have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

As described below in section II.A.3, disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject, and NRDC’s identity, vocation, qualifications, and expertise regarding the requested information explain how NRDC plans to disclose the information to a broad audience of persons. Further, because NRDC is a “representative of the news media,” as explained in Part II.C below, DOI must presume that NRDC has the ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject. 43 C.F.R. § 2.48(a)(2)(v).

3. Contribution to an understanding of the subject by the public is likely to result from disclosure

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NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe” (Att. 22). *See also* Kimberly Kindy, “Are secret, dangerous ingredients in your food?” *Wash. Post*, Apr. 7, 2014 (discussing NRDC’s report) (Att. 23).
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the safety of these drug additives (Att. 24). *See also* P.J. Huffstutter and Brian Grow, “Drug critic slams FDA over antibiotic oversight in meat production,” *Reuters*, Jan. 27, 2014 (discussing NRDC’s report) (Att. 25).

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- (4) NRDC incorporated information obtained through FOIA into a report, available at <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of military sonar and other industrial noise pollution on marine life. *See Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report) (Att. 28). The report also relied upon and synthesized information from other sources. Since the report’s publication, the sonar issue has continued to attract widespread public attention. *See, e.g.*, “Protest Raised over New Tests of Naval Sonar,” Nat’l Pub. Radio, *All Things Considered*, July 24, 2007 (transcript at Att. 29).
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- (8) Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000), available in print and online at <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp> (Att. 35). The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; see also Steve LaRue, “EPA Aims to Cut Levels of Arsenic in Well Water,” *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report) (Att. 36).²

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public’s understanding of the subject.

We believe that the records requested are not currently in the public domain. Their disclosure would thus meaningfully inform public understanding with respect to the transition at DOI, as further discussed below. However, if DOI were to conclude that some of the requested records are publicly available, NRDC would like to discuss that conclusion and might agree to exclude such records from this request.

4. *Significance of the contribution to public understanding*

The records requested shed light on a matter of considerable public interest and concern: the transition of power at DOI and the communications between the President-elect’s transition team and DOI staff.

Public understanding of the transition would be significantly enhanced by disclosure of the requested records. Disclosure would help the public to more effectively evaluate the transition and determine whether there have been requests such as the one made to the Department of Energy staff regarding involvement in climate-change issues. Disclosure would also help the public to better understand and evaluate DOI’s response to any such requests. Thus, disclosure of these records would contribute significantly to the public’s understanding of the subject in question. See 43 C.F.R. § 2.48(a)(4).

² There are numerous other examples of national news articles that were based in part on documents NRDC obtained through FOIA. See, e.g., Felicity Barringer, “Science Panel Issues Report on Exposure to Pollutant,” *N.Y. Times*, Jan. 11, 2005 (Att. 37); Katharine Q. Seelye, “Draft of Air Rule is Said to Exempt Many Old Plants,” *N.Y. Times*, Aug. 22, 2003 (Att. 38); Don Van Natta, Jr., “E-Mail Suggests Energy Official Encouraged Lobbyist on Policy,” *N.Y. Times*, Apr. 27, 2002 (Att. 39).

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 2.48(b). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the transition. As noted at Part II.A, any work done by DOI on the transition relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the transition.

Also, because NRDC is a representative of the news media, as described below, DOI must presume that the public interest outweighs any commercial interest. 43 C.F.R. § 2.48(b)(3)(ii).

C. NRDC Is a Media Requester

Even if DOI denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and DOI's FOIA regulations, 43 C.F.R. § 2.39; see also 43 C.F.R. § 2.70 (defining “[r]epresentative of the news media”). A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); see also *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep't of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 40) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. As described earlier in this request, NRDC publishes original reporting of environmental news stories on its website, <http://www.nrdc.org>. Previously, NRDC published stories like these in its magazine, *OnEarth*, which has won numerous news media awards, including the Independent Press Award for Best Environmental Coverage and for General Excellence, a Gold Eddie Award for editorial excellence among magazines, and the Phillip D. Reed Memorial Award for Outstanding Writing on the Southern Environment. NRDC also publishes a regular newsletter for its more than one million members and online activists; issues other electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. See 43 C.F.R. § 2.70 (“Examples of news media [include] . . . publishers of periodicals.”). NRDC maintains a significant additional communications presence on the internet through its staff blogs on <http://www.nrdc.org>, which are updated regularly and feature writing about current environmental issues, through daily news messaging on “Twitter” and “Facebook,” and through content distributed to outlets such as Medium. See OPEN Government

Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”). The aforementioned publications and media sources routinely include information about current events of interest to the readership and the public. To publish and transmit this news content, NRDC employs more than fifty staff members dedicated full-time to communications with the public, including accomplished journalists and editors. These staff members rely on information acquired under FOIA and through other means. Public interest organizations meeting the requirements “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union).³

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by NRDC to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of NRDC’s publications or other suitable media channels. NRDC staff gather information from a variety of sources—including documents provided pursuant to FOIA requests—to write original articles and reports that are featured on its website, in its newsletters and blogs, and on other media outlets. *See Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”). NRDC seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with DOI’s FOIA regulations for all or a portion of the requested records. *See* 43 C.F.R. § 2.38-2.44. Please contact me before doing anything that would cause the fee to exceed \$250. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; DOI’s search for—or deliberations concerning—certain records should not delay the production of others that DOI has already retrieved and elected to produce. *See generally* 43 C.F.R. § 2.21-2.25. If DOI concludes that any of the records requested here are publicly available, please let me know.

³ To be a representative of the news media, an organization need not *exclusively* perform news gathering functions. If that were required, major news and entertainment entities like the National Broadcasting Company (NBC) would not qualify as representatives of the news media. This country has a long history, dating back to its founding, of news organizations engaging in public advocacy.

Please do not hesitate to call or email with questions.

Thank you.

Sincerely,

Jaclyn H. Prange
Staff Attorney
Natural Resources Defense Council, Inc.
111 Sutter St., 21st Floor
San Francisco, CA 94104
jprange@nrdc.org
415-875-6184

Enclosures:

Attachments 1 through 42 (in two emails)

Attachment L

NRDC

December 23, 2016

Via Email

wo_foia@fs.fed.us

Re: FOIA request for communications between the President-elect's transition team and Forest Service staff

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and applicable Department of Agriculture regulations at 7 C.F.R. § 1.1-1.25.

I. Description of Records Sought

Please produce records¹ in the Forest Service's possession, custody, or control that are, include, or reflect communications between Forest Service staff and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Joel Leftwich and Brian Klippenstein.

II. Request for a Fee Waiver

NRDC requests that the Forest Service waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without 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 the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 7 C.F.R. Pt. 1, Subpt. A, App. A, Sec. 6(a). The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as "a representative of the

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any Forest Service office, including, but not limited to, Forest Service Headquarters offices, and specifically including Forest Service offices in possession of responsive records.

news media” entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 7 C.F.R. Pt. 1, Subpt. A, App. A, Sec. 5(c).

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 7 C.F.R. Pt. 1, Subpt. A, App. A, Sec. 6(a). Each of the factors used by the Forest Service to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 7 C.F.R. Pt. 1, Subpt. A, App. A, Sec. 6(a).

1. *Subject of the request*

The records requested here reflect communications between the Forest Service and the President-elect’s transition team after a presidential election. The requested records thus directly concern “the operations or activities of the government.” 7 C.F.R. Pt. 1, Subpt. A, App. A, Sec. 6(a)(1)(i).

2. *Informative value of the information to be disclosed*

The requested records are “likely to contribute to” the public’s understanding of government operations and activities. 7 C.F.R. Pt. 1, Subpt. A, App. A, Sec. 6(a)(1)(ii). The public does not currently possess comprehensive information regarding the transition of power within the agency. There is more than a reasonable likelihood that these records have informative value to the public because, for example, the President-elect sent a questionnaire to Department of Energy staff asking about involvement in specific areas of research and attendance at climate-related conferences. *See* “Climate Change Conversations Are Targeted in Questionnaire to Energy Department,” Coral Davenport, *New York Times*, Dec. 9, 2016, <http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html? r=0>. There may be similar communications with the Forest Service that would similarly have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

We believe that the records requested are not currently in the public domain. Their disclosure would thus meaningfully inform public understanding with respect to the transition at the Forest Service, as further discussed below. However, if the Forest Service were to conclude that some of the requested records are publicly available, NRDC would like to discuss that conclusion and might agree to exclude such records from this request.

3. *Contribution to an understanding of the subject by the public is likely to result from disclosure*

NRDC’s expertise in matters concerning Forest Service staffing and policy, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability to and will use disclosed records to reach a broad audience of interested persons

with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are a broad audience of persons interested in the subject of the transition of power at the Forest Service, and when combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly reasonably broad. 7 C.F.R. Pt. 1, Subpt. A, App. A, Sec. 6(a)(1)(iii). As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. As of June 2016, these include, but are not limited to the following:

- NRDC's website, available at <http://www.nrdc.org> (homepage at Att. 1), is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. (sample email at Att. 2) This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions> (Att. 3).
- *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter> (Att. 4).
- NRDC updates and maintains several social media accounts: Facebook (565,530 followers) (Att. 5), Twitter (195,426 followers) (Att. 6), Instagram (37,868 followers) (Att. 7), YouTube (19,518 subscribers) (Att. 8), and LinkedIn (9,108 followers) (Att. 9). We also use Medium as another distribution channel for our content (1,478 followers).

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*, narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post (Att. 10); and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, “The requirement to rebuild US fish stocks: Is it working?” *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell) (Att. 11);
- Issue brief, “The Untapped Potential of California’s Water Supply: Efficiency, Reuse, and Stormwater,” June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann) (Att. 12); *see also* “Saving Water in California,” *N.Y. Times*, July 9, 2014 (discussing the report’s estimates) (Att. 13);
- Article, “Waves of phony charges over new clean water safeguards,” *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner) (Att. 14);
- Article, “Don’t Buy the Smear of the EPA,” *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke) (Att. 15);
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Public understanding of the transition would be significantly enhanced by disclosure of the requested records. Disclosure would help the public to more effectively evaluate the transition and determine whether there have been requests such as the one made to the Department of Energy staff regarding involvement in climate-change issues. Disclosure would also help the public to better understand and evaluate the Forest Service's response to any such requests. Thus, disclosure here would significantly contribute to the public's understanding of government operations or activities. See 7 C.F.R. Pt. 1, Subpt. A, App. A, Sec. 6(a)(1)(iv).

5. *NRDC does not have a commercial interest in the disclosure*

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested

² There are numerous other examples of national news articles that were based in part on documents NRDC obtained through FOIA. See, e.g., Felicity Barringer, "Science Panel Issues Report on Exposure to Pollutant," *N.Y. Times*, Jan. 11, 2005 (Att. 37); Katharine Q. Seelye, "Draft of Air Rule is Said to Exempt Many Old Plants," *N.Y. Times*, Aug. 22, 2003 (Att. 38); Don Van Natta, Jr., "E-Mail Suggests Energy Official Encouraged Lobbyist on Policy," *N.Y. Times*, Apr. 27, 2002 (Att. 39).

disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 7 C.F.R. Pt. 1, Subpt. A, App. A, Sec. 6(a)(1)(v), (vi). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); *see Natural Res. Def. Council v. United States Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the transition. As noted at Part II.A, any work done by the Forest Service on the transition relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the transition.

B. NRDC is a non-profit organization designed to further public health safety

The Department’s FOIA regulations also give the Forest Service the ability to waive fees if the requester is “engaged in a nonprofit activity designed for the public safety, health, or welfare.” 7 C.F.R. Pt. 1, Subpt. A, App. A, Sec. 6(a)(3)(ii). NRDC is a non-profit organization whose mission is to “to safeguard the earth—its people, its plants and animals, and the natural systems on which all life depends.” As described in the sections above, NRDC is engaged in nonprofit activity designed to further public health and safety. Therefore, the Forest Service should waive any fees on this basis as well.

C. NRDC Is a Media Requester

Even if the Forest Service denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and the Forest Service’s FOIA regulations, 7 C.F.R. Pt. 1, Subpt. A, App. A, Sec. 5(c); *see also* 7 C.F.R. Pt. 1, Subpt. A, App. A, Sec. 5(c)(1) (defining “[r]epresentative of the news media”). A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep’t of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 40) (granting NRDC media requester status).

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entities include . . . publishers of periodicals.”). NRDC maintains a significant additional communications presence on the internet through its staff blogs on <http://www.nrdc.org>, which are updated regularly and feature writing about current environmental issues, through daily news messaging on “Twitter” and “Facebook,” and through content distributed to outlets such as Medium. *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”). The aforementioned publications and media sources routinely include information about current events of interest to the readership and the public. To publish and transmit this news content, NRDC employs more than fifty staff members dedicated full-time to communications with the public, including accomplished journalists and editors. These staff members rely on information acquired under FOIA and through other means. Public interest organizations meeting the requirements “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union).³

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by NRDC to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of NRDC’s publications or other suitable media channels. NRDC staff gather information from a variety of sources—including documents provided pursuant to FOIA requests—to write original articles and reports that are featured on its website, in its newsletters and blogs, and on other media outlets. *See Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”). NRDC seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with the Forest Service’s FOIA regulations for all or a portion of the requested records. *See* 7 C.F.R. Pt. 1, Subpt. A, App. A. Please contact me before doing anything that would cause the fee to exceed \$250. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

³ To be a representative of the news media, an organization need not *exclusively* perform news gathering functions. If that were required, major news and entertainment entities like the National Broadcasting Company (NBC) would not qualify as representatives of the news media. This country has a long history, dating back to its founding, of news organizations engaging in public advocacy.

IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; the Forest Service's search for—or deliberations concerning—certain records should not delay the production of others that the Forest Service has already retrieved and elected to produce. *See generally* 7 C.F.R. § 1.7. If the Forest Service concludes that any of the records requested here are publicly available, please let me know.

Please do not hesitate to call or email with questions.

Thank you.

Sincerely,

Jaclyn H. Prange
Staff Attorney
Natural Resources Defense Council, Inc.
111 Sutter St., 21st Floor
San Francisco, CA 94104
jprange@nrdc.org
415-875-6184

Enclosures (sent via two emails): Attachments 1 through 40

Attachment M

NRDC

December 23, 2016

Via Email

FOIARouting.enrd@usdoj.gov

Re: FOIA request for communications between the President-elect's transition team and ENRD staff

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and applicable Department of Justice regulations at 28 C.F.R. § 16.1-16.301.

I. Description of Records Sought

Please produce records¹ in the Environment and Natural Resources Division's (ENRD's) possession, custody, or control that are, include, or reflect communications between ENRD staff and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Jeff Sessions, Brian Benczkowski, Zina Bash, Greg Katsas, James Burnham, William Cleveland, David Higbee, J. Patrick Rowan, Jessie Liu, Ronald Tenpas, Lizette Benedi Herraiz, Steven Engel, Thomas Wheeler, Stefani Carter, James Burnham, Michael Battle, and Edmund Searby.

II. Request for a Fee Waiver

NRDC requests that ENRD waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without 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 the government and is not primarily in the commercial interest of the requester." 5 U.S.C. §

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any ENRD office, including, but not limited to, ENRD Headquarters offices, and specifically including ENRD offices in possession of responsive records.

552(a)(4)(A)(iii); *see also* 28 C.F.R. § 16.10(k)(1)(i), (ii). The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as “a representative of the news media” entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 28 C.F.R. § 16.10(c)(1)(i), (d)(1).

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.10(k)(1)(i). Each of the four factors used by ENRD to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 28 C.F.R. § 16.10(k)(2).

1. Subject of the request

The records requested here reflect communications between ENRD and the President-elect’s transition team after a presidential election. The requested records thus directly concern “the operations or activities of the government.” 28 C.F.R. § 16.10(k)(2)(i).

2. Informative value of the information to be disclosed

The requested records are “likely to contribute to” the public’s understanding of government operations and activities. 28 C.F.R. § 16.10(k)(2)(ii). The public does not currently possess comprehensive information regarding the transition of power within the agency. There is more than a reasonable likelihood that these records have informative value to the public because, for example, the President-elect sent a questionnaire to Department of Energy staff asking about involvement in specific areas of research and attendance at climate-related conferences. *See* “Climate Change Conversations Are Targeted in Questionnaire to Energy Department,” Coral Davenport, *New York Times*, Dec. 9, 2016, <http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html? r=0>. There may be similar communications with ENRD that would similarly have informative value to the public. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

We believe that the records requested are not currently in the public domain. Their disclosure would thus meaningfully inform public understanding with respect to the transition at ENRD, as further discussed below. However, if ENRD were to conclude that some of the requested records are publicly available, NRDC would like to discuss that conclusion and might agree to exclude such records from this request.

3. Contribution to an understanding of the subject by the public is likely to result from disclosure

Because NRDC is a “representative of the news media,” as explained in Part II.C below, ENRD must presume that this disclosure is likely to contribute to public understanding of its subject. 28 C.F.R. § 16.10(k)(2)(iii).

However, even if NRDC were not a media requester, NRDC's expertise in matters concerning ENRD staffing and policy, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability to and will use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are a "broad audience of persons interested in the subject" of the transition of power at ENRD, and when combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly "reasonably broad." 28 C.F.R. § 16.10(k)(2)(iii). As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. As of June 2016, these include, but are not limited to the following:

- NRDC's website, available at <http://www.nrdc.org> (homepage at Att. 1), is updated daily and draws approximately 1.3 million page views and 510,000 unique visitors per month. The new NRDC.org launched in late March 2016 and features NRDC staff blogs, original reporting of environmental news stories, and more.
- NRDC's Activist email list includes more than 2.1 million members and online activists who receive regular communications on urgent environmental issues. (sample email at Att. 2) This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions> (Att. 3).
- *NRDC This Week* is a weekly electronic environmental newsletter distributed by email to more than 86,700 subscribers, at <http://www.nrdc.org/newsletter> (Att. 4).
- NRDC updates and maintains several social media accounts: Facebook (565,530 followers) (Att. 5), Twitter (195,426 followers) (Att. 6), Instagram (37,868 followers) (Att. 7), YouTube (19,518 subscribers) (Att. 8), and LinkedIn (9,108 followers) (Att. 9). We also use Medium as another distribution channel for our content (1,478 followers).

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, *Stories from the Gulf*, and *Acid Test*, narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters

and editorial writers; distributes content on Huffington Post (Att. 10); and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, “The requirement to rebuild US fish stocks: Is it working?” *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell) (Att. 11);
- Issue brief, “The Untapped Potential of California’s Water Supply: Efficiency, Reuse, and Stormwater,” June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann) (Att. 12); *see also* “Saving Water in California,” *N.Y. Times*, July 9, 2014 (discussing the report’s estimates) (Att. 13);
- Article, “Waves of phony charges over new clean water safeguards,” *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner) (Att. 14);
- Article, “Don’t Buy the Smear of the EPA,” *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke) (Att. 15);
- Transcript, “Conservationists Call For Quiet: The Ocean Is Too Loud!” Nat’l Pub. Radio, *All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny) (Att. 16);
- Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012 (Att. 17);
- Article, “Pollution Still a Hazard to U.S. Beaches,” CBS, *CBS NEWS*, July 29, 2009 (featuring former NRDC Water Program Co-Director Nancy Stoner) (Att. 18);
- Conference brochure, “World Business Summit on Climate Change,” May 24-26, 2009 (featuring former NRDC Director for Market Innovation Rick Duke at 9) (Att. 19);
- Article, “Is there a ‘proper level’ of compliance with environmental law?” *Trends: ABA Section of Environment, Energy, and Resources Newsletter*, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall) (Att. 20);
- NRDC Document Bank, <http://docs.nrdc.org/> (Att. 21).

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

- (1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification of the public. The report, titled *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe” (Att. 22). *See also* Kimberly

Kindy, “Are secret, dangerous ingredients in your food?” *Wash. Post*, Apr. 7, 2014 (discussing NRDC’s report) (Att. 23).

- (2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled *Playing Chicken with Antibiotics*, which is based on the documents obtained, and reveals decades of hesitancy on FDA’s part to ensure the safety of these drug additives (Att. 24). *See also* P.J. Huffstutter and Brian Grow, “Drug critic slams FDA over antibiotic oversight in meat production,” *Reuters*, Jan. 27, 2014 (discussing NRDC’s report) (Att. 25).
- (3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA’s decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (Apr. 2010) (update to 2009 report) (Att. 26); *see also* William Souder, “It’s Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?” *Harper’s Bazaar*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC) (Att. 27).
- (4) NRDC incorporated information obtained through FOIA into a report, available at <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of military sonar and other industrial noise pollution on marine life. *See Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Nov. 2005) (update to 1999 report) (Att. 28). The report also relied upon and synthesized information from other sources. Since the report’s publication, the sonar issue has continued to attract widespread public attention. *See, e.g.*, “Protest Raised over New Tests of Naval Sonar,” Nat’l Pub. Radio, *All Things Considered*, July 24, 2007 (transcript at Att. 29).
- (5) NRDC scientists have used information obtained through FOIA to publish analyses of the United States’ and other nations’ nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States’ plans to deploy a ballistic missile system and the implications for global security. *See* Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, “The Protection Paradox,” *Bulletin of Atomic Scientists*, Mar./Apr. 2004 (Att. 30).
- (6) NRDC obtained through FOIA, and made public, records of the operations of the Bush administration’s Energy Task Force, along with analysis of selected excerpts and links to the administration’s index of withheld documents (Att. 31). NRDC’s efforts cast light on an issue of considerable public interest. *See, e.g.*, Elizabeth Shogren, “Bush Gets One-Two Punch on Energy,” *L.A. Times*, Mar. 28, 2002, at A22 (Att. 32).

- (7) Through FOIA, NRDC obtained a memorandum by ExxonMobil, advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration's decision to replace Dr. Robert Watson. See NRDC Press Release and attached Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," Apr. 3, 2002 (Att. 33); Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19 (Att. 34).
- (8) Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000), available in print and online at <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp> (Att. 35). The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; see also Steve LaRue, "EPA Aims to Cut Levels of Arsenic in Well Water," *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report) (Att. 36).²

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public's understanding of the subject.

4. *Significance of the contribution to public understanding*

The records requested shed light on a matter of considerable public interest and concern: the transition of power at ENRD and the communications between the President-elect's transition team and ENRD staff.

Public understanding of the transition would be significantly enhanced by disclosure of the requested records. Disclosure would help the public to more effectively evaluate the transition and determine whether there have been requests such as the one made to the Department of Energy staff regarding involvement in climate-change issues. Disclosure would also help the public to better understand and evaluate ENRD's response to any such requests. Thus, disclosure here would significantly contribute to the public's understanding of government operations or activities. See 28 C.F.R. § 16.10(k)(2)(iv).

² There are numerous other examples of national news articles that were based in part on documents NRDC obtained through FOIA. See, e.g., Felicity Barringer, "Science Panel Issues Report on Exposure to Pollutant," *N.Y. Times*, Jan. 11, 2005 (Att. 37); Katharine Q. Seelye, "Draft of Air Rule is Said to Exempt Many Old Plants," *N.Y. Times*, Aug. 22, 2003 (Att. 38); Don Van Natta, Jr., "E-Mail Suggests Energy Official Encouraged Lobbyist on Policy," *N.Y. Times*, Apr. 27, 2002 (Att. 39).

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.10(k)(3). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env’t. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the transition. As noted at Part II.A, any work done by ENRD on the transition relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of the transition.

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Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”). The aforementioned publications and media sources routinely include information about current events of interest to the readership and the public. To publish and transmit this news content, NRDC employs more than fifty staff members dedicated full-time to communications with the public, including accomplished journalists and editors. These staff members rely on information acquired under FOIA and through other means. Public interest organizations meeting the requirements “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (accord[ing] media requester status to the American Civil Liberties Union).³

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Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; ENRD’s search for—or deliberations concerning—certain records should not delay the production of others that ENRD has already retrieved and elected to produce. *See generally* 28 C.F.R. § 16.5-16.6. If ENRD concludes that any of the records requested here are publicly available, please let me know.

³ To be a representative of the news media, an organization need not *exclusively* perform news gathering functions. If that were required, major news and entertainment entities like the National Broadcasting Company (NBC) would not qualify as representatives of the news media. This country has a long history, dating back to its founding, of news organizations engaging in public advocacy.

Please do not hesitate to call or email with questions.

Thank you.

Sincerely,

Jaclyn H. Prange
Staff Attorney
Natural Resources Defense Council, Inc.
111 Sutter St., 21st Floor
San Francisco, CA 94104
jprange@nrdc.org
415-875-6184

Enclosures: Attachments 1 through 40 (sent via two emails)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,)	
425 Third Street SW, Suite 800)	
Washington, DC 20024,)	
)	
Plaintiff,)	
)	Civil Action No.
v.)	
)	
UNITED STATES DEPARTMENT)	
OF COMMERCE,)	
1401 Constitution Avenue, NW)	
Washington, DC 20230,)	
)	
Defendant.)	
)	

COMPLAINT

Plaintiff Judicial Watch, Inc. brings this action against Defendant U.S. Department of Commerce to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As grounds therefor, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff Judicial Watch, Inc. is a not-for-profit, educational organization incorporated under the laws of the District of Columbia and headquartered at 425 Third Street SW, Suite 800, Washington, DC 20024. Plaintiff seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law. As part of its mission, Plaintiff regularly requests records from federal agencies pursuant to FOIA. Plaintiff analyzes the

responses and disseminates its findings and the requested records to the American public to inform them about “what their government is up to.”

4. Defendant U.S. Department of Commerce is an agency of the United States Government. Defendant has possession, custody, and control of records to which Plaintiff seeks access. Defendant is headquartered at 1401 Constitution Avenue, NW, Washington, DC 20230.

STATEMENT OF FACTS

5. On February 6, 2017 Plaintiff submitted a FOIA request to the National Oceanic and Atmospheric Administration (“NOAA”), a component of Defendant, seeking the following:

Any and all records of communications between NOAA scientist Thomas Karl and Director of the Office of Science and Technology Policy John Holdren.

The timeframe of the request was identified as “January 20, 2009 through January 20, 2017.”

The request was submitted by certified mail.

6. According to U.S. Postal Service records, the request was received by NOAA on February 7, 2017.

7. NOAA confirmed that it received the request on February 8, 2017, assigning the request Tracking Number DOC-NOAA-2017-000580.

8. As of the date of this Complaint, Defendant has failed to: (i) produce all the requested records or demonstrate that the requested records are lawfully exempt from production; and (ii) notify Plaintiff of the scope of responsive records Defendant intends to produce or withhold and the reasons for any withholdings.

COUNT I

Violation of FOIA, 5 U.S.C. § 552

9. Plaintiff realleges paragraphs 1 through 8 as if fully stated herein.

10. Plaintiff is being irreparably harmed by reason of Defendant's violation of FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply with FOIA.

11. To trigger FOIA's administrative exhaustion requirement, Defendant was required to determine whether to comply with Plaintiff's request by March 31, 2017 at the latest. At a minimum, Defendant was required to: (i) gather and review the requested documents; (ii) determine and communicate to Plaintiff the scope of any responsive records Defendant intended to produce or withhold and the reasons for any withholdings; (iii) inform Plaintiff that it may appeal any adequately specific, adverse determination; and (iv) make the records available promptly thereafter. *See, e.g., Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188-89 (D.C. Cir. 2013).

12. Because Defendant failed to determine whether to fully comply with Plaintiff's request within the time period required by FOIA, Plaintiff is deemed to have exhausted its administrative appeal remedies. 5 U.S.C. § 552(a)(6)(C)(i).

WHEREFORE, Plaintiff respectfully requests that the Court: (1) order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request; (2) order Defendant to produce, by a date certain, any and all non-exempt records to Plaintiff's FOIA request and a Vaughn index of any responsive records withheld under claim of exemption; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request; (4) grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (5) grant Plaintiff such other relief as the Court deems just and proper.

Dated: June 29, 2017

Respectfully submitted,

s/ Chris Fedeli

Chris Fedeli

D.C. Bar No. 472919

JUDICIAL WATCH, INC.

425 Third Street SW, Suite 800

Washington, DC 20024

(202) 646-5172

Counsel for Plaintiff

Tracking Number	Type	Requester	Requester Organization	Submitted
DOC-NOAA-2017-001782	Request	Christine M. Walker	Fowler White Burnett	08/29/2017
DOC-NOAA-2017-001765	Request	Jill Riepenhoff	Raycom Media	08/25/2017
DOC-NOAA-2017-001763	Request	Christopher M. Hannan	Baker Donelson	08/24/2017
DOC-NOAA-2017-001758	Request	Cristin Krachon	Geosyntec Consultants	08/24/2017
DOC-NOAA-2017-001757	Request	Jacob Holle	Physical Optics Corporation	08/24/2017
DOC-NOAA-2017-001756	Request	Jeff Tollefson	Nature	08/24/2017

Custom Report - 08/30/2017 08:22:

Received	Assigned To	Case File	Assigned To	Perfected?	Due	Closed Date
08/29/2017	NOS	NOS		Yes	09/27/2017	TBD
08/25/2017	NMFS	NMFS		Yes	09/27/2017	TBD
08/24/2017	NOS	NOS		Yes	09/27/2017	TBD
08/24/2017	NMFS	NMFS		Yes	09/27/2017	TBD
08/24/2017	NWS	NWS		No	TBD	TBD
08/24/2017	USEC	USEC		Yes	09/22/2017	TBD

Status	Dispositions
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Assignment Determination	
Assignment Determination	
Assignment Determination	
Assignment Determination	
Assignment Determination	
Assignment Determination	

Detail

My request is for any and all documents, including internal emails, that discuss NOAA's decision to remove the ma
I am seeking the database of the Marine Mammal Inventory Report compiled by the National Marine Fisheries Ser
ATTN - NAUTICAL DATA BRANCH: Requesting the following: (1) Latest Edition of All Volumes of the NAUTICAL C
1994 report by NOAA. Exact title unknown but referenced document indicates the following keywords: Terry Creek
was interested in gaining access to the Ops1 webpage links. Specifically, I am interested in files discussing Airfield
I would like copies of all emails including the word CLIMATE or the word CHARTER or the phrase "ADVISO

genta line from its navigational chart

vice for all years that are available in electronic form. I would like to receive this data in electronic form th
CHART MANUAL (2) Any and all documents or files associated with the charting of oil and gas structure:
, Dupree Creek, Brunswick, GA sediment, Ampelisca abdita, amphipod, toxicity. Full quote regarding NC
Weather Sensing equipment. My employer, Physical Optics Corporation, has been working with the US
RY COMMITTEE". I limit this search to an electronic search of emails in the email accounts of the /

that is compatible with Excel or Access. Also, I would like to receive an electronic version of what is comr
s in Quarantine Bay, Louisiana, as depicted on NOAA/NOS/OCS Chart # 11364 and/or US Coast and G
DAA report to give context: In 1994, NOAA obtained sediment samples from estuarine settings in the Te
; Air Force, Navy, and Marine Core weather departments to develop both remote and fixed weather sens
Acting Administrator Ben Friedman, and those of his Senior Advisor, Special Assistant, Chief of Staff, De

nonly called the data dictionary, which would explain the contents of each field of information.
ieodetic Survey Chart #1271 and/or NOAA Electronic Navigation Chart (ENC) US4LA35M for the years
rry Creek and Back River areas and analyzed these samples for acute toxicity to the marine amphipod /
sors. As a prior Air Force weather forecaster, I understand the benefit of staying up to date with current p
eputy Chief of Staff and Policy Director. I limit this search to the dates July 1, 2017 to the present.

1960-2016 (3) For the years 1960-2016, any and all copies of documents provided by the US Army Corp
Ampelisca abdita (NOAA, 1994). Results indicated that sediments from Terry Creek exhibited sediment
ublications, as well as in touch with the NWS/NOAA departments. Would I be able to gain access to pa

s of Engineers to NOAA/NOS/OCS (and specifically the NOS Marine Charting Divisi
toxicity to A. abdita tha
rticular Ops1 Publi

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Wednesday, August 30, 2017 4:14 PM
To: Bogomolny, Michael (Federal)
Cc: Robert Swisher - NOAA Federal; Lola Stith - NOAA Affiliate; Maria Williams - NOAA Federal; Robert Hogan; Roxie Allison-Holman - NOAA Federal
Subject: Re: new lawsuit
Attachments: Amended Complaint.pdf; Search Tasker.pdf; Pacer Court Filings.pdf

(copying relevant FOIA folks)--

Hi Bogo,

(b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted] Let me know anything you need on this--

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) [Redacted] (C)

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On Wed, Aug 30, 2017 at 3:56 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:
Thanks Bogo--

(b)(5) [Redacted]
[Redacted]). Let me confirm--

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) [Redacted] (C)

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On Wed, Aug 30, 2017 at 3:44 PM, Bogomolny, Michael (Federal) <MBogomolny@doc.gov> wrote:

Mark,

(b)(5)
[Redacted text block]

[Redacted text block] ? I'm happy
with whatever works best for you.

-bogo

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY
378 North Main Avenue
Tucson, AZ 85701,

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW
Washington, D.C. 20240,

U.S. ENVIRONMENTAL PROTECTION
AGENCY
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460,

U.S. DEPARTMENT OF ENERGY
1000 Independence Avenue, SW
Washington, D.C. 20585,

U.S. DEPARTMENT OF STATE
2201 C. Street, NW
Washington, D.C. 20037,

U.S. DEPARTMENT OF COMMERCE
1401 Constitution Avenue, NW
Washington, D.C. 20230,

and

U.S. NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
1315 East-West Highway
Silver Spring, MD 20910

Defendants.

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

Case No.: 1:17-cv-0974 (KBJ)

INTRODUCTION

1. The Center for Biological Diversity (“Center”)—an environmental conservation organization that works to protect native wildlife species and their habitats—challenges the failure of the U.S. Department of Interior, U.S. Environmental Protection Agency, U.S. Department of Energy, U.S. Department of State, U.S. Department of Commerce, and U.S. National Oceanic and Atmospheric Administration to provide records concerning the Trump administration’s censorship of these federal departments’ and their component agencies’ discussion or dissemination of information about climate change, in violation of the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA” or “Act”), or alternatively, the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (“APA”).

2. From January through March 2017, news outlets reported that the Trump administration directed numerous federal departments and agencies to remove information from their websites about climate change and/or to cease use of phrases such as “climate change,” “emissions reduction,” or “Paris agreement” in agency documents. These departments and agencies include the six named defendants in this action.

3. To understand these actions, the Center filed FOIA requests with each of the defendants, seeking directives or communications barring or removing climate change-related words or phrases from formal communications as well as the information, such as webpages about climate change, that has been removed from public view.

4. However, although each defendant acknowledged the Center’s request, none have provided any responsive records or stated when they might do so.

5. Defendants are unlawfully withholding the records by failing to search for and provide all responsive records to the Center. The defendants’ failure to comply with FOIA by

releasing all records related to the censorship of climate change-related words and phrases is contrary to FOIA and undermines FOIA's policy of government transparency.

6. Because prompt access to these records is necessary to effectuate FOIA's purpose, the Center seeks declaratory relief establishing that defendants are in violation of FOIA, or alternatively, the APA. The Center also seeks injunctive relief directing defendants to provide responsive records without any further delay.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under FOIA, the APA, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

8. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district, because a portion of the responsive records may be found in this district.

9. Declaratory relief is appropriate under 28 U.S.C. § 2201.

10. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

PARTIES

11. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit conservation organization with offices throughout the United States. The Center has more than 58,000 members. The Center and its members are harmed by EPA's violations of FOIA, or alternatively the APA, as such violations preclude the Center from gaining a full understanding of the circumstances, rationales, and individuals involved in the Trump administration's censorship of climate change-related information.

12. Defendant U.S. DEPARTMENT OF THE INTERIOR (“Interior Department”) is an independent agency of the executive branch of the U.S. government. The Interior Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

13. Defendant U.S. ENVIRONMENTAL PROTECTION AGENCY (“EPA”) is an independent agency of the executive branch of the U.S. government. EPA is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

14. Defendant U.S. DEPARTMENT OF ENERGY (“Energy Department”) is an independent agency of the executive branch of the U.S. government. The Energy Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

15. Defendant U.S. DEPARTMENT OF STATE (“State Department”) is an independent agency of the executive branch of the U.S. government. The State Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

16. Defendant U.S. DEPARTMENT OF COMMERCE (“Commerce Department”) is an independent agency of the executive branch of the U.S. government. The Commerce Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

17. Defendant U.S. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (“NOAA”) is an independent agency of the executive branch of the U.S.

government. NOAA is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

STATUTORY BACKGROUND

18. FOIA's basic purpose is government transparency. It establishes the public's right to access all federal agency records unless such records may be withheld pursuant to one of nine, narrowly construed FOIA exemptions. 5 U.S.C. § 552(b)(1)-(9).

19. FOIA imposes strict and rigorous deadlines on federal agencies when they receive a request for records pursuant to FOIA. Specifically, an agency must determine whether to disclose responsive records and notify the requester of its determination within 20 working days of receiving a FOIA request, and it must make records "promptly" available unless it can establish that certain unusual circumstances are present and/or that it may lawfully withhold records, or portions thereof, from disclosure. *Id.* § 552(a)(3)(A), (a)(6). Also within 20 working days, the agency must inform the requester that it has a right to appeal the agency's determination. *Id.* § 552(a)(6)(A)(i).

20. FOIA places the burden on the agency to prove that it may withhold responsive records from a requester. *Id.* § 552(a)(4)(B).

21. Congress has specified limited circumstances in which federal agencies may obtain more time to make the determination that is required by 5 U.S.C. § 552(a)(6)(A)(i).

22. First, an agency may toll the 20-working-day deadline to seek additional information or clarification from a requester, but that tolling period ends when the agency receives such information or clarification. *Id.* § 552(a)(6)(A)(ii).

23. Second, an agency may extend the 20-working-day deadline for an additional 10 working days by giving a written notice to the requester that sets forth "unusual circumstances"

to justify a deadline extension which also requires that it provide the date by which the agency expects to make the determination. *Id.* § 552(a)(6)(B)(i). However, to invoke such “unusual circumstances,” the agency must provide the requester with “an opportunity to limit the scope of the request so that it may be processed within [20 working days] or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.” *Id.* § 552(a)(6)(B)(ii). In addition, when asserting unusual circumstances, the agency “shall make available its FOIA Public Liaison” to “assist in the resolution of any disputes between the requester and the agency.” *Id.*

24. FOIA requires each agency to make reasonable efforts to search for records in a manner that is reasonably calculated to locate all records that are responsive to the FOIA request. *Id.* § 552(a)(3)(C)-(D).

25. FOIA requires federal agencies to expeditiously disclose requested records, *see id.* § 552, and mandates a policy of broad disclosure of government records. Any inquiry under FOIA brings with it a strong presumption in favor of disclosure.

26. Congress recognized that in certain, limited instances, records may be withheld as exempt from FOIA’s broad disclosure mandate, and thus created nine categories of exemptions. *Id.* § 552(b). These exemptions, however, are narrowly construed in light of FOIA’s dominant objective of disclosure, not secrecy.

27. The U.S. district courts have jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

28. Alternatively, an agency’s response to a FOIA request and/or a FOIA appeal is subject to judicial review under the APA, which confers a right of judicial review on any person

who is adversely affected by agency action, 5 U.S.C. § 702, and authorizes district courts to compel agency action that is unlawfully withheld or unreasonably delayed. *Id.* § 706(1). District courts must set aside any agency action that is found to be “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” *Id.* § 706(2)(A).

FACTUAL BACKGROUND

Interior Department FOIA Request (OS-2017-00384)

29. On March 30, 2017, the Center submitted a FOIA request to the Interior Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

30. The same day, the Interior Department acknowledged the Center’s request and assigned it tracking number OS-2017-00384 (“Interior Department FOIA Request”).

31. A determination on the Center’s FOIA request to the Interior Department was due by April 27, 2017, which is 20 working days after the date of the Interior Department’s acknowledgement of the request.

32. As of the date of the filing of this amended complaint, which is 77 working days past the 20-working-day deadline, the Interior Department has not requested additional time to respond, provided any responsive records, or provided a determination in response to the Center’s FOIA request.

EPA FOIA Request (EPA-HQ-2017-005517)

33. On March 30, 2017, the Center submitted a FOIA request to the EPA, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

34. The same day, the EPA acknowledged the Center’s request and assigned it tracking number EPA-HQ-2017-005517 (“EPA FOIA Request”). On March 12, 2017, EPA granted a waiver of fees in connection with the request.

35. A determination on the Center’s FOIA request to the EPA was due by April 27, 2017, which is 20 working days after the date of the EPA’s acknowledgement of the request.

36. After receiving no further communications from EPA regarding this request, by letter dated May 8, 2017, the Center informed EPA that its determination was overdue and offered to assist EPA in making a determination on the Center’s EPA FOIA Request. The Center also requested an estimate for when EPA would make a determination on the Center’s FOIA request.

37. As of the date of the filing of this amended complaint, which is 77 working days past the 20-working-day deadline, EPA has not responded to the Center’s May 8, 2017 letter, requested additional time to respond to the Center’s FOIA request, provided any responsive records, made a determination, or provided an estimated date of completion of the Center’s FOIA request.

Energy Department FOIA Request (HQ-2017-00806)

38. On March 30, 2017, the Center submitted a FOIA request to the Energy Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

39. The next day, on March 31, 2017, the Energy Department acknowledged the Center’s request and assigned it tracking number HQ-2017-00806 (“Energy Department FOIA Request”).

40. On April 11, 2017, a representative of the Energy Department, Ms. Natalie Anderson, contacted Ms. Margaret E. Townsend of the Center for Biological Diversity by phone and email. Ms. Anderson stated that she wanted to clarify the timeframe for records that are responsive to the Center’s Energy Department FOIA Request. In response, Ms. Townsend informed Ms. Anderson that the Energy Department could search for and provide all responsive records that were generated on or after November 9, 2016.

41. Ms. Anderson also stated that the Energy Department had received many FOIA requests that are similar to the Center’s Energy Department FOIA Request, and in an email dated April 11, 2017, suggested that if the Center would agree to limit the department’s search to two of its program offices—specifically, the Office of International Affairs (“OIA”) and the Office of Energy Policy and Systems Analysis (“EPSA”)—this “should allow [the Energy Department] to

provide a response more quickly.” Accordingly, the Center agreed to limit the department’s search to the OIA and EPSA.

42. Also in her April 11, 2017 email, Ms. Anderson asked if the Center would agree to eliminate the phrases “including but not limited to” and “any related words or phrases” from its request, and if the Center would like to include any search terms in addition to “climate change,” “global warming,” “climate disruption,” “greenhouse gas emissions,” “emissions reductions,” and/or “Paris agreement.” In response, Ms. Townsend added the terms “climate” and “fossil fuels” to the search terms to be used by the Energy Department during its search for responsive records from the OIA and EPSA.

43. By email dated April 13, 2017, Ms. Anderson confirmed the scope of the department’s search for responsive records, stating that the department would “move forward with processing.”

44. By letter dated April 26, 2017, Energy Department FOIA Officer Alexander C. Morris confirmed the agreement of Ms. Anderson and Ms. Townsend regarding the scope of the department’s search, informed the Center that the request was assigned to OIA and EPSA, and granting the Center’s request for a waiver of fees.

45. A determination on the Center’s Energy Department FOIA Request was due on May 11, 2017, which is 20 working days after the date of Ms. Anderson’s email stating that the department was prepared to “move forward with processing.”

46. By letter dated August 11, 2017, which was 65 working days past the 20-working-day deadline, the Energy Department provided a determination in response to the Center’s FOIA request.

47. In its determination, the Energy Department stated that it possessed no responsive records.

48. News articles indicate that the Energy Department likely possesses responsive records. For example, in an article date March 29, 2017, *Politico* reported that “[a] supervisor at the Energy Department’s international climate office told staff this week not to use the phrases ‘climate change,’ ‘emissions reduction’ or ‘Paris Agreement’ in written memos, briefings or other written communication” See Eric Wolff, Energy Department climate office bans use of phrase “climate change”, *Politico* (Mar. 29, 2017), <http://www.politico.com/story/2017/03/energy-department-climate-change-phrases-banned-236655>.

49. The Center challenges the adequacy of the Energy Department’s search for responsive records and the Energy Department’s failure to provide all responsive records to the Center.

State Department FOIA Request

50. On April 3, 2017, the Center submitted a FOIA request to the State Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

51. The next day, on April 4, 2017, the State Department acknowledged the Center’s request and assigned it tracking number F-2017-08517 (“State Department FOIA Request”).

52. By form letter dated April 10, 2017, the Requester Communications Branch of the State Department's Office of Information Programs & Services re-acknowledged receipt of the Center's FOIA request, and it also granted a public interest waiver of fees that are incurred in processing the request.

53. After receiving no further communications from the State Department regarding this request, by letter dated May 31, 2017, the Center informed the State Department that its determination was overdue and offered to assist the State Department in making a determination on the Center's State Department FOIA Request. The Center also requested an estimate for when the State Department would make a determination on the Center's FOIA request.

54. By email dated June 1, 2017, Charlotte W. Duckett confirmed the State Department's receipt of the Center's May 31, 2017 communication. Ms. Duckett stated that a copy of the Center's May 31, 2017 communication "was forwarded to the office that is processing your request" and that "our office has requested an estimated completion date for your request." Ms. Duckett did not provide an estimated date of completion of the State Department's determination on the Center's request.

55. A determination on the Center's FOIA request to the State Department was due by May 2, 2017, which is 20 working days after the date of the State Department's acknowledgement of the request.

56. As of the date of the filing of this amended complaint, which is 74 working days past the 20-working-day deadline, the State Department has not requested additional time to respond, provided any responsive records, or provided a determination in response to the Center's FOIA request.

Commerce Department FOIA Request (DOC-OS-2017-000939)

57. On April 3, 2017, the Center submitted a FOIA request to the Commerce Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

58. The same day, the Commerce Department acknowledged the Center’s request and assigned it tracking number DOC-OS-2017-000939 (“Commerce Department FOIA Request”). On April 10, 2017, the Commerce Department granted a waiver of fees in connection with the request.

59. On April 13, 2017, the Commerce Department sent a letter to the Center requesting clarification of (1) the time frame of the records request and (2) the type of records requested.

60. The Center provided the requested clarification to the Commerce Department via electronic mail on April 17, 2017. The Center informed the Commerce Department that “[t]he timeframe of the records request is November 9, 2016 to the date of the search,” and that

[t]he type of records requested is all records, as defined by FOIA, and included in the following paragraph from our request:

For purposes of this request, “records” is consistent with the meaning of the term under FOIA. This includes, but is not limited to, documents of any kind including electronic as well as paper documents, e-mails, writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), correspondence, letters, memoranda, reports, consultations, papers, studies, notes, field notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, data, data bases, drawings, surveys, graphs, charts,

photographs, videos, meeting notes or minutes, electronic and magnetic recordings of meetings, maps, GIS layers, GPS, UTM, LiDAR, CDs, and any other compilations of data from which information can be obtained.

61. On May 23, 2017, Commerce Department FOIA Specialist Ms. Ayana Crawford called Ms. Townsend to ask if the Center would respond to the agency's request for clarification before Ms. Crawford took action to close the request. Ms. Townsend informed Ms. Crawford that the Center had already provided the requested clarification on April 17, 2017. Ms. Crawford asked Ms. Townsend to resend it. Ms. Townsend resent the email clarification the same day.

62. A determination on the Center's Commerce Department FOIA Request was due on May 3, 2017, which is 20 working days after the Commerce Department received the Center's FOIA request.

63. Even if the Commerce Department had reasonably suspended its timeline for a determination on the Center's FOIA request, by relying on May 23, 2017 as the date that the Center provided clarification, then the Center's Commerce Department FOIA Request would have been due on June 9, 2017.

64. As of the date of the filing of this Amended complaint, which is 47 workdays past the June 9, 2017 deadline, the Commerce Department has not requested additional time to respond, provided any responsive records, or provided a determination in response to the Center's Commerce Department FOIA request.

NOAA FOIA Request (DOC-NOAA-2017-001066)

65. On April 21, 2017, the Center submitted a FOIA request to NOAA, requesting "all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-

related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

66. The same day, NOAA acknowledged the Center’s request and assigned it tracking number DOC-NOAA-2017-001066 (“NOAA FOIA Request”). On April 24, 2014, NOAA provided a formal acknowledgement letter to the Center.

67. On May 3, 2017, NOAA informed the Center that it determined that a waiver of fees in connection with the request was not applicable as the request was “not billable.”

68. On May 10, 2017, NOAA provided a final “no records” determination to the Center and informed the Center of its right to appeal the determination.

69. The Center appealed NOAA’s “no records” determination on June 30, 2017. The same day, NOAA acknowledged the Center’s appeal and assigned it tracking number DOC-OS-2017-001456 (“NOAA FOIA Appeal”)

70. NOAA affirmed its decision on the Center’s NOAA FOIA Appeal on July 3, 2017. In the letter, the agency informed the Center that “[r]ecords indicate that a search was tasked to the NOAA National Environmental Satellite Data and Information Services (NESDIS) and that a search of the NESDIS correspondence unit was performed.” NOAA stated that “it is reasonable to assume that the NESDIS correspondence unit would hold any and all documents responsive to [the Center’s] request.” NOAA also informed the Center that it has “the right to obtain judicial review as provided for in 5 U.S.C. § 552(a)(4)(8).”

71. News articles indicate that NOAA possesses responsive records. For example, in an article date July 13, 2017, the *New York Times* reported that phrasing in a NOAA news release accompanying a report about the warming ability of global emissions of greenhouse

gases omitted any link of “human activity” to emissions. *See* Lisa Friedman, Climate-Altering Gases Spiked in 2016, Federal Scientists Report, NY Times (July 13, 2017), <https://www.nytimes.com/2017/07/13/climate/greenhouse-gases-spike-noaa-global-warming.html>.

72. The Center challenges the adequacy of NOAA’s search for responsive records and NOAA’s failure to provide all responsive records to the Center.

All Requests

73. None of FOIA’s nine exemptions to the statute’s disclosure mandate apply to the records that are responsive to any of the Center’s FOIA requests. *Id.* § 552(b).

74. The Center has been required to expend resources to prosecute this action.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF **VIOLATION OF THE FREEDOM OF INFORMATION ACT** **Failure to Comply with FOIA’s Mandatory Determination Deadline**

COUNT ONE: The Interior Department Missed FOIA’s Mandatory Determination Deadline for the Center’s Interior Department FOIA Request Number OS-2017-00384

75. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

76. The Interior Department has violated FOIA by refusing to disclose records that are responsive to the Center’s Interior Department FOIA Request Number OS-2017-00384.

77. The Center has a statutory right to a final determination from the Interior Department on FOIA Request Number OS-2017-00384 in a manner that complies with FOIA. The Interior Department has violated the Center’s rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

78. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Interior Department in the foreseeable future.

79. The Center's organizational activities will be adversely affected if the Interior Department continues to violate FOIA's disclosure provisions as it has in this case.

80. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, the Interior Department will continue to violate Plaintiff's rights to receive public records under FOIA.

COUNT TWO: EPA Missed FOIA's Mandatory Determination Deadline for the Center's EPA FOIA Request Number EPA-HQ-2017-005517

81. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

82. EPA has violated FOIA by refusing to disclose records that are responsive to the Center's EPA FOIA Request Number EPA-HQ-2017-005517.

83. The Center has a statutory right to a final determination from EPA on its EPA FOIA Request Number EPA-HQ-2017-005517 in a manner that complies with FOIA. EPA has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

84. The Center's organizational activities will be adversely affected if EPA is allowed to continue violating FOIA's decision deadlines as it has in this case.

85. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Missed FOIA's Mandatory Determination Deadline for the Center's Energy Department FOIA Request Number EPA-HQ-2017-005517

86. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

87. The Energy Department has violated FOIA by refusing to disclose records that are responsive to the Center's Energy Department FOIA Request Number HQ-2017-00806.

88. The Center has a statutory right to a final determination from the Energy Department on its Energy Department FOIA Request Number HQ-2017-00806 in a manner that complies with FOIA. The Energy Department has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

89. The Center's organizational activities will be adversely affected if the Energy Department is allowed to continue violating FOIA's decision deadlines as it has in this case.

90. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Missed FOIA's Mandatory Determination Deadline for the Center's State Department FOIA Request Number F-2017-08517

91. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

92. The State Department has violated FOIA by refusing to disclose records that are responsive to the Center's State Department FOIA Request Number F-2017-08517.

93. The Center has a statutory right to a final determination from the State Department on its State Department FOIA Request Number F-2017-08517 in a manner that

complies with FOIA. The State Department has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

94. The Center's organizational activities will be adversely affected if the State Department is allowed to continue violating FOIA's decision deadlines as it has in this case.

95. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Missed FOIA's Mandatory Determination Deadline for the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939

96. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

97. The Commerce Department has violated FOIA by refusing to disclose records that are responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939.

98. The Center has a statutory right to a final determination from the Commerce Department on its Commerce Department FOIA Request Number DOC-OS-2017-000939 in a manner that complies with FOIA. The Commerce Department has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

99. The Center's organizational activities will be adversely affected if the Commerce Department is allowed to continue violating FOIA's decision deadlines as it has in this case.

100. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

SECOND CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Disclose All Responsive Records to the Center

COUNT ONE: The Interior Department Has Unlawfully Withheld Records Responsive to Interior Department FOIA Request Number OS-2017-00384

101. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

102. The Center has a statutory right to the records it seeks, and there is no legal basis for the Interior Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

103. The Interior Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's Interior Department FOIA Request Number OS-2017-00384.

104. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the Interior Department in the foreseeable future.

105. The Center's organizational activities will be adversely affected if the Interior Department continues to violate FOIA's disclosure provisions as it has in this case.

106. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Interior Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT TWO: EPA Has Unlawfully Withheld Records Responsive to EPA FOIA Request Number EPA-HQ-2017-005517

107. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

108. The Center has a statutory right to the records it seeks, and there is no legal basis for EPA to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

109. EPA has violated the Center's rights in this regard by withholding records that are responsive to the Center's EPA FOIA Request Number EPA-HQ-2017-005517.

110. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to EPA in the foreseeable future.

111. The Center's organizational activities will be adversely affected if EPA continues to violate FOIA's disclosure provisions as it has in this case.

112. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Has Unlawfully Withheld Records Responsive to Energy Department FOIA Request Number HQ-2017-00806

113. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

114. The Center has a statutory right to the records it seeks, and there is no legal basis for the Energy Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

115. The Energy Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's Energy Department FOIA Request Number HQ-2017-00806.

116. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the Energy Department in the foreseeable future.

117. The Center's organizational activities will be adversely affected if the Energy Department continues to violate FOIA's disclosure provisions as it has in this case.

118. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Has Unlawfully Withheld Records Responsive to The State Department FOIA Request Number F-2017-08517

119. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

120. The Center has a statutory right to the records it seeks, and there is no legal basis for the State Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

121. The State Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's State Department FOIA Request Number F-2017-08517.

122. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the State Department in the foreseeable future.

123. The Center's organizational activities will be adversely affected if the State Department continues to violate FOIA's disclosure provisions as it has in this case.

124. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Has Unlawfully Withheld Records Responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939

125. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

126. The Center has a statutory right to the records it seeks, and there is no legal basis for the Commerce Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

127. The Commerce Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939.

128. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the Commerce Department in the foreseeable future.

129. The Center's organizational activities will be adversely affected if the Commerce Department continues to violate FOIA's disclosure provisions as it has in this case.

130. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT SIX: NOAA Has Failed to Conduct an Adequate Search for All Records Responsive to the Center's Commerce Department FOIA Request Number DOC-NOAA-2017-001066

131. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

132. The Center has a statutory right to the records it seeks, and there is no legal basis for NOAA to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

133. NOAA has violated the Center's rights in this regard by withholding records that are responsive to the Center's NOAA FOIA Request Number DOC- NOAA-2017-001066.

134. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to NOAA in the foreseeable future.

135. The Center's organizational activities will be adversely affected if NOAA continues to violate FOIA's disclosure provisions as it has in this case.

136. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

THIRD CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Conduct an Adequate Search for Responsive Records

COUNT ONE: The Interior Department Has Failed to Conduct an Adequate Search for All Records Responsive to Interior Department FOIA Request Number OS-2017-00384

137. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

138. The Center has a statutory right to have the Interior Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Interior Department

violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to Interior Department FOIA Request Number OS-2017-00384.

139. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Interior Department in the foreseeable future.

140. The Center's organizational activities will be adversely affected if the Interior Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

141. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Interior Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT TWO: EPA Has Failed to Conduct an Adequate Search for All Records Responsive to EPA FOIA Request Number EPA-HQ-2017-005517

142. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

143. The Center has a statutory right to have EPA process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). EPA violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517.

144. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

145. The Center's organizational activities will be adversely affected if EPA continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

146. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Has Failed to Conduct an Adequate Search for All Records Responsive to Energy Department FOIA Request Number HQ-2017-00806

147. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

148. The Center has a statutory right to have the Energy Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Energy Department violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to Energy Department FOIA Request Number HQ-2017-00806.

149. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Energy Department in the foreseeable future.

150. The Center's organizational activities will be adversely affected if the Energy Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

151. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Has Failed to Conduct an Adequate Search for All Records Responsive to State Department FOIA Request Number F-2017-08517

152. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

153. The Center has a statutory right to have the State Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The State Department violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to State Department FOIA Request Number F-2017-08517.

154. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the State Department in the foreseeable future.

155. The Center's organizational activities will be adversely affected if the State Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

156. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Has Failed to Conduct an Adequate Search for All Records Responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939

157. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

158. The Center has a statutory right to have the Commerce Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Commerce

Department violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939.

159. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Commerce Department in the foreseeable future.

160. The Center's organizational activities will be adversely affected if the Commerce Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

161. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT SIX: NOAA Has Failed to Conduct an Adequate Search for All Records Responsive to the Center's NOAA FOIA Request Number DOC-NOAA-2017-001066

162. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

163. The Center has a statutory right to have NOAA process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). NOAA violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066.

164. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NOAA in the foreseeable future.

165. The Center's organizational activities will be adversely affected if NOAA continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

166. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

FOURTH CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records

COUNT ONE: The Interior Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

167. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

168. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

169. The Interior Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to Interior Department FOIA Request Number OS-2017-00384.

170. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Interior Department in the foreseeable future.

171. The Center's organizational activities will be adversely affected if the Interior Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

172. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Interior Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT TWO: EPA Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

173. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

174. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

175. EPA violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517.

176. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

177. The Center's organizational activities will be adversely affected if EPA is allowed to continue violating FOIA's disclosure provisions as it has in this case.

178. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

179. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

180. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

181. The Energy Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to Energy Department FOIA Request Number HQ-2017-00806.

182. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Energy Department in the foreseeable future.

183. The Center's organizational activities will be adversely affected if the Energy Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

184. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

185. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

186. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

187. The State Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to State Department FOIA Request Number F-2017-08517.

188. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the State Department in the foreseeable future.

189. The Center's organizational activities will be adversely affected if the State Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

190. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

191. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

192. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

193. The Commerce Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939.

194. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Commerce Department in the foreseeable future.

195. The Center's organizational activities will be adversely affected if the Commerce Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

196. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT SIX: NOAA Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

197. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

198. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

199. NOAA violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066.

200. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NOAA in the foreseeable future.

201. The Center's organizational activities will be adversely affected if NOAA is allowed to continue violating FOIA's disclosure provisions as it has in this case.

202. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

FIFTH CLAIM FOR RELIEF
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
(In the Alternative to the First through Fourth Claims)
Unlawfully Withheld or Unreasonably Delayed Actions that FOIA Requires

COUNT ONE: The Interior Department Withheld or Unreasonably Delayed Actions that FOIA Requires

203. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

204. The Interior Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose

records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (2) make a timely and lawful determination on Interior Department FOIA Request Number OS-2017-00384; (3) conduct a search that is reasonably calculated to locate all responsive records to Interior Department FOIA Request Number OS-2017-00384; (4) provide the Center with records that are responsive to Interior Department FOIA Request Number OS-2017-00384 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to Interior Department FOIA Request Number OS-2017-00384 in the event that records may be subject to an exemption. The Interior Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

205. Alternatively, the Interior Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (2) make a timely and lawful determination on to Interior Department FOIA Request Number OS-2017-00384; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (4) provide the Center with records that are responsive to OS-2017-00384 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Interior Department FOIA Request Number OS-2017-00384 which contain any material that may be lawfully withheld under an exemption(s). The Interior Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

206. As alleged above, the Interior Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

207. The Center has suffered a legal wrong as a result of the Interior Department's failure to comply with the mandates of FOIA. As alleged above, the Interior Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

208. The Center has no other adequate remedy at law to redress the violations noted above.

209. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT TWO: EPA Withheld or Unreasonably Delayed Actions that FOIA Requires

210. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

211. EPA unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (2) make a timely and lawful determination on EPA FOIA Request Number EPA-HQ-2017-005517; (3) conduct a search that is reasonably calculated to locate all responsive records to EPA FOIA Request Number EPA-HQ-2017-005517; (4) provide the Center with records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to EPA FOIA Request Number EPA-HQ-2017-005517 in the event that records may be subject to an exemption. EPA's failures constitute agency actions that are

unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

212. Alternatively, EPA unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (2) make a timely and lawful determination on EPA FOIA Request Number EPA-HQ-2017-005517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (4) provide the Center with records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to EPA FOIA Request Number EPA-HQ-2017-005517 which contain any material that may be lawfully withheld under an exemption(s). EPA's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

213. As alleged above, EPA's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

214. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, EPA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

215. The Center has no other adequate remedy at law to redress the violations noted above.

216. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT THREE: The Energy Department Withheld or Unreasonably Delayed Actions that FOIA Requires

217. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

218. The Energy Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (2) make a timely and lawful determination on Energy Department FOIA Request Number HQ-2017-00806; (3) conduct a search that is reasonably calculated to locate all responsive records to Energy Department FOIA Request Number HQ-2017-00806; (4) provide the Center with records that are responsive to Energy Department FOIA Request Number HQ-2017-00806 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to Energy Department FOIA Request Number HQ-2017-00806 in the event that records may be subject to an exemption. The Energy Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

219. Alternatively, the Energy Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (2) make a timely and lawful determination on Energy Department FOIA Request Number HQ-2017-00806; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (4) provide the Center with records that are responsive to Energy Department FOIA Request Number HQ-2017-00806 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions

to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Energy Department FOIA Request Number HQ-2017-00806 which contain any material that may be lawfully withheld under an exemption(s). The Energy Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

220. As alleged above, the Energy Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

221. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, the Energy Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

222. The Center has no other adequate remedy at law to redress the violations noted above.

223. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FOUR: The State Department Withheld or Unreasonably Delayed Actions that FOIA Requires

224. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

225. The State Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to State Department FOIA Request Number F-2017-08517; (2) make a timely and lawful determination on State Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all responsive records to State Department FOIA Request Number F-2017-08517; (4) provide the Center with records that are

responsive to State Department FOIA Request Number F-2017-08517 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to State Department FOIA Request Number F-2017-08517 in the event that records may be subject to an exemption. The State Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

226. Alternatively, the State Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to F-2017-085177; (2) make a timely and lawful determination on State Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to State Department FOIA Request Number F-2017-08517; (4) provide the Center with records that are responsive to State Department FOIA Request Number F-2017-08517 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to State Department FOIA Request Number F-2017-08517 which contain any material that may be lawfully withheld under an exemption(s). The State Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

227. As alleged above, the State Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

228. The Center has suffered a legal wrong as a result of the State Department's failure to comply with the mandates of FOIA. As alleged above, the State Department violated its

statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

229. The Center has no other adequate remedy at law to redress the violations noted above.

230. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FIVE: The Commerce Department Withheld or Unreasonably Delayed Actions that FOIA Requires

231. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

232. The Commerce Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (2) make a timely and lawful determination on Commerce Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all responsive records to Commerce Department FOIA Request Number DOC-OS-2017-000939; (4) provide the Center with records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to Commerce Department FOIA Request Number DOC-OS-2017-000939 in the event that records may be subject to an exemption. The Commerce Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

233. Alternatively, the Commerce Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search

for and disclose records that are responsive to DOC-OS-2017-000939; (2) make a timely and lawful determination on Commerce Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (4) provide the Center with records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 which contain any material that may be lawfully withheld under an exemption(s). The Commerce Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

234. As alleged above, the Commerce Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

235. The Center has suffered a legal wrong as a result of the Commerce Department's failure to comply with the mandates of FOIA. As alleged above, the Commerce Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

236. The Center has no other adequate remedy at law to redress the violations noted above.

237. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT SIX: NOAA Withheld or Unreasonably Delayed Actions that FOIA Requires

238. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

239. NOAA unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) conduct a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066; (2) provide the Center with records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (3) provide the Center with reasonably segregable portions of records responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which contain any material that may be withheld lawfully under an exemption(s). NOAA's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

240. Alternatively, NOAA unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal (1) conduct a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066; (2) provide the Center with records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (3) provide the Center with reasonably segregable portions of records responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which contain any material that may be withheld lawfully under an exemption(s). NOAA's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

241. As alleged above, NOAA's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

242. The Center has suffered a legal wrong as a result of NOAA's failure to comply with the mandates of FOIA. As alleged above, NOAA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

243. The Center has no other adequate remedy at law to redress the violations noted above.

244. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

SIXTH CLAIM FOR RELIEF
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
(In the Alternative to the First through Eighth Claims)
Violations of FOIA's Requirements Are Arbitrary, Capricious,
an Abuse of Discretion, or Otherwise Not in Accordance with Law

COUNT ONE: The Interior Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

245. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

246. The Interior Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to OS-2017-00384; (2) make a timely and lawful determination on OS-2017-00384; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (4) provide the Center with records that are responsive to Interior Department FOIA Request Number OS-2017-00384 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Interior Department FOIA Request

Number OS-2017-00384 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the Interior Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

247. As alleged above, the Interior Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

248. The Center has suffered a legal wrong as a result of the Interior Department's failure to comply with the mandates of FOIA. As alleged above, the Interior Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

249. The Center has no other adequate remedy at law to redress the violations noted above.

250. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT TWO: EPA's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

251. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

252. EPA violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (2) make a timely and lawful determination on EPA FOIA Request Number EPA-HQ-2017-005517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (4) provide the Center with records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517 which may

not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to EPA FOIA Request Number EPA-HQ-2017-005517 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, EPA's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

253. As alleged above, EPA's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

254. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, EPA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

255. The Center has no other adequate remedy at law to redress the violations noted above.

256. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT THREE: The Energy Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

257. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

258. The Energy Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (2) make a timely and lawful determination on Energy Department FOIA Request Number HQ-2017-00806; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Energy Department FOIA Request Number

HQ-2017-00806s; (4) provide the Center with records that are responsive to Energy Department FOIA Request Number HQ-2017-00806 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Energy Department FOIA Request Number HQ-2017-00806 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the Energy Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

259. As alleged above, the Energy Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

260. The Center has suffered a legal wrong as a result of the Energy Department's failure to comply with the mandates of FOIA. As alleged above, the Energy Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

261. The Center has no other adequate remedy at law to redress the violations noted above.

262. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FOUR: The State Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

263. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

264. The State Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to State Department FOIA

Request Number F-2017-08517; (2) make a timely and lawful determination on State Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to State Department FOIA Request Number F-2017-08517; (4) provide the Center with records that are responsive to State Department FOIA Request Number F-2017-08517 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to State Department FOIA Request Number F-2017-08517 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the State Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

265. As alleged above, the State Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

266. The Center has suffered a legal wrong as a result of the State Department's failure to comply with the mandates of FOIA. As alleged above, the State Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

267. The Center has no other adequate remedy at law to redress the violations noted above.

268. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FIVE: The Commerce Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

269. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

270. The Commerce Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (2) make a timely and lawful determination on Commerce Department FOIA Request Number DOC-OS-2017-000939; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (4) provide the Center with records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the Commerce Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

271. As alleged above, the Commerce Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

272. The Center has suffered a legal wrong as a result of the Commerce Department's failure to comply with the mandates of FOIA. As alleged above, the Commerce Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

273. The Center has no other adequate remedy at law to redress the violations noted above.

274. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT SIX: NOAA's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

275. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

276. NOAA violated FOIA's statutory mandates due to its failure and refusal to (1) conduct a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066; (2) provide the Center with records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (3) provide the Center with reasonably segregable portions of records responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, NOAA's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

277. As alleged above, NOAA's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

278. The Center has suffered a legal wrong as a result of NOAA's failure to comply with the mandates of FOIA. As alleged above, NOAA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

279. The Center has no other adequate remedy at law to redress the violations noted above.

280. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Order Defendants to conduct searches that are reasonably calculated to locate all records responsive to Plaintiff's FOIA Requests, numbers OS-2017-00384, EPA-HQ-2017-005517, HQ-2017-00806, F-2017-08517, DOC-OS-2017-000939, and DOC-NOAA-2017-001066 with the cut-off date for such searches being the date the searches are conducted, and to provide Plaintiff, by a date certain, with all responsive records and reasonably segregable portions of lawfully exempt records sought in this action.

2. Declare that Defendants' failures to timely make determinations on Plaintiff's FOIA Requests are unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(i), or in the alternative, are an agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

3. Declare that Defendants' failures to properly apply FOIA exemptions, 5 U.S.C. § 552(b), are unlawful under FOIA, or in the alternative, are an agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

4. Declare that Defendants' failures to undertake a search for and disclose to Plaintiff all records that are responsive to Plaintiff's FOIA Requests, as alleged above, are unlawful under FOIA, U.S.C. § 552(a)(6)(A)(i), or in the alternative, are an agency action that

has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

5. Declare that Defendants' failures to provide Plaintiff with reasonably segregable portions of records which may be lawfully subject to a FOIA exemption, as alleged above, are unlawful under FOIA, U.S.C. § 552(a)(7)(b), or in the alternative, are agency actions that have been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

6. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.

7. Grant such other and further relief as the Court may deem just and proper.

DATED: August 16, 2017

Respectfully submitted,

/s/ Margaret E. Townsend

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/s/ Amy R. Atwood

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY
378 North Main Avenue
Tucson, AZ 85701,

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW
Washington, D.C. 20240,

U.S. ENVIRONMENTAL PROTECTION
AGENCY
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460,

U.S. DEPARTMENT OF ENERGY
1000 Independence Avenue, SW
Washington, D.C. 20585,

U.S. DEPARTMENT OF STATE
2201 C. Street, NW
Washington, D.C. 20037,

U.S. DEPARTMENT OF COMMERCE
1401 Constitution Avenue, NW
Washington, D.C. 20230,

and

U.S. NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
1315 East-West Highway
Silver Spring, MD 20910

Defendants.

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

Case No.: 1:17-cv-0974 (KBJ)

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INTRODUCTION

1. The Center for Biological Diversity (“Center”)—an environmental conservation organization that works to protect native wildlife species and their habitats—challenges the failure of the U.S. Department of Interior, U.S. Environmental Protection Agency, U.S.

Department of Energy, U.S. Department of State, U.S. Department of Commerce, and U.S.

National Oceanic and Atmospheric Administration to provide records concerning the Trump administration’s censorship of these federal departments’ and their component agencies’

discussion or dissemination of information about climate change, in violation of the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA” or “Act”), or alternatively, the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (“APA”).

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2. From January through March 2017, news outlets reported that the Trump administration directed numerous federal departments and agencies to remove information from their websites about climate change and/or to cease use of phrases such as “climate change,” “emissions reduction,” or “Paris agreement” in agency documents. These departments and agencies include the six named defendants in this action.

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3. To understand these actions, the Center filed FOIA requests with each of the defendants, seeking directives or communications barring or removing climate change-related words or phrases from formal communications as well as the information, such as webpages about climate change, that has been removed from public view.

4. However, although each defendant acknowledged the Center’s request, none have provided any responsive records or stated when they might do so.

5. Defendants are unlawfully withholding the records by failing to search for and provide all responsive records to the Center. The defendants’ failure to comply with FOIA by

releasing all records related to the censorship of climate change-related words and phrases is contrary to FOIA and undermines FOIA's policy of government transparency.

6. Because prompt access to these records is necessary to effectuate FOIA's purpose, the Center seeks declaratory relief establishing that defendants are in violation of FOIA, or alternatively, the APA. The Center also seeks injunctive relief directing defendants to provide responsive records without any further delay.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under FOIA, the APA, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

8. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district, because a portion of the responsive records may be found in this district.

9. Declaratory relief is appropriate under 28 U.S.C. § 2201.

10. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

PARTIES

11. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit conservation organization with offices throughout the United States. The Center has more than 58,000 members. The Center and its members are harmed by EPA's violations of FOIA, or alternatively the APA, as such violations preclude the Center from gaining a full understanding of the circumstances, rationales, and individuals involved in the Trump administration's censorship of climate change-related information.

12. Defendant U.S. DEPARTMENT OF THE INTERIOR (“Interior Department”) is an independent agency of the executive branch of the U.S. government. The Interior Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

13. Defendant U.S. ENVIRONMENTAL PROTECTION AGENCY (“EPA”) is an independent agency of the executive branch of the U.S. government. EPA is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

14. Defendant U.S. DEPARTMENT OF ENERGY (“Energy Department”) is an independent agency of the executive branch of the U.S. government. The Energy Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

15. Defendant U.S. DEPARTMENT OF STATE (“State Department”) is an independent agency of the executive branch of the U.S. government. The State Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

16. Defendant U.S. DEPARTMENT OF COMMERCE (“Commerce Department”) is an independent agency of the executive branch of the U.S. government. The Commerce Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

17. Defendant U.S. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (“NOAA”) is an independent agency of the executive branch of the U.S.

government. NOAA is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

STATUTORY BACKGROUND

18. FOIA's basic purpose is government transparency. It establishes the public's right to access all federal agency records unless such records may be withheld pursuant to one of nine, narrowly construed FOIA exemptions. 5 U.S.C. § 552(b)(1)-(9).

19. FOIA imposes strict and rigorous deadlines on federal agencies when they receive a request for records pursuant to FOIA. Specifically, an agency must determine whether to disclose responsive records and notify the requester of its determination within 20 working days of receiving a FOIA request, and it must make records "promptly" available unless it can establish that certain unusual circumstances are present and/or that it may lawfully withhold records, or portions thereof, from disclosure. *Id.* § 552(a)(3)(A), (a)(6). Also within 20 working days, the agency must inform the requester that it has a right to appeal the agency's determination. *Id.* § 552(a)(6)(A)(i).

20. FOIA places the burden on the agency to prove that it may withhold responsive records from a requester. *Id.* § 552(a)(4)(B).

21. Congress has specified limited circumstances in which federal agencies may obtain more time to make the determination that is required by 5 U.S.C. § 552(a)(6)(A)(i).

22. First, an agency may toll the 20-working-day deadline to seek additional information or clarification from a requester, but that tolling period ends when the agency receives such information or clarification. *Id.* § 552(a)(6)(A)(ii).

23. Second, an agency may extend the 20-working-day deadline for an additional 10 working days by giving a written notice to the requester that sets forth "unusual circumstances"

to justify a deadline extension which also requires that it provide the date by which the agency expects to make the determination. *Id.* § 552(a)(6)(B)(i). However, to invoke such “unusual circumstances,” the agency must provide the requester with “an opportunity to limit the scope of the request so that it may be processed within [20 working days] or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.” *Id.* § 552(a)(6)(B)(ii). In addition, when asserting unusual circumstances, the agency “shall make available its FOIA Public Liaison” to “assist in the resolution of any disputes between the requester and the agency.” *Id.*

24. FOIA requires each agency to make reasonable efforts to search for records in a manner that is reasonably calculated to locate all records that are responsive to the FOIA request. *Id.* § 552(a)(3)(C)-(D).

25. FOIA requires federal agencies to expeditiously disclose requested records, *see id.* § 552, and mandates a policy of broad disclosure of government records. Any inquiry under FOIA brings with it a strong presumption in favor of disclosure.

26. Congress recognized that in certain, limited instances, records may be withheld as exempt from FOIA’s broad disclosure mandate, and thus created nine categories of exemptions. *Id.* § 552(b). These exemptions, however, are narrowly construed in light of FOIA’s dominant objective of disclosure, not secrecy.

27. The U.S. district courts have jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

28. Alternatively, an agency’s response to a FOIA request and/or a FOIA appeal is subject to judicial review under the APA, which confers a right of judicial review on any person

who is adversely affected by agency action, 5 U.S.C. § 702, and authorizes district courts to compel agency action that is unlawfully withheld or unreasonably delayed. *Id.* § 706(1). District courts must set aside any agency action that is found to be “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” *Id.* § 706(2)(A).

FACTUAL BACKGROUND

Interior Department FOIA Request (OS-2017-00384)

29. On March 30, 2017, the Center submitted a FOIA request to the Interior Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

30. The same day, the Interior Department acknowledged the Center’s request and assigned it tracking number OS-2017-00384 (“Interior Department FOIA Request”).

31. A determination on the Center’s FOIA request to the Interior Department was due by April 27, 2017, which is 20 working days after the date of the Interior Department’s acknowledgement of the request.

32. As of the date of the filing of this amended complaint, which is 77 working days past the 20-working-day deadline, the Interior Department has not requested additional time to respond, provided any responsive records, or provided a determination in response to the Center’s FOIA request.

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EPA FOIA Request (EPA-HQ-2017-005517)

33. On March 30, 2017, the Center submitted a FOIA request to the EPA, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

34. The same day, the EPA acknowledged the Center’s request and assigned it tracking number EPA-HQ-2017-005517 (“EPA FOIA Request”). On March 12, 2017, EPA granted a waiver of fees in connection with the request.

35. A determination on the Center’s FOIA request to the EPA was due by April 27, 2017, which is 20 working days after the date of the EPA’s acknowledgement of the request.

36. After receiving no further communications from EPA regarding this request, by letter dated May 8, 2017, the Center informed EPA that its determination was overdue and offered to assist EPA in making a determination on the Center’s EPA FOIA Request. The Center also requested an estimate for when EPA would make a determination on the Center’s FOIA request.

37. As of the date of the filing of this amended complaint, which is 77 working days past the 20-working-day deadline, EPA has not responded to the Center’s May 8, 2017 letter, requested additional time to respond to the Center’s FOIA request, provided any responsive records, made a determination, or provided an estimated date of completion of the Center’s FOIA request.

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Energy Department FOIA Request (HQ-2017-00806)

38. On March 30, 2017, the Center submitted a FOIA request to the Energy Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

39. The next day, on March 31, 2017, the Energy Department acknowledged the Center’s request and assigned it tracking number HQ-2017-00806 (“Energy Department FOIA Request”).

40. On April 11, 2017, a representative of the Energy Department, Ms. Natalie Anderson, contacted Ms. Margaret E. Townsend of the Center for Biological Diversity by phone and email. Ms. Anderson stated that she wanted to clarify the timeframe for records that are responsive to the Center’s Energy Department FOIA Request. In response, Ms. Townsend informed Ms. Anderson that the Energy Department could search for and provide all responsive records that were generated on or after November 9, 2016.

41. Ms. Anderson also stated that the Energy Department had received many FOIA requests that are similar to the Center’s Energy Department FOIA Request, and in an email dated April 11, 2017, suggested that if the Center would agree to limit the department’s search to two of its program offices—specifically, the Office of International Affairs (“OIA”) and the Office of Energy Policy and Systems Analysis (“EPSA”)—this “should allow [the Energy Department] to

provide a response more quickly.” Accordingly, the Center agreed to limit the department’s search to the OIA and EPSA.

42. Also in her April 11, 2017 email, Ms. Anderson asked if the Center would agree to eliminate the phrases “including but not limited to” and “any related words or phrases” from its request, and if the Center would like to include any search terms in addition to “climate change,” “global warming,” “climate disruption,” “greenhouse gas emissions,” “emissions reductions,” and/or “Paris agreement.” In response, Ms. Townsend added the terms “climate” and “fossil fuels” to the search terms to be used by the Energy Department during its search for responsive records from the OIA and EPSA.

43. By email dated April 13, 2017, Ms. Anderson confirmed the scope of the department’s search for responsive records, stating that the department would “move forward with processing.”

44. By letter dated April 26, 2017, Energy Department FOIA Officer Alexander C. Morris confirmed the agreement of Ms. Anderson and Ms. Townsend regarding the scope of the department’s search, informed the Center that the request was assigned to OIA and EPSA, and granting the Center’s request for a waiver of fees.

45. A determination on the Center’s Energy Department FOIA Request was due on May 11, 2017, which is 20 working days after the date of Ms. Anderson’s email stating that the department was prepared to “move forward with processing.”

46. ~~By letter dated August 11, 2017, which was 65 working days past the 20-~~
working-day deadline, the Energy Department provided a determination in response to the
Center’s FOIA request.

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47. In its determination, the Energy Department stated that it possessed no responsive records.

48. News articles indicate that the Energy Department likely possesses responsive records. For example, in an article date March 29, 2017, *Politico* reported that “[a] supervisor at the Energy Department’s international climate office told staff this week not to use the phrases ‘climate change,’ ‘emissions reduction’ or ‘Paris Agreement’ in written memos, briefings or other written communication” See Eric Wolff, Energy Department climate office bans use of phrase “climate change”, *Politico* (Mar. 29, 2017), <http://www.politico.com/story/2017/03/energy-department-climate-change-phrases-banned-236655>.

49. The Center challenges the adequacy of the Energy Department’s search for responsive records and the Energy Department’s failure to provide all responsive records to the Center.

State Department FOIA Request

50. On April 3, 2017, the Center submitted a FOIA request to the State Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

51. The next day, on April 4, 2017, the State Department acknowledged the Center’s request and assigned it tracking number F-2017-08517 (“State Department FOIA Request”).

52. By form letter dated April 10, 2017, the Requester Communications Branch of the State Department's Office of Information Programs & Services re-acknowledged receipt of the Center's FOIA request, and it also granted a public interest waiver of fees that are incurred in processing the request.

53. After receiving no further communications from the State Department regarding this request, by letter dated May 31, 2017, the Center informed the State Department that its determination was overdue and offered to assist the State Department in making a determination on the Center's State Department FOIA Request. The Center also requested an estimate for when the State Department would make a determination on the Center's FOIA request.

54. By email dated June 1, 2017, Charlotte W. Duckett confirmed the State Department's receipt of the Center's May 31, 2017 communication. Ms. Duckett stated that a copy of the Center's May 31, 2017 communication "was forwarded to the office that is processing your request" and that "our office has requested an estimated completion date for your request." Ms. Duckett did not provide an estimated date of completion of the State Department's determination on the Center's request.

55. A determination on the Center's FOIA request to the State Department was due by May 2, 2017, which is 20 working days after the date of the State Department's acknowledgement of the request.

56. As of the date of the filing of this amended complaint, which is 74 working days past the 20-working-day deadline, the State Department has not requested additional time to respond, provided any responsive records, or provided a determination in response to the Center's FOIA request.

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Commerce Department FOIA Request (DOC-OS-2017-000939)

57. On April 3, 2017, the Center submitted a FOIA request to the Commerce Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

58. The same day, the Commerce Department acknowledged the Center’s request and assigned it tracking number DOC-OS-2017-000939 (“Commerce Department FOIA Request”). On April 10, 2017, the Commerce Department granted a waiver of fees in connection with the request.

59. On April 13, 2017, the Commerce Department sent a letter to the Center requesting clarification of (1) the time frame of the records request and (2) the type of records requested.

60. The Center provided the requested clarification to the Commerce Department via electronic mail on April 17, 2017. The Center informed the Commerce Department that “[t]he timeframe of the records request is November 9, 2016 to the date of the search,” and that

[t]he type of records requested is all records, as defined by FOIA, and included in the following paragraph from our request:

For purposes of this request, “records” is consistent with the meaning of the term under FOIA. This includes, but is not limited to, documents of any kind including electronic as well as paper documents, e-mails, writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), correspondence, letters, memoranda, reports, consultations, papers, studies, notes, field notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, data, data bases, drawings, surveys, graphs, charts,

photographs, videos, meeting notes or minutes, electronic and magnetic recordings of meetings, maps, GIS layers, GPS, UTM, LiDAR, CDs, and any other compilations of data from which information can be obtained.

61. On May 23, 2017, Commerce Department FOIA Specialist Ms. Ayana Crawford called Ms. Townsend to ask if the Center would respond to the agency's request for clarification before Ms. Crawford took action to close the request. Ms. Townsend informed Ms. Crawford that the Center had already provided the requested clarification on April 17, 2017. Ms. Crawford asked Ms. Townsend to resend it. Ms. Townsend resent the email clarification the same day.

62. A determination on the Center's Commerce Department FOIA Request was due on May 3, 2017, which is 20 working days after the Commerce Department received the Center's FOIA request.

63. Even if the Commerce Department had reasonably suspended its timeline for a determination on the Center's FOIA request, by relying on May 23, 2017 as the date that the Center provided clarification, then the Center's Commerce Department FOIA Request would have been due on June 9, 2017.

64. As of the date of the filing of this Amended complaint, which is 47 workdays past the June 9, 2017 deadline, the Commerce Department has not requested additional time to respond, provided any responsive records, or provided a determination in response to the Center's Commerce Department FOIA request.

NOAA FOIA Request (DOC-NOAA-2017-001066)

65. On April 21, 2017, the Center submitted a FOIA request to NOAA, requesting "all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-

related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.’

66. The same day, NOAA acknowledged the Center’s request and assigned it tracking number DOC-NOAA-2017-001066 (“NOAA FOIA Request”). On April 24, 2014, NOAA provided a formal acknowledgement letter to the Center.

67. On May 3, 2017, NOAA informed the Center that it determined that a waiver of fees in connection with the request was not applicable as the request was “not billable.”

68. On May 10, 2017, NOAA provided a final “no records” determination to the Center and informed the Center of its right to appeal the determination.

69. The Center appealed NOAA’s “no records” determination on June 30, 2017. The same day, NOAA acknowledged the Center’s appeal and assigned it tracking number DOC-OS-2017-001456 (“NOAA FOIA Appeal”)

70. NOAA affirmed its decision on the Center’s NOAA FOIA Appeal on July 3, 2017. In the letter, the agency informed the Center that “[r]ecords indicate that a search was tasked to the NOAA National Environmental Satellite Data and Information Services (NESDIS) and that a search of the NESDIS correspondence unit was performed.” NOAA stated that “it is reasonable to assume that the NESDIS correspondence unit would hold any and all documents responsive to [the Center’s] request.” NOAA also informed the Center that it has “the right to obtain judicial review as provided for in 5 U.S.C. § 552(a)(4)(8).”

71. News articles indicate that NOAA possesses responsive records. For example, in an article date July 13, 2017, the *New York Times* reported that phrasing in a NOAA news release accompanying a report about the warming ability of global emissions of greenhouse

gases omitted any link of “human activity” to emissions. *See* Lisa Friedman, *Climate-Altering Gases Spiked in 2016, Federal Scientists Report*, NY Times (July 13, 2017), <https://www.nytimes.com/2017/07/13/climate/greenhouse-gases-spike-noaa-global-warming.html>.

72. The Center challenges the adequacy of NOAA’s search for responsive records and NOAA’s failure to provide all responsive records to the Center.

All Requests

73. None of FOIA’s nine exemptions to the statute’s disclosure mandate apply to the records that are responsive to any of the Center’s FOIA requests. *Id.* § 552(b).

74. The Center has been required to expend resources to prosecute this action.

CLAIMS FOR RELIEF

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FIRST CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Comply with FOIA’s Mandatory Determination Deadline

COUNT ONE: The Interior Department Missed FOIA’s Mandatory Determination Deadline for the Center’s Interior Department FOIA Request Number OS-2017-00384

75. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

76. The Interior Department has violated FOIA by refusing to disclose records that are responsive to the Center’s Interior Department FOIA Request Number OS-2017-00384.

77. The Center has a statutory right to a final determination from the Interior Department on FOIA Request Number OS-2017-00384 in a manner that complies with FOIA. The Interior Department has violated the Center’s rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

78. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Interior Department in the foreseeable future.

79. The Center's organizational activities will be adversely affected if the Interior Department continues to violate FOIA's disclosure provisions as it has in this case.

80. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, the Interior Department will continue to violate Plaintiff's rights to receive public records under FOIA.

COUNT TWO: EPA Missed FOIA's Mandatory Determination Deadline for the Center's EPA FOIA Request Number EPA-HQ-2017-005517

81. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

82. EPA has violated FOIA by refusing to disclose records that are responsive to the Center's EPA FOIA Request Number EPA-HQ-2017-005517.

83. The Center has a statutory right to a final determination from EPA on its EPA FOIA Request Number EPA-HQ-2017-005517 in a manner that complies with FOIA. EPA has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

84. The Center's organizational activities will be adversely affected if EPA is allowed to continue violating FOIA's decision deadlines as it has in this case.

85. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Missed FOIA's Mandatory Determination Deadline for the Center's Energy Department FOIA Request Number EPA-HQ-2017-005517

86. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

87. The Energy Department has violated FOIA by refusing to disclose records that are responsive to the Center's Energy Department FOIA Request Number HQ-2017-00806.

88. The Center has a statutory right to a final determination from the Energy Department on its Energy Department FOIA Request Number HQ-2017-00806 in a manner that complies with FOIA. The Energy Department has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

89. The Center's organizational activities will be adversely affected if the Energy Department is allowed to continue violating FOIA's decision deadlines as it has in this case.

90. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Missed FOIA's Mandatory Determination Deadline for the Center's State Department FOIA Request Number F-2017-08517

91. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

92. The State Department has violated FOIA by refusing to disclose records that are responsive to the Center's State Department FOIA Request Number F-2017-08517.

93. The Center has a statutory right to a final determination from the State Department on its State Department FOIA Request Number F-2017-08517 in a manner that

complies with FOIA. The State Department has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

94. The Center's organizational activities will be adversely affected if the State Department is allowed to continue violating FOIA's decision deadlines as it has in this case.

95. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Missed FOIA's Mandatory Determination Deadline for the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939

96. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

97. The Commerce Department has violated FOIA by refusing to disclose records that are responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939.

98. The Center has a statutory right to a final determination from the Commerce Department on its Commerce Department FOIA Request Number DOC-OS-2017-000939 in a manner that complies with FOIA. The Commerce Department has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

99. The Center's organizational activities will be adversely affected if the Commerce Department is allowed to continue violating FOIA's decision deadlines as it has in this case.

100. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

SECOND CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Disclose All Responsive Records to the Center

COUNT ONE: The Interior Department Has Unlawfully Withheld Records Responsive to Interior Department FOIA Request Number OS-2017-00384

101. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

102. The Center has a statutory right to the records it seeks, and there is no legal basis for the Interior Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

103. The Interior Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's Interior Department FOIA Request Number OS-2017-00384.

104. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the Interior Department in the foreseeable future.

105. The Center's organizational activities will be adversely affected if the Interior Department continues to violate FOIA's disclosure provisions as it has in this case.

106. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Interior Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT TWO: EPA Has Unlawfully Withheld Records Responsive to EPA FOIA Request Number EPA-HQ-2017-005517

107. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

108. The Center has a statutory right to the records it seeks, and there is no legal basis for EPA to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

109. EPA has violated the Center's rights in this regard by withholding records that are responsive to the Center's EPA FOIA Request Number EPA-HQ-2017-005517.

110. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to EPA in the foreseeable future.

111. The Center's organizational activities will be adversely affected if EPA continues to violate FOIA's disclosure provisions as it has in this case.

112. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Has Unlawfully Withheld Records Responsive to Energy Department FOIA Request Number HQ-2017-00806

113. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

114. The Center has a statutory right to the records it seeks, and there is no legal basis for the Energy Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

115. The Energy Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's Energy Department FOIA Request Number HQ-2017-00806.

116. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the Energy Department in the foreseeable future.

117. The Center's organizational activities will be adversely affected if the Energy Department continues to violate FOIA's disclosure provisions as it has in this case.

118. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Has Unlawfully Withheld Records Responsive to The State Department FOIA Request Number F-2017-08517

119. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

120. The Center has a statutory right to the records it seeks, and there is no legal basis for the State Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

121. The State Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's State Department FOIA Request Number F-2017-08517.

122. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the State Department in the foreseeable future.

123. The Center's organizational activities will be adversely affected if the State Department continues to violate FOIA's disclosure provisions as it has in this case.

124. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Has Unlawfully Withheld Records Responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939

125. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

126. The Center has a statutory right to the records it seeks, and there is no legal basis for the Commerce Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. See 5 U.S.C. § 552(b)(1)-(9).

127. The Commerce Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939.

128. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the Commerce Department in the foreseeable future.

129. The Center's organizational activities will be adversely affected if the Commerce Department continues to violate FOIA's disclosure provisions as it has in this case.

130. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT SIX: NOAA Has Failed to Conduct an Adequate Search for All Records Responsive to the Center's Commerce Department FOIA Request Number DOC-NOAA-2017-001066

131. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

132. The Center has a statutory right to the records it seeks, and there is no legal basis for NOAA to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

133. NOAA has violated the Center's rights in this regard by withholding records that are responsive to the Center's NOAA FOIA Request Number DOC- NOAA-2017-001066.

134. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to NOAA in the foreseeable future.

135. The Center's organizational activities will be adversely affected if NOAA continues to violate FOIA's disclosure provisions as it has in this case.

136. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

THIRD CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Conduct an Adequate Search for Responsive Records

COUNT ONE: The Interior Department Has Failed to Conduct an Adequate Search for All Records Responsive to Interior Department FOIA Request Number OS-2017-00384

137. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

138. The Center has a statutory right to have the Interior Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Interior Department

violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to Interior Department FOIA Request Number OS-2017-00384.

139. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Interior Department in the foreseeable future.

140. The Center's organizational activities will be adversely affected if the Interior Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

141. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Interior Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT TWO: EPA Has Failed to Conduct an Adequate Search for All Records Responsive to EPA FOIA Request Number EPA-HQ-2017-005517

142. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

143. The Center has a statutory right to have EPA process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). EPA violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517.

144. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

145. The Center's organizational activities will be adversely affected if EPA continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

146. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Has Failed to Conduct an Adequate Search for All Records Responsive to Energy Department FOIA Request Number HQ-2017-00806

147. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

148. The Center has a statutory right to have the Energy Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Energy Department violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to Energy Department FOIA Request Number HQ-2017-00806.

149. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Energy Department in the foreseeable future.

150. The Center's organizational activities will be adversely affected if the Energy Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

151. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Has Failed to Conduct an Adequate Search for All Records Responsive to State Department FOIA Request Number F-2017-08517

152. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

153. The Center has a statutory right to have the State Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The State Department violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to State Department FOIA Request Number F-2017-08517.

154. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the State Department in the foreseeable future.

155. The Center's organizational activities will be adversely affected if the State Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

156. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Has Failed to Conduct an Adequate Search for All Records Responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939

157. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

158. The Center has a statutory right to have the Commerce Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Commerce

Department violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939.

159. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Commerce Department in the foreseeable future.

160. The Center's organizational activities will be adversely affected if the Commerce Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

161. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT SIX: NOAA Has Failed to Conduct an Adequate Search for All Records Responsive to the Center's NOAA FOIA Request Number DOC-NOAA-2017-001066

162. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

163. The Center has a statutory right to have NOAA process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). NOAA violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066.

164. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NOAA in the foreseeable future.

165. The Center's organizational activities will be adversely affected if NOAA continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

166. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

FOURTH CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records

COUNT ONE: The Interior Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

167. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

168. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

169. The Interior Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to Interior Department FOIA Request Number OS-2017-00384.

170. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Interior Department in the foreseeable future.

171. The Center's organizational activities will be adversely affected if the Interior Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

172. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Interior Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT TWO: EPA Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

173. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

174. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

175. EPA violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517.

176. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

177. The Center's organizational activities will be adversely affected if EPA is allowed to continue violating FOIA's disclosure provisions as it has in this case.

178. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

179. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

180. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

181. The Energy Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to Energy Department FOIA Request Number HQ-2017-00806.

182. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Energy Department in the foreseeable future.

183. The Center's organizational activities will be adversely affected if the Energy Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

184. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

185. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

186. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

187. The State Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to State Department FOIA Request Number ~~F-2017-08517~~.

188. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the State Department in the foreseeable future.

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189. The Center's organizational activities will be adversely affected if the State Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

190. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

191. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

192. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

193. The Commerce Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939.

194. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Commerce Department in the foreseeable future.

195. The Center's organizational activities will be adversely affected if the Commerce Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

196. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT SIX: NOAA Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

197. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

198. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

199. NOAA violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066.

200. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NOAA in the foreseeable future.

201. The Center's organizational activities will be adversely affected if NOAA is allowed to continue violating FOIA's disclosure provisions as it has in this case.

202. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

FIFTH CLAIM FOR RELIEF
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
(In the Alternative to the First through Fourth Claims)
Unlawfully Withheld or Unreasonably Delayed Actions that FOIA Requires

COUNT ONE: The Interior Department Withheld or Unreasonably Delayed Actions that FOIA Requires

203. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

204. The Interior Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose

records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (2) make a timely and lawful determination on Interior Department FOIA Request Number OS-2017-00384; (3) conduct a search that is reasonably calculated to locate all responsive records to Interior Department FOIA Request Number OS-2017-00384; (4) provide the Center with records that are responsive to Interior Department FOIA Request Number OS-2017-00384 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to Interior Department FOIA Request Number OS-2017-00384 in the event that records may be subject to an exemption. The Interior Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

205. Alternatively, the Interior Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (2) make a timely and lawful determination on to Interior Department FOIA Request Number OS-2017-00384; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (4) provide the Center with records that are responsive to OS-2017-00384 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Interior Department FOIA Request Number OS-2017-00384 which contain any material that may be lawfully withheld under an exemption(s). The Interior Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

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206. As alleged above, the Interior Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

207. The Center has suffered a legal wrong as a result of the Interior Department's failure to comply with the mandates of FOIA. As alleged above, the Interior Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

208. The Center has no other adequate remedy at law to redress the violations noted above.

209. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT TWO: EPA Withheld or Unreasonably Delayed Actions that FOIA Requires

210. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

211. EPA unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (2) make a timely and lawful determination on EPA FOIA Request Number EPA-HQ-2017-005517; (3) conduct a search that is reasonably calculated to locate all responsive records to EPA FOIA Request Number EPA-HQ-2017-005517; (4) provide the Center with records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to EPA FOIA Request Number EPA-HQ-2017-005517 in the event that records may be subject to an exemption. EPA's failures constitute agency actions that are

unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

212. Alternatively, EPA unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (2) make a timely and lawful determination on EPA FOIA Request Number EPA-HQ-2017-005517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (4) provide the Center with records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to EPA FOIA Request Number EPA-HQ-2017-005517 which contain any material that may be lawfully withheld under an exemption(s). EPA's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

213. As alleged above, EPA's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

214. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, EPA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

215. The Center has no other adequate remedy at law to redress the violations noted above.

216. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT THREE: The Energy Department Withheld or Unreasonably Delayed Actions that FOIA Requires

217. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

218. The Energy Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (2) make a timely and lawful determination on Energy Department FOIA Request Number HQ-2017-00806; (3) conduct a search that is reasonably calculated to locate all responsive records to Energy Department FOIA Request Number HQ-2017-00806; (4) provide the Center with records that are responsive to Energy Department FOIA Request Number HQ-2017-00806 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to Energy Department FOIA Request Number HQ-2017-00806 in the event that records may be subject to an exemption. The Energy Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

219. Alternatively, the Energy Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (2) make a timely and lawful determination on Energy Department FOIA Request Number HQ-2017-00806; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (4) provide the Center with records that are responsive to Energy Department FOIA Request Number HQ-2017-00806 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions

to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Energy Department FOIA Request Number HQ-2017-00806 which contain any material that may be lawfully withheld under an exemption(s). The Energy Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

220. As alleged above, the Energy Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

221. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, the Energy Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

222. The Center has no other adequate remedy at law to redress the violations noted above.

223. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FOUR: The State Department Withheld or Unreasonably Delayed Actions that FOIA Requires

224. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

225. The State Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to State Department FOIA Request Number F-2017-08517; (2) make a timely and lawful determination on State Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all responsive records to State Department FOIA Request Number F-2017-08517; (4) provide the Center with records that are

responsive to State Department FOIA Request Number F-2017-08517 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to State Department FOIA Request Number F-2017-08517 in the event that records may be subject to an exemption. The State Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

226. Alternatively, the State Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to F-2017-085177; (2) make a timely and lawful determination on State Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to State Department FOIA Request Number F-2017-08517; (4) provide the Center with records that are responsive to State Department FOIA Request Number F-2017-08517 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to State Department FOIA Request Number F-2017-08517 which contain any material that may be lawfully withheld under an exemption(s). The State Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

227. As alleged above, the State Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

228. The Center has suffered a legal wrong as a result of the State Department's failure to comply with the mandates of FOIA. As alleged above, the State Department violated its

statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

229. The Center has no other adequate remedy at law to redress the violations noted above.

230. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FIVE: The Commerce Department Withheld or Unreasonably Delayed Actions that FOIA Requires

231. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

232. The Commerce Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (2) make a timely and lawful determination on Commerce Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all responsive records to Commerce Department FOIA Request Number DOC-OS-2017-000939; (4) provide the Center with records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to Commerce Department FOIA Request Number DOC-OS-2017-000939 in the event that records may be subject to an exemption. The Commerce Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

233. Alternatively, the Commerce Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search

for and disclose records that are responsive to DOC-OS-2017-000939; (2) make a timely and lawful determination on Commerce Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (4) provide the Center with records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 which contain any material that may be lawfully withheld under an exemption(s). The Commerce Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

234. As alleged above, the Commerce Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

235. The Center has suffered a legal wrong as a result of the Commerce Department's failure to comply with the mandates of FOIA. As alleged above, the Commerce Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

236. The Center has no other adequate remedy at law to redress the violations noted above.

237. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT SIX: NOAA Withheld or Unreasonably Delayed Actions that FOIA Requires

238. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

239. NOAA unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) conduct a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066; (2) provide the Center with records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (3) provide the Center with reasonably segregable portions of records responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which contain any material that may be withheld lawfully under an exemption(s). NOAA's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

240. Alternatively, NOAA unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal (1) conduct a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066; (2) provide the Center with records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (3) provide the Center with reasonably segregable portions of records responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which contain any material that may be withheld lawfully under an exemption(s). NOAA's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

241. As alleged above, NOAA's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

242. The Center has suffered a legal wrong as a result of NOAA's failure to comply with the mandates of FOIA. As alleged above, NOAA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

243. The Center has no other adequate remedy at law to redress the violations noted above.

244. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

SIXTH CLAIM FOR RELIEF
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
(In the Alternative to the First through Eighth Claims)
Violations of FOIA's Requirements Are Arbitrary, Capricious,
an Abuse of Discretion, or Otherwise Not in Accordance with Law

COUNT ONE: The Interior Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

245. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

246. The Interior Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to OS-2017-00384; (2) make a timely and lawful determination on OS-2017-00384; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (4) provide the Center with records that are responsive to Interior Department FOIA Request Number OS-2017-00384 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Interior Department FOIA Request

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Number OS-2017-00384 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the Interior Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

247. As alleged above, the Interior Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

248. The Center has suffered a legal wrong as a result of the Interior Department's failure to comply with the mandates of FOIA. As alleged above, the Interior Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

249. The Center has no other adequate remedy at law to redress the violations noted above.

250. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT TWO: EPA's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

251. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

252. EPA violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (2) make a timely and lawful determination on EPA FOIA Request Number EPA-HQ-2017-005517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (4) provide the Center with records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517 which may

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not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to EPA FOIA Request Number EPA-HQ-2017-005517 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, EPA's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

253. As alleged above, EPA's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

254. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, EPA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

255. The Center has no other adequate remedy at law to redress the violations noted above.

256. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT THREE: The Energy Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

257. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

258. The Energy Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (2) make a timely and lawful determination on Energy Department FOIA Request Number HQ-2017-00806; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Energy Department FOIA Request Number

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HQ-2017-00806s; (4) provide the Center with records that are responsive to Energy Department FOIA Request Number HQ-2017-00806 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Energy Department FOIA Request Number HQ-2017-00806 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the Energy Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

259. As alleged above, the Energy Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

260. The Center has suffered a legal wrong as a result of the Energy Department's failure to comply with the mandates of FOIA. As alleged above, the Energy Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

261. The Center has no other adequate remedy at law to redress the violations noted above.

262. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FOUR: The State Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

263. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

264. The State Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to State Department FOIA

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Request Number F-2017-08517; (2) make a timely and lawful determination on State Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to State Department FOIA Request Number F-2017-08517; (4) provide the Center with records that are responsive to State Department FOIA Request Number F-2017-08517 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to State Department FOIA Request Number F-2017-08517 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the State Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

265. As alleged above, the State Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

266. The Center has suffered a legal wrong as a result of ~~the State Department's failure~~ to comply with the mandates of FOIA. As alleged above, the State Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

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267. The Center has no other adequate remedy at law to redress the violations noted above.

268. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

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COUNT FIVE: The Commerce Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

269. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

270. The Commerce Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (2) make a timely and lawful determination on Commerce Department FOIA Request Number DOC-OS-2017-000939; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (4) provide the Center with records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the Commerce Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

271. As alleged above, the Commerce Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

272. The Center has suffered a legal wrong as a result of the Commerce Department's failure to comply with the mandates of FOIA. As alleged above, the Commerce Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

273. The Center has no other adequate remedy at law to redress the violations noted above.

274. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT SIX: NOAA's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

275. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

276. NOAA violated FOIA's statutory mandates due to its failure and refusal to (1) conduct a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066; (2) provide the Center with records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (3) provide the Center with reasonably segregable portions of records responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, NOAA's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

277. As alleged above, NOAA's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

278. The Center has suffered a legal wrong as a result of NOAA's failure to comply with the mandates of FOIA. As alleged above, NOAA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

279. The Center has no other adequate remedy at law to redress the violations noted above.

280. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Order Defendants to conduct searches that are reasonably calculated to locate all records responsive to Plaintiff's FOIA Requests, numbers OS-2017-00384, EPA-HQ-2017-005517, HQ-2017-00806, F-2017-08517, DOC-OS-2017-000939, and DOC-NOAA-2017-001066 with the cut-off date for such searches being the date the searches are conducted, and to provide Plaintiff, by a date certain, with all responsive records and reasonably segregable portions of lawfully exempt records sought in this action.

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2. Declare that Defendants' failures to timely make determinations on Plaintiff's FOIA Requests are unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(i), or in the alternative, are an agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

3. Declare that Defendants' failures to properly apply FOIA exemptions, 5 U.S.C. § 552(b), are unlawful under FOIA, or in the alternative, are an agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

4. Declare that Defendants' failures to undertake a search for and disclose to Plaintiff all records that are responsive to Plaintiff's FOIA Requests, as alleged above, are unlawful under FOIA, U.S.C. § 552(a)(6)(A)(i), or in the alternative, are an agency action that

has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

5. Declare that Defendants' failures to provide Plaintiff with reasonably segregable portions of records which may be lawfully subject to a FOIA exemption, as alleged above, are unlawful under FOIA, U.S.C. § 552(a)(7)(b), or in the alternative, are agency actions that have been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

6. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.

7. Grant such other and further relief as the Court may deem just and proper.

DATED: August 16, 2017

Respectfully submitted,

Deleted: May 23

/s/ Margaret E. Townsend
Margaret E. Townsend (D.C. Bar No OR0008)
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
(971) 717-6409
mtownsend@biologicaldiversity.org

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/s/ Amy R. Atwood
Amy R. Atwood (D.C. Bar No. 470258)
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
(971) 717-6401
atwood@biologicaldiversity.org

Attorneys for Plaintiff

Deleted: Attorney

**U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:17-cv-00974-KBJ**

CENTER FOR BIOLOGICAL DIVERSITY v. U.S.
DEPARTMENT OF THE INTERIOR et al
Assigned to: Judge Ketanji Brown Jackson
Cause: 05:552 Freedom of Information Act

Date Filed: 05/23/2017
Jury Demand: None
Nature of Suit: 895 Freedom of Information
Act
Jurisdiction: U.S. Government Defendant

Plaintiff

**CENTER FOR BIOLOGICAL
DIVERSITY**

represented by **Margaret E. Townsend**
CENTER FOR BIOLOGICAL
DIVERSITY
P.O. Box 11374
Portland, OR 97211
(971) 717-6409
Fax: (503) 283-5528
Email: mtownsend@biologicaldiversity.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amy R. Atwood
CENTER FOR BIOLOGICAL
DIVERSITY
P.O. Box 11374
Portland, OR 97211
(971) 717-6401
Fax: (503) 283-5528
Email: atwood@biologicaldiversity.org
ATTORNEY TO BE NOTICED

V.

Defendant

**U.S. DEPARTMENT OF THE
INTERIOR**

represented by **Joshua M. Kolsky**
U.S. ATTORNEY'S OFFICE FOR THE
DISTRICT OF COLUMBIA
555 Fourth Street, NW
Washington, DC 20530
(202) 252-2541
Fax: (202) 252-2599
Email: joshua.kolsky@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

**U.S. ENVIRONMENTAL
PROTECTION AGENCY**

represented by **Joshua M. Kolsky**
(See above for address)

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant**U.S. DEPARTMENT OF ENERGY**

represented by **Joshua M. Kolsky**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant**U.S. DEPARTMENT OF STATE**

represented by **Joshua M. Kolsky**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant**U.S. NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION****Defendant****U.S. DEPARTMENT OF COMMERCE**

Date Filed	#	Docket Text
05/23/2017	1	COMPLAINT against U.S. DEPARTMENT OF ENERGY, U.S. DEPARTMENT OF STATE, U.S. DEPARTMENT OF THE INTERIOR, U.S. ENVIRONMENTAL PROTECTION AGENCY (Filing fee \$ 400 receipt number 0090-4961916) filed by CENTER FOR BIOLOGICAL DIVERSITY. (Attachments: # 1 Civil Cover Sheet, # 2 Summons, # 3 Summons, # 4 Summons, # 5 Summons, # 6 Summons, # 7 Summons) (Atwood, Amy) (Entered: 05/23/2017)
05/23/2017	2	Corporate Disclosure Statement by CENTER FOR BIOLOGICAL DIVERSITY. (Atwood, Amy) (Entered: 05/23/2017)
05/23/2017		Case Assigned to Judge Ketanji Brown Jackson. (jd) (Entered: 05/23/2017)
05/23/2017	3	SUMMONS (6) Issued Electronically as to U.S. DEPARTMENT OF ENERGY, U.S. DEPARTMENT OF STATE, U.S. DEPARTMENT OF THE INTERIOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, U.S. Attorney and U.S. Attorney General (Attachment: # 1 Consent Forms)(jd) (Entered: 05/23/2017)
05/23/2017	4	GENERAL ORDER AND GUIDELINES FOR CIVIL CASES BEFORE JUDGE KETANJI BROWN JACKSON. The Court will hold the parties and counsel responsible for following these directives, and parties and counsel should pay particular attention to the Courts instructions for briefing motions and filing exhibits. Failure to adhere to this Order may, when appropriate, result the imposition of sanctions and/or sua sponte denial of non-conforming motions. Signed by Judge Ketanji Brown Jackson on 5/23/2017. (lckbj1) (Entered: 05/23/2017)
06/29/2017	5	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the United States Attorney. Date of Service Upon United States Attorney on 6/6/2017. Answer due for ALL FEDERAL DEFENDANTS by 7/6/2017. (Atwood, Amy) (Entered: 06/29/2017)
06/29/2017	6	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on United

		States Attorney General. Date of Service Upon United States Attorney General 6/2/2017. (Atwood, Amy) (Entered: 06/29/2017)
06/29/2017	7	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. U.S. DEPARTMENT OF ENERGY served on 6/1/2017; U.S. DEPARTMENT OF STATE served on 6/19/2017; U.S. DEPARTMENT OF THE INTERIOR served on 6/2/2017; U.S. ENVIRONMENTAL PROTECTION AGENCY served on 6/1/2017 (Atwood, Amy) (Entered: 06/29/2017)
06/29/2017	8	NOTICE of Appearance by Joshua M. Kolsky on behalf of U.S. DEPARTMENT OF ENERGY, U.S. DEPARTMENT OF STATE, U.S. DEPARTMENT OF THE INTERIOR, U.S. ENVIRONMENTAL PROTECTION AGENCY (Kolsky, Joshua) (Entered: 06/29/2017)
06/29/2017	9	Unopposed MOTION for Extension of Time to File Answer re 1 Complaint, by U.S. DEPARTMENT OF ENERGY, U.S. DEPARTMENT OF STATE, U.S. DEPARTMENT OF THE INTERIOR, U.S. ENVIRONMENTAL PROTECTION AGENCY (Attachments: # 1 Text of Proposed Order)(Kolsky, Joshua) (Entered: 06/29/2017)
07/03/2017		MINUTE ORDER granting, for good cause shown, 9 Unopposed Motion for Extension of Time to Answer. Defendants shall answer or otherwise respond to the complaint on or before 7/27/2017. Signed by Judge Ketanji Brown Jackson on 07/03/2017. (lckbj1) (Entered: 07/03/2017)
07/27/2017	10	ANSWER to Complaint by U.S. DEPARTMENT OF ENERGY, U.S. DEPARTMENT OF STATE, U.S. DEPARTMENT OF THE INTERIOR, U.S. ENVIRONMENTAL PROTECTION AGENCY.(Kolsky, Joshua) (Entered: 07/27/2017)
07/28/2017		MINUTE ORDER. Before the Court in this FOIA case are a complaint and an answer. It is hereby ORDERED that the parties shall promptly confer and file a joint proposed schedule for briefing or disclosure, on or before 8/11/2017. Signed by Judge Ketanji Brown Jackson on 07/28/2017. (lckbj1) (Entered: 07/28/2017)
08/11/2017	11	Joint PROPOSED BRIEFING SCHEDULE <i>Joint Proposed Schedule</i> by CENTER FOR BIOLOGICAL DIVERSITY. (Atwood, Amy) Modified event title on 8/14/2017 (znmw). (Entered: 08/11/2017)
08/11/2017	12	NOTICE of Appearance by Margaret E. Townsend on behalf of CENTER FOR BIOLOGICAL DIVERSITY (Townsend, Margaret) (Entered: 08/11/2017)
08/14/2017		MINUTE ORDER. Based on the representations in the parties' 11 Joint Status Report, it is hereby ORDERED that Plaintiff shall file any amended complaint on or before 8/17/2017, and shall promptly serve any such amended complaint. Signed by Judge Ketanji Brown Jackson on 08/14/2017. (lckbj1) (Entered: 08/14/2017)
08/14/2017		Set/Reset Deadlines: Amended Complaint due by 8/17/2017. (hs) (Entered: 08/14/2017)
08/16/2017	13	AMENDED COMPLAINT <i>First Amended Complaint</i> against U.S. DEPARTMENT OF ENERGY, U.S. DEPARTMENT OF STATE, U.S. DEPARTMENT OF THE INTERIOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, U.S. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION filed by CENTER FOR BIOLOGICAL DIVERSITY. (Attachments: # 1 Redline Comparison to Complaint)(Townsend, Margaret) Modified to add defendant on 8/17/2017 (znmw). (Entered: 08/16/2017)
08/17/2017	14	REQUEST FOR SUMMONS TO ISSUE <i>for the U.S. Department of Commerce, U.S. National Oceanic and Atmospheric Administration, U.S. Attorney, and U.S. Attorney General</i> re 13 Amended Complaint, filed by CENTER FOR BIOLOGICAL DIVERSITY. Related document: 13 Amended Complaint, filed by CENTER FOR BIOLOGICAL DIVERSITY.(Townsend, Margaret) (Entered: 08/17/2017)

08/18/2017	15	SUMMONS (4) Issued Electronically as to U.S. DEPARTMENT OF COMMERCE, U.S. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. Attorney and U.S. Attorney General (znmw) (Entered: 08/18/2017)
08/29/2017	16	Consent MOTION for Extension of Time to File Answer re 13 Amended Complaint, by U.S. DEPARTMENT OF ENERGY, U.S. DEPARTMENT OF STATE, U.S. DEPARTMENT OF THE INTERIOR, U.S. ENVIRONMENTAL PROTECTION AGENCY (Attachments: # 1 Text of Proposed Order)(Kolsky, Joshua) (Entered: 08/29/2017)

PACER Service Center			
Transaction Receipt			
08/30/2017 15:59:28			
PACER Login:	GCNRSWSS:2726730:0	Client Code:	FOIA
Description:	Docket Report	Search Criteria:	1:17-cv-00974-KBJ
Billable Pages:	3	Cost:	0.30



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

May 1, 2017

MEMORANDUM FOR: Maria Williams - NESDIS

FROM: Lola Stith
NOAA FOIA Office

SUBJECT: FOIA Request No. DOC-NOAA-2017-001066

I am forwarding a copy of the attached FOIA request for your immediate attention. Please produce one, or two in the case of withheld documents, set of all documents (retain your originals in accordance with the proper record schedule) that may be responsive to the request and upload into FOIAonline. If processing outside of the FOIAonline system, print a set to send to the FOIA requester. If any documents or parts of documents are withheld, you must keep both the unredacted and redacted versions in FOIAonline with rare exceptions. These documents may include final documents, drafts, notes, informal records, and electronic records. You must search every place that could reasonably be expected to have responsive documents. The search must be documented on the "Document of Search" page (Page 3).

Make sure that you identify any documents or portions of documents that originated with another office, agency or bureau that need to be referred for disclosure determinations.

One set of copies (not original documents) should be produced without additional annotation; on the second set, please identify whether you believe the document, or any portion of it, should be withheld from disclosure because it is not an agency record, outside the scope of the request, privileged, confidential, an invasion of personal privacy, or for any other legitimate reason recognized by FOIA. You must include the FOIA exemption next to any information you identify as protected from disclosure. Please ensure that the information withheld under FOIA is **securely redacted**. The office that originated a document must make disclosure determinations for that document.

The search period is to April 17, 2017. Documents created after this date are not responsive to the request.

Refer to FOIA Exemptions for Tasker Memo (http://www.corporateservices.noaa.gov/~foia/sample_letters/) for list of FOIA exemptions for your use in making disclosure determinations.

We would like to respond in a timely manner, please respond to the requester by **May 17, 2017**.

In accordance with the NAO (http://www.corporateservices.noaa.gov/ames/administrative_orders/chapter_205/205-14.html) Lead Office, please upload the close-out letter and the completed Tasker (this document) into FOIAonline (<https://foiaonline.regulations.gov>) within one day of completion.

Please include in the FOIAonline file documentation of (attached form acceptable):

- 1) Which office(s) originated the documents.
- 2) How the search was conducted (e.g., which data base searched and the search terms). Contact the FOIA Liaison or Office of General Counsel for suggestions and clarification.
- 3) Who in the originating office made the disclosure determination(s).

THIS RESPONSE MUST BE SIGNED BY A SENIOR OFFICIAL IN YOUR OFFICE.

My office closed this request due to non-payment of fees or requester's failure to respond to correspondence (aka administrative close-out).

My office copied for our files and transmitted to the requester all documents in our possession that are responsive and can be released in entirety.

My office copied, noted the exemption, and held all documents in our possession which are responsive and we have found reason to partially withhold.

My office copied, noted the exemption, and held all documents in our possession which are responsive and we have found reason to withhold entirely.

My office referred all documents in our possession which are responsive to the originating office, bureau, or federal agency for disclosure determination(s).

My office conducted a search and the records are available online.

My office conducted a search and did not find any responsive documents.

A foreseeable harm review and analysis was not applicable.

A foreseeable harm review and analysis has been completed for all withheld documents and portions of documents and it has been determined that disclosure of the withheld materials would result in harm to an interest protected by the asserted exemption or that disclosure is prohibited by law. If Foreseeable Harm checklist is not provided in FOIAonline, provide the name of the person who completed the foreseeable harm review and analysis
_____.

Check **all** exemptions that apply:

(b)(4)

(b)(6)

Interim response

WILLIAMS.MARIA
A.STELLA.10424
93429

Digitally signed by
WILLIAMS.MARIA.STELLA.1042493429
DN: c=US, o=U.S. Government,
ou=DoD, ou=PKI, ou=OTHER,
cn=WILLIAMS.MARIA.STELLA.10424934
29
Date: 2017.05.01 12:52:57 -04'00'

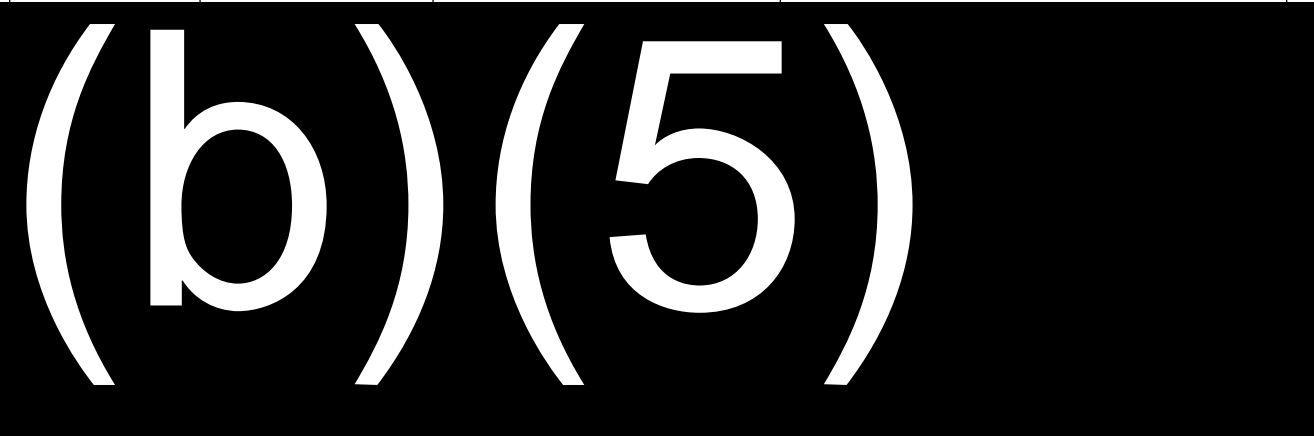
Signature (Senior Official)

Final response

May 1, 2017

Date

Documentation of Search (add rows as needed)

Office where documents originated	Person recommending Disclosure Determination	Database or physical location searched	Search terms for database queries
			

Y / N Discussed search terms with requester

WILLIAMS.MARIA
A.STELLA.10424
93429

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WILLIAMS.MARIA.STELLA.1042493429
DN: c=US, o=U.S. Government,
ou=DoD, ou=PKI, ou=OTHER,
cn=WILLIAMS.MARIA.STELLA.10424934
29
Date: 2017.05.01 12:53:48 -04'00'

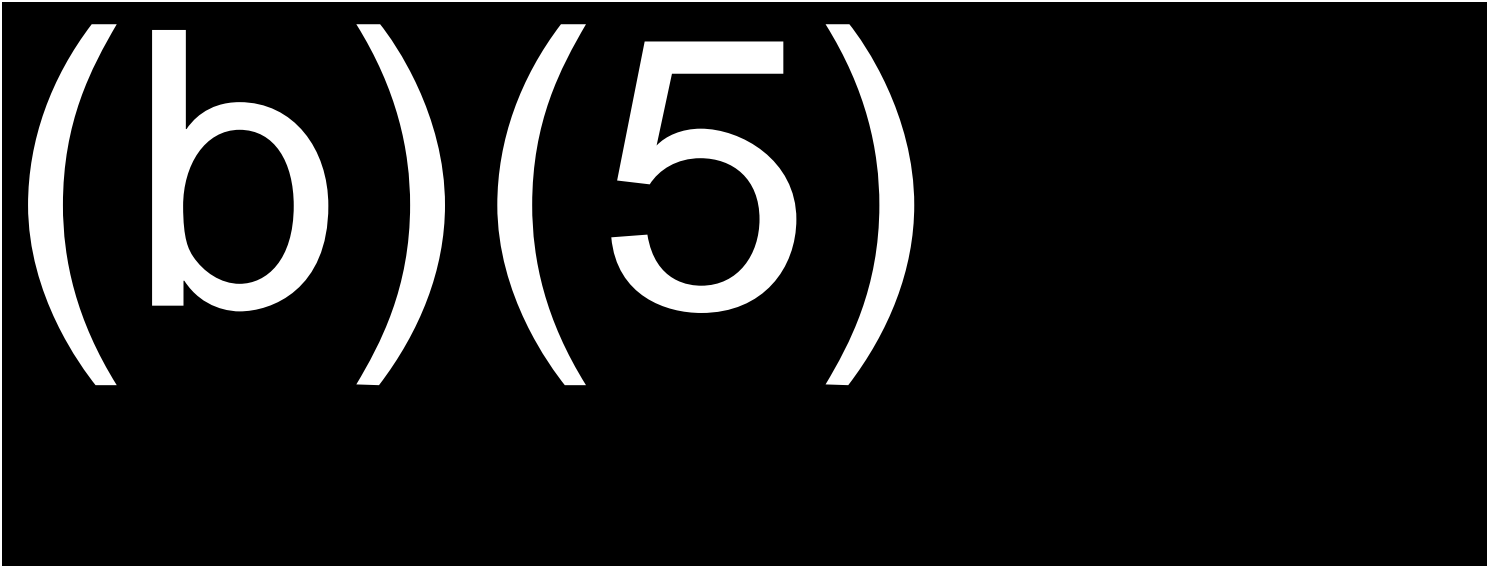
May 1, 2017

Signature (contact person)

Date

Bogomolny, Michael (Federal)

From: Bogomolny, Michael (Federal)
Sent: Wednesday, August 30, 2017 5:12 PM
To: Graff, Mark (Federal)
Cc: Swisher, Robert (Federal); Stith, Lola (Contractor); Williams, Maria (Federal); Hogan, Robert (Federal); Allison-Holman, Roxie (Federal)
Subject: RE: new lawsuit
Attachments: 10.pdf; 11.pdf; 16.pdf; 01-0.pdf



-bogo

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Wednesday, August 30, 2017 4:14 PM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Cc: Swisher, Robert (Federal) <Robert.Swisher@noaa.gov>; Stith, Lola (Contractor) <Lola.M.Stith@noaa.gov>; Williams, Maria (Federal) <Maria.Williams@noaa.gov>; Hogan, Robert (Federal) <Robert.J.Hogan@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: Re: new lawsuit

(copying relevant FOIA folks)--

Hi Bogo,

(b)(5)
[Redacted text block consisting of multiple lines of blacked-out content]

(b)(5)

Let me know anything you need on this--

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)

(b)(6) (C)

Confidentiality Notice: This e-mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.

On Wed, Aug 30, 2017 at 3:56 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Thanks Bogo--

(b)(5)

Let me confirm--

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

Confidentiality Notice: This e-mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.

On Wed, Aug 30, 2017 at 3:44 PM, Bogomolny, Michael (Federal) <MBogomolny@doc.gov> wrote:

Mark,

(b)(5)

[Redacted content]

(b)(5)

[REDACTED] ? I'm happy
with whatever works best for you.

-bogo

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY
378 North Main Avenue
Tucson, AZ 85701,

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW
Washington, D.C. 20240;

U.S. ENVIRONMENTAL PROTECTION
AGENCY
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460;

U.S. DEPARTMENT OF ENERGY
1000 Independence Avenue, SW
Washington, D.C. 20585;

and

U.S. DEPARTMENT OF STATE
2201 C. Street, NW
Washington, D.C. 20037,

Defendants.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Case No.: 1:17-cv-0974

INTRODUCTION

1. The Center for Biological Diversity (“Center”)—an environmental conservation organization that works to protect native wildlife species and their habitats—challenges the failure of the U.S. Department of Interior, U.S. Environmental Protection Agency, U.S. Department of Energy, and U.S. Department of State to provide records concerning the Trump

administration's censorship of these federal departments' and their component agencies' discussion or dissemination about climate change, in violation of the Freedom of Information Act, 5 U.S.C. § 552, *as amended* ("FOIA" or "Act"), or alternatively, the Administrative Procedure Act, 5 U.S.C. §§ 701-06 ("APA").

2. From January through March 2017, news outlets reported that the Trump administration directed numerous federal departments and agencies to remove information from their websites about climate change and/or to cease use of phrases such as "climate change," "emissions reduction," or "Paris agreement" in agency documents. These departments and agencies include the four named defendants in this action.

3. To understand these actions, the Center filed FOIA requests with each of the defendants, seeking directives or communications barring or removing climate change-related words or phrases from formal communications as well as the information, such as webpages about climate change, that has been removed from public view.

4. However, although each defendant acknowledged the Center's request, none have provided any responsive records or stated when they might do so.

5. Defendants are unlawfully withholding the records by failing to search for and provide all responsive records to the Center. The defendants' failure to comply with FOIA by releasing all records related to the censorship of climate change-related words and phrases is contrary to FOIA and undermines FOIA's policy of government transparency.

6. Because prompt access to these records is necessary to effectuate FOIA's purpose, the Center seeks declaratory relief establishing that defendants are in violation of FOIA, or alternatively, the APA. The Center also seeks injunctive relief directing defendants to provide responsive records without any further delay.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under FOIA, the APA, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

8. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district, because a portion of the responsive records may be found in this district.

9. Declaratory relief is appropriate under 28 U.S.C. § 2201.

10. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

PARTIES

11. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit conservation organization with offices throughout the United States. The Center has more than 58,000 members. The Center and its members are harmed by EPA's violations of FOIA, or alternatively the APA, as such violations preclude the Center from gaining a full understanding of the circumstances, rationales, and individuals involved in the Trump administration's censorship of climate change-related information.

12. Defendant U.S DEPARTMENT OF THE INTERIOR ("Interior Department") is an independent agency of the executive branch of the U.S. government. The Interior Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

13. Defendant U.S. ENVIRONMENTAL PROTECTION AGENCY ("EPA") is an independent agency of the executive branch of the U.S. government. EPA is in possession and

control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

14. Defendant U.S. DEPARTMENT OF ENERGY (“Energy Department”) is an independent agency of the executive branch of the U.S. government. The Energy Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

15. Defendant U.S. DEPARTMENT OF STATE (“State Department”) is an independent agency of the executive branch of the U.S. government. The State Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

STATUTORY BACKGROUND

16. FOIA’s basic purpose is government transparency. It establishes the public’s right to access all federal agency records unless such records may be withheld pursuant to one of nine, narrowly construed FOIA exemptions. 5 U.S.C. § 552(b)(1)-(9).

17. FOIA imposes strict and rigorous deadlines on federal agencies when they receive a request for records pursuant to FOIA. Specifically, an agency must determine whether to disclose responsive records and notify the requester of its determination within 20 working days of receiving a FOIA request, and it must make records “promptly” available unless it can establish that certain unusual circumstances are present and/or that it may lawfully withhold records, or portions thereof, from disclosure. *Id.* § 552(a)(3)(A), (a)(6). Also within 20 working days, the agency must inform the requester that it has a right to appeal the agency’s determination. *Id.* § 552(a)(6)(A)(i).

18. FOIA places the burden on the agency to prove that it may withhold responsive records from a requester. *Id.* § 552(a)(4)(B).

19. Congress has specified limited circumstances in which federal agencies may obtain more time to make the determination that is required by 5 U.S.C. § 552(a)(6)(A)(i).

20. First, an agency may toll the 20-working-day deadline to seek additional information or clarification from a requester, but that tolling period ends when the agency receives such information or clarification. *Id.* § 552(a)(6)(A)(ii).

21. Second, an agency may extend the 20-working-day deadline for an additional 10 working days by giving a written notice to the requester that sets forth “unusual circumstances” to justify a deadline extension which also requires that it provide the date by which the agency expects to make the determination. *Id.* § 552(a)(6)(B)(i). However, to invoke such “unusual circumstances,” the agency must provide the requester with “an opportunity to limit the scope of the request so that it may be processed within [20 working days] or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.” *Id.* § 552(a)(6)(B)(ii). In addition, when asserting unusual circumstances, the agency “shall make available its FOIA Public Liaison” to “assist in the resolution of any disputes between the requester and the agency.” *Id.*

22. FOIA requires each agency to make reasonable efforts to search for records in a manner that is reasonably calculated to locate all records that are responsive to the FOIA request. *Id.* § 552(a)(3)(C)-(D).

23. FOIA requires federal agencies to expeditiously disclose requested records, *see id.* § 552, and mandates a policy of broad disclosure of government records. Any inquiry under FOIA brings with it a strong presumption in favor of disclosure.

24. Congress recognized that in certain, limited instances, records may be withheld as exempt from FOIA's broad disclosure mandate, and thus created nine categories of exemptions. *Id.* § 552(b). These exemptions, however, are narrowly construed in light of FOIA's dominant objective of disclosure, not secrecy.

25. The U.S. district courts have jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." *Id.* § 552(a)(4)(B).

26. Alternatively, an agency's response to a FOIA request and/or a FOIA appeal is subject to judicial review under the APA, which confers a right of judicial review on any person who is adversely affected by agency action, 5 U.S.C. § 702, and authorizes district courts to compel agency action that is unlawfully withheld or unreasonably delayed. *Id.* § 706(1). District courts must set aside any agency action that is found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Id.* § 706(2)(A).

FACTUAL BACKGROUND

Interior Department FOIA Request (OS-2017-00384)

27. On March 30, 2017, the Center submitted a FOIA request to the Interior Department, requesting "all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to 'climate change,' 'global warming,' 'climate disruption,' 'greenhouse gas emissions,' 'emissions reductions,' and/or 'Paris agreement,' and any related words or phrases."

28. The same day, the Interior Department acknowledged the Center's request and assigned it tracking number OS-2017-00384 ("Interior Department FOIA Request").

29. A determination on the Center's FOIA request to the Interior Department was due by April 27, 2017, which is 20 working days after the date of the Interior Department's acknowledgement of the request.

30. As of the date of the filing of this complaint, which is 18 days past the 20-working-day deadline, the Interior Department has not requested additional time to respond, provided any responsive records, or provided a determination in response to the Center's FOIA request.

EPA FOIA Request (EPA-HQ-2017-005517)

31. On March 30, 2017, the Center submitted a FOIA request to the EPA, requesting "all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to 'climate change,' 'global warming,' 'climate disruption,' 'greenhouse gas emissions,' 'emissions reductions,' and/or 'Paris agreement,' and any related words or phrases."

32. The same day, the EPA acknowledged the Center's request and assigned it tracking number EPA-HQ-2017-005517 ("EPA FOIA Request"). On March 12, 2017, EPA granted a waiver of fees in connection with the request.

33. A determination on the Center's FOIA request to the EPA was due by April 27, 2017, which is 20 working days after the date of the EPA's acknowledgement of the request.

34. After receiving no further communications from EPA regarding this request, by letter dated May 8, 2017, the Center informed EPA that its determination was overdue and offered to assist EPA in making a determination on the Center's EPA FOIA Request. The Center also requested an estimate for when EPA would make a determination on the Center's FOIA request.

35. As of the date of the filing of this complaint, which is 18 days past the 20-working-day deadline, EPA has not responded to the Center's May 8, 2017 letter, requested additional time to respond to the Center's FOIA request, provided any responsive records, made a determination, or provided an estimated date of completion of the Center's FOIA request.

Energy Department FOIA Request (HQ-2017-00806)

36. On March 30, 2017, the Center submitted a FOIA request to the Energy Department, requesting "all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to 'climate change,' 'global warming,' 'climate disruption,' 'greenhouse gas emissions,' 'emissions reductions,' and/or 'Paris agreement,' and any related words or phrases."

37. The next day, on March 31, 2017, the Energy Department acknowledged the Center's request and assigned it tracking number HQ-2017-00806 ("Energy Department FOIA Request").

38. On April 11, 2017, a representative of the Energy Department, Ms. Natalie Anderson, contacted Ms. Margaret E. Townsend of the Center for Biological Diversity by phone and email. Ms. Anderson stated that she wanted to clarify the timeframe for records that are

responsive to the Center's Energy Department FOIA Request. In response, Ms. Townsend informed Ms. Anderson that the Energy Department could search for and provide all responsive records that were generated on or after November 9, 2016.

39. Ms. Anderson also stated that the Energy Department had received many FOIA requests that are similar to the Center's Energy Department FOIA Request, and in an email dated April 11, 2017, suggested that if the Center would agree to limit the department's search to two of its program offices—specifically, the Office of International Affairs (“OIA”) and the Office of Energy Policy and Systems Analysis (“EPSA”)—this “should allow [the Energy Department] to provide a response more quickly.” Accordingly, the Center agreed to limit the department's search to the OIA and EPSA.

40. Also in her April 11, 2017 email, Ms. Anderson asked if the Center would agree to eliminate the phrases “including but not limited to” and “any related words or phrases” from its request, and if the Center would like to include any search terms in addition to “climate change,” “global warming,” “climate disruption,” “greenhouse gas emissions,” “emissions reductions,” and/or “Paris agreement.” In response, Ms. Townsend added the terms “climate” and “fossil fuels” to the search terms to be used by the Energy Department during its search for responsive records from the OIA and EPSA.

41. By email dated April 13, 2017, Ms. Anderson confirmed the scope of the department's search for responsive records, stating that the department would “move forward with processing.”

42. By letter dated April 26, 2017, Energy Department FOIA Officer Alexander C. Morris confirmed the agreement of Ms. Anderson and Ms. Townsend regarding the scope of the

department's search, informed the Center that the request was assigned to OIA and EPSA, and granting the Center's request for a waiver of fees.

43. A determination on the Center's Energy Department FOIA Request was due on May 11, 2017, which is 20 working days after the date of Ms. Anderson's email stating that the department was prepared to "move forward with processing."

44. As of the date of the filing of this complaint, which is eight days past the 20-working-day deadline, the Energy Department has not requested additional time to respond, provided any responsive records, or provided a determination in response to the Center's FOIA request.

State Department FOIA Request

45. On April 3, 2017, the Center submitted a FOIA request to the State Department, requesting "all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to 'climate change,' 'global warming,' 'climate disruption,' 'greenhouse gas emissions,' 'emissions reductions,' and/or 'Paris agreement,' and any related words or phrases."

46. The next day, on April 4, 2017, the State Department acknowledged the Center's request and assigned it tracking number F-2017-08517 ("State Department FOIA Request").

47. By form letter dated April 10, 2017, the Requester Communications Branch of the State Department's Office of Information Programs & Services re-acknowledged receipt of the Center's FOIA request, and it also granted a public interest waiver of fees that are incurred in processing the request.

48. A determination on the Center's FOIA request to the State Department was due by May 2, 2017, which is 20 working days after the date of the State Department's acknowledgement of the request.

49. As of the date of the filing of this complaint, which is 15 days past the 20-working-day deadline, the State Department has not requested additional time to respond, provided any responsive records, or provided a determination in response to the Center's FOIA request.

All Requests

50. None of FOIA's nine exemptions to the statute's disclosure mandate apply to the records that are responsive to any of the Center's FOIA requests. *Id.* § 552(b).

51. The Center has been required to expend resources to prosecute this action.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF **VIOLATION OF THE FREEDOM OF INFORMATION ACT** **Failure to Comply with FOIA's Mandatory Determination Deadline**

COUNT ONE: The Interior Department Missed FOIA's Mandatory Determination Deadline for the Center's Interior Department FOIA Request Number OS-2017-00384

52. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

53. The Interior Department has violated FOIA by refusing to disclose records that are responsive to the Center's Interior Department FOIA Request Number OS-2017-00384.

54. The Center has a statutory right to a final determination from the Interior Department on FOIA Request Number OS-2017-00384 in a manner that complies with FOIA.

The Interior Department has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

55. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Interior Department in the foreseeable future.

56. The Center's organizational activities will be adversely affected if the Interior Department continues to violate FOIA's disclosure provisions as it has in this case.

57. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, the Interior Department will continue to violate Plaintiff's rights to receive public records under FOIA.

COUNT TWO: EPA Missed FOIA's Mandatory Determination Deadline for the Center's EPA FOIA Request Number EPA-HQ-2017-005517

58. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

59. EPA has violated FOIA by refusing to disclose records that are responsive to the Center's EPA FOIA Request Number EPA-HQ-2017-005517.

60. The Center has a statutory right to a final determination from EPA on its EPA FOIA Request Number EPA-HQ-2017-005517 in a manner that complies with FOIA. EPA has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

61. The Center's organizational activities will be adversely affected if EPA is allowed to continue violating FOIA's decision deadlines as it has in this case.

62. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Missed FOIA's Mandatory Determination Deadline for the Center's Energy Department FOIA Request Number EPA-HQ-2017-005517

63. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

64. The Energy Department has violated FOIA by refusing to disclose records that are responsive to the Center's Energy Department FOIA Request Number HQ-2017-00806.

65. The Center has a statutory right to a final determination from the Energy Department on its Energy Department FOIA Request Number HQ-2017-00806 in a manner that complies with FOIA. The Energy Department has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

66. The Center's organizational activities will be adversely affected if the Energy Department is allowed to continue violating FOIA's decision deadlines as it has in this case.

67. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Missed FOIA's Mandatory Determination Deadline for the Center's State Department FOIA Request Number F-2017-08517

68. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

69. The State Department has violated FOIA by refusing to disclose records that are responsive to the Center's State Department FOIA Request Number F-2017-08517.

70. The Center has a statutory right to a final determination from the State Department on its State Department FOIA Request Number F-2017-08517 in a manner that

complies with FOIA. The State Department has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

71. The Center's organizational activities will be adversely affected if the State Department is allowed to continue violating FOIA's decision deadlines as it has in this case.

72. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

SECOND CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Disclose All Responsive Records to the Center

COUNT ONE: The Interior Department Has Unlawfully Withheld Records Responsive to Interior Department FOIA Request Number OS-2017-00384

73. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

74. The Center has a statutory right to the records it seeks, and there is no legal basis for the Interior Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

75. The Interior Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's Interior Department FOIA Request Number OS-2017-00384.

76. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the Interior Department in the foreseeable future.

77. The Center's organizational activities will be adversely affected if the Interior Department continues to violate FOIA's disclosure provisions as it has in this case.

78. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Interior Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT TWO: EPA Has Unlawfully Withheld Records Responsive to EPA FOIA Request Number EPA-HQ-2017-005517

79. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

80. The Center has a statutory right to the records it seeks, and there is no legal basis for EPA to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

81. EPA has violated the Center's rights in this regard by withholding records that are responsive to the Center's EPA FOIA Request Number EPA-HQ-2017-005517.

82. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to EPA in the foreseeable future.

83. The Center's organizational activities will be adversely affected if EPA continues to violate FOIA's disclosure provisions as it has in this case.

84. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Has Unlawfully Withheld Records Responsive to Energy Department FOIA Request Number HQ-2017-00806

85. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

86. The Center has a statutory right to the records it seeks, and there is no legal basis for the Energy Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

87. The Energy Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's Energy Department FOIA Request Number HQ-2017-00806.

88. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the Energy Department in the foreseeable future.

89. The Center's organizational activities will be adversely affected if the Energy Department continues to violate FOIA's disclosure provisions as it has in this case.

90. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Has Unlawfully Withheld Records Responsive to The State Department FOIA Request Number F-2017-08517

91. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

92. The Center has a statutory right to the records it seeks, and there is no legal basis for the State Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

93. The State Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's State Department FOIA Request Number F-2017-08517.

94. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the State Department in the foreseeable future.

95. The Center's organizational activities will be adversely affected if the State Department continues to violate FOIA's disclosure provisions as it has in this case.

96. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

THIRD CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Conduct an Adequate Search for Responsive Records

COUNT ONE: The Interior Department Has Failed to Conduct an Adequate Search for All Records Responsive to Interior Department FOIA Request Number OS-2017-00384

97. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

98. The Center has a statutory right to have the Interior Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Interior Department violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to Interior Department FOIA Request Number OS-2017-00384.

99. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Interior Department in the foreseeable future.

100. The Center's organizational activities will be adversely affected if the Interior Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

101. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Interior Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT TWO: EPA Has Failed to Conduct an Adequate Search for All Records Responsive to EPA FOIA Request Number EPA-HQ-2017-005517

102. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

103. The Center has a statutory right to have EPA process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). EPA violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517.

104. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

105. The Center's organizational activities will be adversely affected if EPA continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

106. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Has Failed to Conduct an Adequate Search for All Records Responsive to Energy Department FOIA Request Number HQ-2017-00806

107. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

108. The Center has a statutory right to have the Energy Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Energy Department violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to Energy Department FOIA Request Number HQ-2017-00806.

109. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Energy Department in the foreseeable future.

110. The Center's organizational activities will be adversely affected if the Energy Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

111. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Has Failed to Conduct an Adequate Search for All Records Responsive to State Department FOIA Request Number F-2017-08517

112. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

113. The Center has a statutory right to have the State Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The State Department violated the Center's rights in this regard when it unlawfully failed to undertake a search that is

reasonably calculated to locate all records that are responsive to State Department FOIA Request Number F-2017-08517.

114. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the State Department in the foreseeable future.

115. The Center's organizational activities will be adversely affected if the State Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

116. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

FOURTH CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records

COUNT ONE: The Interior Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

117. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

118. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

119. The Interior Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to Interior Department FOIA Request Number OS-2017-00384.

120. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Interior Department in the foreseeable future.

121. The Center's organizational activities will be adversely affected if the Interior Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

122. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Interior Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT TWO: EPA Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

123. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

124. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

125. EPA violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517.

126. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

127. The Center's organizational activities will be adversely affected if EPA is allowed to continue violating FOIA's disclosure provisions as it has in this case.

128. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

129. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

130. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

131. The Energy Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to Energy Department FOIA Request Number HQ-2017-00806.

132. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Energy Department in the foreseeable future.

133. The Center's organizational activities will be adversely affected if the Energy Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

134. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

135. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

136. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

137. The State Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to State Department FOIA Request Number EPA-HQ-2017-005517.

138. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the State Department in the foreseeable future.

139. The Center's organizational activities will be adversely affected if the State Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

140. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

FIFTH CLAIM FOR RELIEF
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
(In the Alternative to the First through Fourth Claims)
Unlawfully Withheld or Unreasonably Delayed Actions that FOIA Requires

COUNT ONE: The Interior Department Withheld or Unreasonably Delayed Actions that FOIA Requires

141. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

142. The Interior Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (2) make a timely and lawful determination on Interior Department FOIA Request Number OS-2017-00384; (3) conduct a search that is reasonably calculated to locate all responsive records to Interior Department FOIA Request Number OS-2017-00384; (4) provide the Center with records

that are responsive to Interior Department FOIA Request Number OS-2017-00384 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to Interior Department FOIA Request Number OS-2017-00384 in the event that records may be subject to an exemption. The Interior Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

143. Alternatively, the Interior Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to to Interior Department FOIA Request Number OS-2017-00384; (2) make a timely and lawful determination on to Interior Department FOIA Request Number OS-2017-00384; (3) conduct a search that is reasonably calculated to locate all records that are responsive to to Interior Department FOIA Request Number OS-2017-00384; (4) provide the Center with records that are responsive to OS-2017-00384 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Interior Department FOIA Request Number OS-2017-00384 which contain any material that may be lawfully withheld under an exemption(s). The Interior Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

144. As alleged above, the Interior Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

145. The Center has suffered a legal wrong as a result of the Interior Department's failure to comply with the mandates of FOIA. As alleged above, the Interior Department

violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

146. The Center has no other adequate remedy at law to redress the violations noted above.

147. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT TWO: EPA Withheld or Unreasonably Delayed Actions that FOIA Requires

148. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

149. EPA unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (2) make a timely and lawful determination on EPA FOIA Request Number EPA-HQ-2017-005517; (3) conduct a search that is reasonably calculated to locate all responsive records to EPA FOIA Request Number EPA-HQ-2017-005517; (4) provide the Center with records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to EPA FOIA Request Number EPA-HQ-2017-005517 in the event that records may be subject to an exemption. EPA's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

150. Alternatively, EPA unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (2) make a timely

and lawful determination on EPA FOIA Request Number EPA-HQ-2017-005517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (4) provide the Center with records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to EPA FOIA Request Number EPA-HQ-2017-005517 which contain any material that may be lawfully withheld under an exemption(s). EPA's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

151. As alleged above, EPA's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

152. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, EPA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

153. The Center has no other adequate remedy at law to redress the violations noted above.

154. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT THREE: The Energy Department Withheld or Unreasonably Delayed Actions that FOIA Requires

155. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

156. The Energy Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose

records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (2) make a timely and lawful determination on Energy Department FOIA Request Number HQ-2017-00806; (3) conduct a search that is reasonably calculated to locate all responsive records to Energy Department FOIA Request Number HQ-2017-00806; (4) provide the Center with records that are responsive to Energy Department FOIA Request Number HQ-2017-00806 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to Energy Department FOIA Request Number HQ-2017-00806 in the event that records may be subject to an exemption. The Energy Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

157. Alternatively, the Energy Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (2) make a timely and lawful determination on Energy Department FOIA Request Number HQ-2017-00806; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (4) provide the Center with records that are responsive to Energy Department FOIA Request Number HQ-2017-00806 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Energy Department FOIA Request Number HQ-2017-00806 which contain any material that may be lawfully withheld under an exemption(s). The Energy Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

158. As alleged above, the Energy Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

159. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, the Energy Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

160. The Center has no other adequate remedy at law to redress the violations noted above.

161. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FOUR: The State Department Withheld or Unreasonably Delayed Actions that FOIA Requires

162. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

163. The State Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to State Department FOIA Request Number F-2017-08517; (2) make a timely and lawful determination on State Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all responsive records to State Department FOIA Request Number F-2017-08517; (4) provide the Center with records that are responsive to State Department FOIA Request Number F-2017-08517 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to State Department FOIA Request Number F-2017-08517 in the event that records may be subject to an exemption. The State

Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

164. Alternatively, the State Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to F-2017-085177; (2) make a timely and lawful determination on State Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to State Department FOIA Request Number F-2017-08517; (4) provide the Center with records that are responsive to State Department FOIA Request Number F-2017-08517 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to State Department FOIA Request Number F-2017-08517 which contain any material that may be lawfully withheld under an exemption(s). The State Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

165. As alleged above, the State Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

166. The Center has suffered a legal wrong as a result of the State Department's failure to comply with the mandates of FOIA. As alleged above, the State Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

167. The Center has no other adequate remedy at law to redress the violations noted above.

168. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

SIXTH CLAIM FOR RELIEF
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
(In the Alternative to the First through Eighth Claims)
Violations of FOIA's Requirements Are Arbitrary, Capricious,
an Abuse of Discretion, or Otherwise Not in Accordance with Law

COUNT ONE: The Interior Department's Violations of FOIA are Arbitrary, Capricious,
an Abuse of Discretion, or Otherwise Not in Accordance with Law

169. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

170. The Interior Department violated FOIA's statutory mandates due to its failure and refusal because it failed to (1) search for and disclose records that are responsive to OS-2017-00384; (2) make a timely and lawful determination on OS-2017-00384; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (4) provide the Center with records that are responsive to Interior Department FOIA Request Number OS-2017-00384 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Interior Department FOIA Request Number OS-2017-00384 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the Interior Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

171. As alleged above, the Interior Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

172. The Center has suffered a legal wrong as a result of the Interior Department's failure to comply with the mandates of FOIA. As alleged above, the Interior Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

173. The Center has no other adequate remedy at law to redress the violations noted above.

174. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT TWO: EPA's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

175. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

176. EPA violated FOIA's statutory mandates due to its failure and refusal because it failed to (1) search for and disclose records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (2) make a timely and lawful determination on EPA FOIA Request Number EPA-HQ-2017-005517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (4) provide the Center with records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to EPA FOIA Request Number EPA-HQ-2017-005517 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, EPA's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

177. As alleged above, EPA's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

178. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, EPA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

179. The Center has no other adequate remedy at law to redress the violations noted above.

180. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT THREE: The Energy Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

181. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

182. The Energy Department violated FOIA's statutory mandates due to its failure and refusal because it failed to (1) search for and disclose records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (2) make a timely and lawful determination on Energy Department FOIA Request Number HQ-2017-00806; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Energy Department FOIA Request Number HQ-2017-00806s; (4) provide the Center with records that are responsive to Energy Department FOIA Request Number HQ-2017-00806 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Energy Department FOIA Request Number HQ-2017-00806 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates,

the Energy Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

183. As alleged above, the Energy Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

184. The Center has suffered a legal wrong as a result of the Energy Department's failure to comply with the mandates of FOIA. As alleged above, the Energy Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

185. The Center has no other adequate remedy at law to redress the violations noted above.

186. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FOUR: The State Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

187. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

188. The State Department violated FOIA's statutory mandates due to its failure and refusal because it failed to (1) search for and disclose records that are responsive to State Department FOIA Request Number F-2017-08517; (2) make a timely and lawful determination on State Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to State Department FOIA Request Number F-2017-08517; (4) provide the Center with records that are responsive to State Department FOIA Request Number F-2017-08517 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with

reasonably segregable portions of records responsive to State Department FOIA Request Number F-2017-08517 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the State Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

189. As alleged above, the State Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

190. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, the State Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

191. The Center has no other adequate remedy at law to redress the violations noted above.

192. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Order Defendants to conduct searches that are reasonably calculated to locate all records responsive to Plaintiff's FOIA Requests, numbers OS-2017-00384, EPA-HQ-2017-005517, HQ-2017-00806, and F-2017-08517, with the cut-off date for such searches being the date the searches are conducted, and to provide Plaintiff, by a date certain, with all responsive records and reasonably segregable portions of lawfully exempt records sought in this action.

2. Declare that Defendants' failures to timely make determinations on Plaintiff's FOIA Requests are unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(i), or in the alternative, are an agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

3. Declare that Defendants' failures to properly apply FOIA exemptions, 5 U.S.C. § 552(b), are unlawful under FOIA, or in the alternative, are an agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

4. Declare that Defendants' failures to undertake a search for and disclose to Plaintiff all records that are responsive to Plaintiff's FOIA Requests, as alleged above, are unlawful under FOIA, U.S.C. § 552(a)(6)(A)(i), or in the alternative, are an agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

5. Declare that Defendants' failures to provide Plaintiff with reasonably segregable portions of records which may be lawfully subject to a FOIA exemption, as alleged above, are unlawful under FOIA, U.S.C. § 552(a)(7)(b), or in the alternative, are agency actions that have been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

6. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.

7. Grant such other and further relief as the Court may deem just and proper.

DATED: May 23, 2017

Respectfully submitted,

/s/ Amy R. Atwood

Amy R. Atwood (D.C. Bar No. 470258)

Center for Biological Diversity

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Attorney for Plaintiff

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:17-cv-0974 (KBJ)
)	
UNITED STATES DEPARTMENT OF THE)	
INTERIOR, <i>et al.</i>)	
)	
Defendants.)	
_____)	

ANSWER

Defendants United States Department of the Interior, United States Environmental Protection Agency (“EPA”), United States Department of Energy (“DOE”), and United States Department of State (“State”), by and through undersigned counsel, hereby answer the Complaint of Plaintiff Center for Biological Diversity as follows:

1. This paragraph contains Plaintiff’s characterization of its action, to which no response is required.
2. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph.
3. Defendants admit that Plaintiff submitted Freedom of Information Act requests to each of the Defendants. Defendants respectfully refer the court to the requests as the best evidence of their contents.
4. Admit.
5. This paragraph contains conclusions of law to which no response is required. To the extent that a response is deemed required, Defendants deny the allegations.

6. This paragraph contains a characterization of the relief sought in this action, to which no response is required. To the extent that a response is deemed required, Defendants deny that Plaintiff is entitled to the relief sought, or to any other relief, in this case.

JURISDICTION AND VENUE

7. This paragraph contains Plaintiff's legal conclusions regarding jurisdiction, to which no response is required. To the extent that a response is deemed required, Defendants admit that this Court has jurisdiction.

8. This paragraph contains Plaintiff's legal conclusions regarding venue, to which no response is required. To the extent that a response is deemed required, Defendants admit that venue may be found in this District.

9. This paragraph contains Plaintiff's legal conclusions concerning this Court's authority to grant declaratory relief, to which no response is required. To the extent that a response is deemed required, deny.

10. This paragraph contains Plaintiff's legal conclusions concerning this Court's authority to grant injunctive relief, to which no response is required. To the extent that a response is deemed required, deny.

PARTIES

11. Admit the first sentence. Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the claims.

12. Admit that Interior Department is a federal agency within the U.S. Government and is subject to 5 U.S.C. § 552(f). Interior Department lacks knowledge or information sufficient to admit or deny the allegations in the second sentence.

13. Admit that EPA is a federal agency within the U.S. Government and is subject to 5 U.S.C. § 552(f). EPA lacks knowledge or information sufficient to admit or deny the allegations in the second sentence.

14. Admit that DOE is a federal agency within the U.S. Government and is subject to 5 U.S.C. § 552(f). DOE lacks knowledge or information sufficient to admit or deny the allegations in the second sentence.

15. Admit that State is a federal agency within the U.S. Government and is subject to 5 U.S.C. § 552(f). State lacks knowledge or information sufficient to admit or deny the allegations in the second sentence.

STATUTORY BACKGROUND

16. This paragraph characterizes the purpose of FOIA and makes legal conclusions concerning the availability of government records under the FOIA, to which no response is required.

17. This paragraph contains Plaintiff's characterization of the requirements of FOIA, to which no response is required.

18. This paragraph contains Plaintiff's characterization of the requirements of FOIA, to which no response is required.

19. This paragraph contains Plaintiff's characterization of the requirements of FOIA, to which no response is required.

20. This paragraph contains Plaintiff's characterization of the requirements of FOIA, to which no response is required.

21. This paragraph contains Plaintiff's characterization of the requirements of FOIA, to which no response is required.

22. This paragraph contains Plaintiff's characterization of the requirements of FOIA, to which no response is required.

23. This paragraph contains Plaintiff's characterization of the requirements of FOIA, to which no response is required.

24. This paragraph contains Plaintiff's characterization of the requirements of FOIA, to which no response is required.

25. This paragraph contains Plaintiff's legal conclusions concerning this Court's authority to grant injunctive relief, to which no response is required.

26. This paragraph contains conclusions of law, to which no response is required.

FACTUAL BACKGROUND

Interior Department FOIA Request (OS-2017-00384)

27. Admit that the quoted text is contained in Plaintiff's FOIA request and admit that it received the request on March 30, 2017.

28. Admit.

29. This paragraph contains conclusions of law, to which no response is required. To the extent a response is required, Defendant Interior Department denies that a determination was due on April 27, 2017, avers that it took a 10-day working extension, and further avers that Plaintiff was notified of the 10-day extension in the acknowledgement letter referenced in Paragraph 28.

30. This paragraph contains conclusions of law, to which no response is required. To the extent a response is deemed necessary, Defendant Interior Department denies that it has not requested additional time to respond, but otherwise admits the allegations in this paragraph.

EPA FOIA Request (EPA-HQ-2017-005517)

31. Admit that Plaintiff's FOIA request was submitted on March 30, 2017, and that it contains the text quoted in the complaint.

32. Admit the first sentence. Admit EPA granted Plaintiff's fee waiver request, but the date of the action was April 12, 2017.

33. This paragraph contains conclusions of law, to which no response is required.

34. Admit that Plaintiff sent a letter to EPA on May 8, 2017. Defendants respectfully direct the Court to the letter for a full and accurate assessment of its contents.

35. This paragraph contains conclusions of law, to which no response is required. To the extent a response is deemed necessary, Defendant EPA admits that it has not responded to the May 8, 2017 letter.

Energy Department FOIA Request (HQ-2017-00806)

36. Defendant DOE admits that it received a FOIA request from Plaintiff on March 30, 2017, and that it contains the text quoted in the complaint.

37. Admit, with the clarification that the controlled number for the request is HQ-2017-008060F.

38. Admit.

39. Admit.

40. Admit.

41. Admit.

42. Defendants admit only that DOE sent an interim response to Plaintiff on April 26, 2017, and respectfully refers the Court to that document as the best evidence of its contents.

43. This paragraph contains conclusions of law, to which no response is required.

44. This paragraph contains conclusions of law, to which no response is required. To the extent a response is deemed necessary, Defendants admit that as of the date of the filing of Plaintiff's Complaint, DOE has not provided Plaintiff with a determination on Plaintiff's request.

State Department FOIA Request

45. Admit that State received a FOIA request on April 4, 2017, and that it contains the text quoted in the complaint.

46. Deny that State "acknowledged" the request and assigned it a tracking number on April 4, 2017, but admit that an automatic confirmation of the submission of Plaintiff's FOIA request was generated on that date. Admit that State later assigned the tracking number F-2017-08517 to Plaintiff's request.

47. Admit that State acknowledged the FOIA request and granted a fee waiver by letter on April 10, 2017.

48. This paragraph contains conclusions of law, to which no response is required.

49. This paragraph contains conclusions of law, to which no response is required. To the extent a response is deemed necessary, Defendant State admits that it has not responded to the request.

All Requests

50. This paragraph contains conclusions of law, to which no response is required. To the extent a response may be deemed required, deny.

51. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT

Failure to Comply with FOIA's Mandatory Determination Deadline

COUNT ONE: The Interior Department Missed FOIA's Mandatory Determination Deadline for the Center's Interior Department FOIA Request Number OS-2017-00384

52. Defendants incorporate herein their prior answers to the preceding paragraphs.

53. This paragraph contains conclusions of law, to which no response is required.

54. This paragraph contains conclusions of law, to which no response is required.

55. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

56. Deny.

57. Deny.

COUNT TWO: EPA Missed FOIA's Mandatory Determination Deadline for the Center's EPA FOIA Request Number EPA-HQ-2017-005517

58. Defendants incorporate herein their answers to the preceding paragraphs.

59. This paragraph contains conclusions of law, to which no response is required.

60. This paragraph contains conclusions of law, to which no response is required.

61. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

62. Deny.

COUNT THREE: The Energy Department Missed FOIA's Mandatory Determination Deadline for the Center's Energy Department FOIA Request Number HQ-2017-00806

63. Defendants incorporate herein their answers to the preceding paragraphs.

64. This paragraph contains conclusions of law, to which no response is required.

65. This paragraph contains conclusions of law, to which no response is required.

66. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

67. Deny.

COUNT FOUR: The State Department Missed FOIA's Mandatory Determination Deadline for the Center's State Department FOIA Request Number F-2017-08517

68. Defendants incorporate herein their answers to the preceding paragraphs.

69. This paragraph contains conclusions of law, to which no response is required.

70. This paragraph contains conclusions of law, to which no response is required.

71. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph.

72. Deny.

SECOND CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Disclose All Responsive Records to the Center

COUNT ONE: The Interior Department Has Unlawfully Withheld Record Responsive to Interior Department FOIA Request Number OS-2017-00384

73. Defendants incorporate herein their answers to the preceding paragraphs.

74. This paragraph contains conclusions of law, to which no response is required.

75. This paragraph contains conclusions of law, to which no response is required.

76. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

77. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

78. Deny.

COUNT TWO: EPA Has Unlawfully Withheld Records Responsive to EPA FOIA Request Number EPA-HQ-2017-005517

79. Defendants incorporate herein their answers to the preceding paragraphs.

80. This paragraph contains conclusions of law, to which no response is required.

81. This paragraph contains conclusions of law, to which no response is required.

82. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

83. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

84. Deny.

COUNT THREE: The Energy Department Has Unlawfully Withheld Records Responsive to the Energy Department FOIA Request Number HQ-2017-00806

85. Defendants incorporate herein their answers to the preceding paragraphs.

86. This paragraph contains conclusions of law, to which no response is required.

87. This paragraph contains conclusions of law, to which no response is required.

88. Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in the paragraph and therefore deny the allegations.

89. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

90. Deny.

COUNT FOUR: The State Department Has Unlawfully Withheld Records Responsive to State Department FOIA Request Number F-2017-08517

91. Defendants incorporate herein their answers to the preceding paragraphs.

92. This paragraph contains conclusions of law, to which no response is required.

93. This paragraph contains conclusions of law, to which no response is required.

94. Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in the paragraph and therefore deny the allegations.

95. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

96. Deny.

THIRD CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Conduct an Adequate Search for Responsive Records

COUNT ONE: The Interior Department Has Failed to Conduct an Adequate Search for All Records Responsive to Interior Department FOIA Request Number OS-2017-00384

97. Defendants incorporate herein their answers to the preceding paragraphs

98. This paragraph contains conclusions of law, to which no response is required.

99. Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

100. Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

101. Deny.

COUNT TWO: EPA Has Failed to Conduct an Adequate Search for All Records Responsive to EPA FOIA Request Number EPA-HQ-2017-005517

102. Defendants incorporate herein their answers to the preceding paragraphs.

103. This paragraph contains conclusions of law, to which no response is required.

104. Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

105. Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

106. Deny.

COUNT THREE: The Energy Department Has Failed to Conduct an Adequate Search for all Records Responsive to the Energy Department FOIA Request Number HQ-2017-00806

107. Defendants incorporate herein their answers to the preceding paragraphs.

108. This paragraph contains conclusions of law, to which no response is required.

109. Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in the paragraph and therefore deny the allegations.

110. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

111. Deny.

COUNT FOUR: The State Department Has Failed to Conduct an Adequate Search for All Records Responsive to State Department FOIA Request Number F-2017-08517

112. Defendants incorporate herein their answers to the preceding paragraphs.

113. This paragraph contains conclusions of law, to which no response is required.

114. Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in the paragraph and therefore deny the allegations.

115. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

116. Deny.

FOURTH CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records

COUNT ONE: The Interior Department Failed to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records

117. Defendants incorporate herein their answers to the preceding paragraphs.

118. This paragraph contains conclusions of law, to which no response is required.

119. This paragraph contains conclusions of law, to which no response is required.

120. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

121. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

122. Deny.

COUNT TWO: EPA Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

123. Defendants incorporate herein their answers to the preceding paragraphs.

124. This paragraph contains conclusions of law, to which no response is required.

125. This paragraph contains conclusions of law, to which no response is required.

126. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

127. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the claims.

128. Deny.

COUNT THREE: The Energy Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

129. Defendants incorporate herein their answers to the preceding paragraphs.

130. This paragraph contains conclusions of law, to which no response is required.

131. This paragraph contains conclusions of law, to which no response is required.

132. Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in the paragraph and therefore deny the allegations.

133. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

134. Deny.

COUNT FOUR: The State Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

135. Defendants incorporate herein their answers to the preceding paragraphs.

136. This paragraph contains conclusions of law, to which no response is required.

137. This paragraph contains conclusions of law, to which no response is required.

138. Defendants lack knowledge or information sufficient to admit or deny the truth of the allegations in the paragraph and therefore deny the allegations.

139. Defendants lack knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore deny the allegations.

140. Deny.

FIFTH CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
(In the Alternative to the First and Fourth Claims)
Unlawfully Withheld or Unreasonably Delayed Actions that FOIA Requires

COUNT ONE: The Interior Department Withheld or Unreasonably Delayed Actions that FOIA Requires

141. Defendants incorporate herein their answers to the preceding paragraphs.

142. This paragraph contains conclusions of law, to which no response is required.

143. This paragraph contains conclusions of law, to which no response is required.

144. This paragraph contains conclusions of law, to which no response is required.

Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

145. This paragraph contains conclusions of law, to which no response is required. Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

146. This paragraph contains conclusions of law, to which no response is required.

147. Deny.

COUNT TWO: EPA Withheld or Unreasonably Delayed Actions that FOIA Requires

148. Defendants incorporate herein their answers to the preceding paragraphs.

149. This paragraph contains conclusions of law, to which no response is required.

150. This paragraph contains conclusions of law, to which no response is required.

151. This paragraph contains conclusions of law, to which no response is required.

Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

152. This paragraph contains conclusions of law, to which no response is required.

Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

153. This paragraph contains conclusions of law, to which no response is required.

154. Deny.

COUNT THREE: The Energy Department Withheld or Unreasonably Delayed Actions that FOIA Requires

155. Defendants incorporate herein their answers to the preceding paragraphs.

156. This paragraph contains conclusions of law, to which no response is required.

157. This paragraph contains conclusions of law, to which no response is required.

158. This paragraph contains conclusions of law, to which no response is required.

Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

159. This paragraph contains conclusions of law, to which no response is required. Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations

160. This paragraph contains conclusions of law, to which no response is required.

161. Deny.

COUNT FOUR: The State Department Withheld or Unreasonably Delayed Actions that FOIA Requires

162. Defendants incorporate herein their answers to the preceding paragraphs.

163. This paragraph contains conclusions of law, to which no response is required.

164. This paragraph contains conclusions of law, to which no response is required.

165. This paragraph contains conclusions of law, to which no response is required. Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

166. This paragraph contains conclusions of law, to which no response is required. Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

167. This paragraph contains conclusions of law, to which no response is required.

168. Deny.

SIXTH CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
(In the Alternative to the First through [FIFTH?] Eighth Claims)
Violations of FOIA's Requirements Are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

COUNT ONE: The Interior Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

169. Defendants incorporate herein their answers to the preceding paragraphs.

170. This paragraph contains conclusions of law, to which no response is required.

171. This paragraph contains conclusions of law, to which no response is required.

Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

172. This paragraph contains conclusions of law, to which no response is required.

Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations

173. This paragraph contains conclusions of law, to which no response is required.

174. Deny.

COUNT TWO: EPA's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

175. Defendants incorporate herein their answers to the preceding paragraphs.

176. This paragraph contains conclusions of law, to which no response is required.

177. This paragraph contains conclusions of law, to which no response is required.

Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

178. This paragraph contains conclusions of law, to which no response is required.

Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the claims.

179. This paragraph contains conclusions of law, to which no response is required.

180. Deny.

COUNT THREE: The Energy Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

181. Defendants incorporate herein their answers to the preceding paragraphs.

182. This paragraph contains conclusions of law, to which no response is required.

183. This paragraph contains conclusions of law, to which no response is required.

Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

184. This paragraph contains conclusions of law, to which no response is required.

Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

185. This paragraph contains conclusions of law, to which no response is required.

186. Deny.

COUNT FOUR: The State Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

187. Defendants incorporate herein their answers to the preceding paragraphs.

188. This paragraph contains conclusions of law, to which no response is required.

189. This paragraph contains conclusions of law, to which no response is required.

Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

190. This paragraph contains conclusions of law, to which no response is required.

Defendants lack knowledge or information sufficient to admit or deny the remainder of the paragraph and therefore deny the allegations.

191. This paragraph contains conclusions of law, to which no response is required.

192. Deny.

PRAYER FOR RELIEF

The remaining paragraphs contain plaintiff's requests for relief, not allegations of fact, and therefore no response is required. To the extent a response may be deemed necessary, Defendants deny

the allegations contained in these paragraphs, and further aver that plaintiff is not entitled to the requested relief or to any other relief from Defendants.

Defendants deny any and all allegations in the Complaint not expressly admitted herein.

FIRST AFFIRMATIVE DEFENSE

As to some or all of the claims asserted in this action, Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The information sought by Plaintiff is exempt from release in full under one or more exemptions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's FOIA requests are overbroad and do not reasonably describe the records sought.

FOURTH AFFIRMATIVE DEFENSE

The complaint should be dismissed in whole or in part to the extent Plaintiff failed to exhaust administrative remedies with respect to some or all of the FOIA requests at issue.

Respectfully submitted,

CHANNING D. PHILLIPS, D.C. BAR # 415793
United States Attorney

DANIEL F. VAN HORN, D.C. BAR #924092
Chief, Civil Division

/s/

JOSHUA KOLSKY, D.C. BAR # 993430
Assistant United States Attorney
District of Columbia
555 Fourth St., N.W.
Washington, D.C. 20530
Phone: (202) 252-2541
Fax: (202) 252-2599

joshua.kolsky@usdoj.gov

Counsel for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR, et
al,

Defendants.

Case No.: 1:17-cv-00974 (KBJ)

JOINT PROPOSED SCHEDULE

Pursuant to the Court’s Order dated July 28, 2017, Plaintiff the Center for Biological Diversity (the “Center”) and Defendants U.S. Department of the Interior, U.S. Environmental Protection Agency, U.S. Department of Energy, and U.S. Department of State (collectively “Defendants,” and with the Center, the “Parties”) hereby submit this joint proposal for further proceedings in this matter brought pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA” or “Act”).

Plaintiff initiated this matter on May 24, 2017 in connection with four identical requests for records pursuant to FOIA to each of the Defendants. ECF No. 1. In each request, the Center has sought all “agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’

and/or 'Paris agreement,' and any related words or phrases." Defendants filed an Answer on July 27, 2017. ECF No. 10.

Plaintiff reports that it has submitted similar requests for such records to four additional Federal agencies: the U.S. Department of Health and Human Services ("DHHS"), the U.S. Department of Commerce ("DOC"), the U.S. National Oceanic and Atmospheric Administration ("NOAA"), and the U.S. Department of Agriculture ("USDA"). The Center has been working through the administrative process with these additional agencies to resolve outstanding issues and to obtain the requested records. However, unfortunately the Center has been unable to resolve these issues and is preparing to amend its complaint in this matter to add DOC and NOAA as defendants.

Thus, pursuant to Federal Rule of Civil Procedure 15(a)(2), Plaintiff intends to file a First Amended Complaint on or before August 17, 2017, 21 days after the date of Defendants' Answer. Plaintiff will serve DOC and NOAA with the First Amended Complaint once it is filed.

Additionally, while the Center continues to work to resolve its outstanding issues with DHHS and USDA and their component agencies, it does not anticipate that these issues will be resolved, and that its administrative remedies will be exhausted, by August 17, 2017. Hence, Plaintiff will continue to work with DHHS and USDA through the administrative process, but in the event that it cannot resolve issues with these agencies, Plaintiff may seek to amend its complaint a second time to add DHHS and/or USDA (and, possibly, one or more of their components) as a defendant.

Defendants report that they have not been involved in the administrative proceedings concerning the additional Federal agencies described above and take no position at this time regarding Plaintiff's litigation plans discussed above and, instead, expressly reserve all rights.

In light of the foregoing, the Parties respectfully request the Court enter an order directing them to file a joint proposed schedule for further proceedings within 14 days after all defendants, including any newly added defendants, have filed an Answer to Plaintiff's forthcoming Amended Complaint. At that time, Plaintiff will determine whether it will add USDA, or any of its component agencies, as a defendant. Either way, the parties will develop a joint proposed schedule for further proceedings within 14 days of all defendants answering the Amended Complaint.

DATED: August 11, 2017

/s/ Amy R. Atwood
Amy R. Atwood
(D.C. Bar No. 470258)
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
(971) 717-6401
atwood@biologicaldiversity.org

/s/ Margaret E. Townsend
Margaret E. Townsend
(D.C. Bar No. OR0008)
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
(971) 717-6409
mtownsend@biologicaldiversity.org

Attorneys for Plaintiff

Respectfully submitted,

CHANNING D. PHILLIPS
D.C. BAR # 415793
United States Attorney

DANIEL F. VAN HORN
D.C. BAR #924092
Chief, Civil Division

/s/
JOSHUA M. KOLSKY
D.C. BAR # 993430
Assistant United States Attorney
District of Columbia
555 Fourth St., N.W.
Washington, D.C. 20530
Phone: (202) 252-2541
Fax: (202) 252-2599
joshua.kolsky@usdoj.gov

Counsel for Defendants

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

<hr/>)	
CENTER FOR BIOLOGICAL)	
DIVERSITY,)	
	Plaintiff,)	
)	
v.)	Civil Action No. 17-974 (KBJ)
)	
U.S. DEPARTMENT OF THE)	
INTERIOR, <i>et al.</i> ,)	
	Defendants,)	
<hr/>)	

**CONSENT MOTION FOR EXTENSION OF
TIME TO FILE ANSWER TO AMENDED COMPLAINT**

Defendants Department of Interior, Department of State, Environmental Protection Agency, and Department of Energy (the “Initial Defendants”) respectfully move this Court pursuant to Federal Rule of Civil Procedure 6(b)(1) to extend the deadline for them to file their answer to Plaintiff’s Amended Complaint in this Freedom of Information Act case from August 30, 2017, until the deadline for the newly-added defendants to answer. Plaintiff, through counsel, consents to the relief sought herein.

Plaintiff filed this action on April 23, 2017, against the Initial Defendants and those defendants filed their answer to the Complaint on July 27, 2017. ECF Nos. 1, 10. On August 16, 2017, Plaintiff filed an Amended Complaint adding the Department of Commerce and the National Oceanic and Atmospheric Administration as defendants. ECF No. 13. In the interest of efficiency, the Initial Defendants respectfully request that the deadline for them to answer the Amended Complaint be extended until such time as the newly added defendants’ answer is due,

so that Defendants will have the option of filing one answer on behalf of all Defendants and so that the litigation against all Defendants will be on the same schedule.

In sum, good cause supports this motion, and it is being filed in good faith and not for purposes of undue delay. The Initial Defendants previously sought an extension of time to file their answer to the Complaint.

A proposed Order is attached hereto.

Respectfully submitted,

CHANNING D. PHILLIPS
United States Attorney
D.C. BAR # 415793

DANIEL F. VAN HORN
Chief, Civil Division
D.C. BAR # 924092

By: _____/s/_____
JOSHUA KOLSKY
D.C. BAR #993430
Assistant United States Attorney
District of Columbia
555 Fourth St., N.W.
Washington, D.C. 20530
Phone: (202) 252-2541
Fax: (202) 252-2599

Counsel for Defendants DOI, DOE, DOS, and EPA

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

<hr/>)	
CENTER FOR BIOLOGICAL)	
DIVERSITY,)	
)	
	Plaintiff,)	
)	
v.)	Civil Action No. 17-974 (KBJ)
)	
U.S. DEPARTMENT OF THE)	
INTERIOR, <i>et al.</i> ,)	
)	
	Defendants,)	
<hr/>)	

ORDER

Upon consideration of Defendants’ Consent Motion for Extension of Time to File Answer to Amended Complaint and the entire record herein, it is hereby **ORDERED** that the motion is **GRANTED**.

It is further **ORDERED** that the deadline for Defendants Department of Interior, Department of State, Environmental Protection Agency, and Department of Energy to file their answer to the Amended Complaint shall be extended until such date, to be determined, on which Defendants Department of Commerce and National Oceanic and Atmospheric Administration must file their answer to the Amended Complaint.

It is **SO ORDERED** this _____ day of _____,
2017.

United States District Judge

Ana Liza Malabanan - NOAA Federal

From: Ana Liza Malabanan - NOAA Federal
Sent: Wednesday, August 30, 2017 5:47 PM
To: Stacey Nathanson - NOAA Federal; Mark Graff - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Samuel Dixon - NOAA Affiliate; FOIA Office
Subject: Re: DOC-NOAA-2017-000226

Hi Stacey,

(b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]. Thanks!

Mark (b)(5) [Redacted]
[Redacted]? Thanks!

Ana Liza

On Fri, Aug 11, 2017 at 4:22 PM, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov> wrote:

Mark,

(b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]. I think Stacey is back on Monday and may be able to provide you with an update directly.

Stacey,

(b)(5) [Redacted]
[Redacted]
[Redacted]. I hope you are enjoying your time off!

Ana Liza

----- Forwarded message -----

From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Tue, Aug 8, 2017 at 5:06 AM
Subject: DOC-NOAA-2017-000226
To: Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov>
Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>

Hi Ana Liza,

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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--
[Ana Liza S. Malabanan](#)
[Freedom of Information Act \(FOIA\) Coordinator](#)
[Information Services and Management Branch](#)
[Operations, Management & Information Division](#)
[NOAA Fisheries West Coast Region](#)
[U.S. Department of Commerce](#)
Office: [562-980-4008](tel:5629804008)



--
[Ana Liza S. Malabanan](#)
[Freedom of Information Act \(FOIA\) Coordinator](#)
[Information Services and Management Branch](#)
[Operations, Management & Information Division](#)
[NOAA Fisheries West Coast Region](#)
[U.S. Department of Commerce](#)
Office: [562-980-4008](tel:5629804008)



Stacey Nathanson - NOAA Federal

From: Stacey Nathanson - NOAA Federal
Sent: Wednesday, August 30, 2017 5:51 PM
To: Ana Liza Malabanan - NOAA Federal
Cc: Mark Graff - NOAA Federal; Lola Stith - NOAA Affiliate; Samuel Dixon - NOAA Affiliate; FOIA Office
Subject: Re: DOC-NOAA-2017-000226

Hi Ana Liza,

(b)(5)

I'll check in with you early next week. Thanks!

Stacey

Stacey Nathanson
Attorney-Advisor
NOAA Office of the General Counsel
Fisheries and Protected Resources Section
Phone: 301-713-9673
Email: Stacey.Nathanson@noaa.gov

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On Wed, Aug 30, 2017 at 5:47 PM, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov> wrote:

Hi Stacey,

(b)(5)

. Thanks!

Mark (b)(5)

? Thanks!

Ana Liza

On Fri, Aug 11, 2017 at 4:22 PM, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov>

wrote:

Mark,

(b)(5)

. I think Stacey is back on Monday and may be able to provide you with an update directly.

Stacey,

(b)(5)

I hope you are enjoying your time off!

Ana Liza

----- Forwarded message -----

From: **Mark Graff - NOAA Federal** <mark.graff@noaa.gov>

Date: Tue, Aug 8, 2017 at 5:06 AM

Subject: DOC-NOAA-2017-000226

To: Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov>

Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>

Hi Ana Liza,

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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--

Ana Liza S. Malabanan

Freedom of Information Act (FOIA) Coordinator
Information Services and Management Branch
Operations, Management & Information Division
NOAA Fisheries West Coast Region
U.S. Department of Commerce
Office: [562-980-4008](tel:562-980-4008)



--
Ana Liza S. Malabanan
Freedom of Information Act (FOIA) Coordinator
Information Services and Management Branch
Operations, Management & Information Division
NOAA Fisheries West Coast Region
U.S. Department of Commerce
Office: [562-980-4008](tel:562-980-4008)



Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Thursday, August 31, 2017 7:23 AM
To: Ana Liza Malabanan - NOAA Federal
Cc: Stacey Nathanson - NOAA Federal; Lola Stith - NOAA Affiliate; Samuel Dixon - NOAA Affiliate; FOIA Office
Subject: Re: DOC-NOAA-2017-000226

Hi Ana Liza,

(b)(5)
[Redacted]
[Redacted] --

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Wed, Aug 30, 2017 at 5:47 PM, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov> wrote:

Hi Stacey,

(b)(5)
[Redacted]
[Redacted]
[Redacted]. Thanks!

Mark (b)(5) [Redacted] ? Thanks!

Ana Liza

On Fri, Aug 11, 2017 at 4:22 PM, Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov> wrote:

Mark,

(b)(5)
[Redacted].

(b)(5)

. I think Stacey is back on Monday and may be able to provide you with an update directly.

Stacey,

(b)(5)

. I hope you are enjoying your time off!

Ana Liza

----- Forwarded message -----

From: **Mark Graff - NOAA Federal** <mark.graff@noaa.gov>

Date: Tue, Aug 8, 2017 at 5:06 AM

Subject: DOC-NOAA-2017-000226

To: Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov>

Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Samuel Dixon - NOAA Affiliate <samuel.dixon@noaa.gov>

Hi Ana Liza,

(b)(5)

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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--
[Ana Liza S. Malabanan](mailto:Ana.Liza.S.Malabanan@noaa.gov)
Freedom of Information Act (FOIA) Coordinator
Information Services and Management Branch
Operations, Management & Information Division
NOAA Fisheries West Coast Region
U.S. Department of Commerce
Office: [562-980-4008](tel:5629804008)



--
Ana Liza S. Malabanan
Freedom of Information Act (FOIA) Coordinator
Information Services and Management Branch
Operations, Management & Information Division
NOAA Fisheries West Coast Region
U.S. Department of Commerce
Office: [562-980-4008](tel:562-980-4008)



Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Thursday, August 31, 2017 7:41 AM
To: Pua Kamaka - NOAA Federal
Cc: Lola Stith - NOAA Affiliate
Subject: Re: Followup from 8/28/17

(Copying Lola in case I'm out)

You bet--

(b)(5)
[Redacted]

[Redacted]

Please feel free to have her give me a call or reach out to me by email--I'd be happy to go through the analysis above with her.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Wed, Aug 30, 2017 at 9:04 PM, Pua Kamaka - NOAA Federal <pua.kamaka@noaa.gov> wrote:
Can you help me with this one?

----- Forwarded message -----
From: **Candace Calloway Whiting** <cmcwhiting@gmail.com>
Date: Wed, Aug 30, 2017 at 3:02 PM
Subject: Re: Followup from 8/28/17
To: Pua Kamaka - NOAA Federal <pua.kamaka@noaa.gov>

Hi Pua,

I appreciate this notice, however my understanding was that you agreed to send to me your reasons for asking me to make the request instead of through the Office of Protected Resources. I did not agree to submit a FOIA until the justification for asking this is further explained to me in writing so that I can process the information. I have waited six months and followed the procedures as required for this public database.

Please send me the recap as was agreed upon.

Sincerely,
Candace

On Wed, Aug 30, 2017 at 5:37 PM, Pua Kamaka - NOAA Federal <pua.kamaka@noaa.gov> wrote:

Aloha Candace,

Thank you for taking the time yesterday to speak to me regarding your request for data from the NMFS Marine Mammal Stranding database.

As we discussed, the NMFS Pacific Islands Regional Office will be processing your below request through the Freedom of Information Act (FOIA). Should you have any additional questions or concerns regarding the processing of your request, please contact the NOAA FOIA Officer, Mark Graff at mark.graff@noaa.gov or (301)628-5658 (O) or (b)(6) (C).

Thank you,
Pua

"For all cetaceans in the database, including those euthanized offshore and/or brought to shore:

In the region of the entire NOAA Fisheries Pacific Islands Regional area including, but not limited to: Hawaiian Archipelago, Guam, Wake Island, the Mariana Islands, Palau, Marshall Islands, Samoa, Micronesia, and Johnston, Jarvis, Palmyra, Howland, Baker Islands (all PIRAs).

From 1950 to the present:

Species,
Date of Initial Observation,
Location of Stranding,
Condition at Initial Observation,
Gender,
Age Class
Occurance details
Condition at examination
Initial live animal disposition
Condition/determination
Photos/videos taken
Tag data
Carcass status
Specimen disposition
Necropsied
Necropsied by"

--
Candace Calloway Whiting

[International Dolphin & Whale Stranding Network](#)

blog.seattlepi.com/candacemwhiting

<http://www.huffingtonpost.com/candace-calloway-whiting/>

James LeDuc - NOAA Federal

From: James LeDuc - NOAA Federal
Sent: Thursday, August 31, 2017 9:15 AM
To: Lola Stith - NOAA Affiliate
Cc: Mark Graff - NOAA Federal; Devin Brakob - NOAA Federal; Samuel Dixon - NOAA Affiliate
Subject: RE: DOC-OS-2017-001150

(b)(5) [REDACTED] thanks.

Jim LeDuc
NOAA HCHB Room 58020
Office 202-482-0965
Ce (b)(6) [REDACTED]

From: Lola Stith - NOAA Affiliate [mailto:lola.m.stith@noaa.gov]
Sent: Wednesday, August 30, 2017 10:10 AM
To: James LeDuc - NOAA Federal
Cc: Mark Graff - NOAA Federal; Devin Brakob - NOAA Federal; Samuel Dixon - NOAA Affiliate
Subject: Re: DOC-OS-2017-001150

Good morning Jim (b)(5) [REDACTED]
[REDACTED]

R/
Lola

On Tue, Aug 29, 2017 at 1:17 PM, James LeDuc - NOAA Federal <james.leduc@noaa.gov> wrote:
(b)(5) [REDACTED] ?

Jim LeDuc
NOAA HCHB Room 58020
Office [202-482-0965](tel:202-482-0965)
Ce (b)(6) [REDACTED]

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Tuesday, August 29, 2017 1:10 PM
To: James LeDuc - NOAA Federal
Cc: Lola Stith - NOAA Affiliate; Devin Brakob - NOAA Federal; Samuel Dixon - NOAA Affiliate
Subject: Re: DOC-OS-2017-001150

Hi Jim,

(b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) (C)

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On Tue, Aug 29, 2017 at 12:57 PM, James LeDuc - NOAA Federal <james.leduc@noaa.gov> wrote:
Hi Mark,

(b)(5)

Jim LeDuc
NOAA HCHB Room 58020
Office [202-482-0965](tel:2024820965)
Ce (b)(6)

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Monday, August 21, 2017 3:29 PM
To: James LeDuc - NOAA Federal
Cc: Lola Stith - NOAA Affiliate
Subject: Fwd: DOC-OS-2017-001150

Hi Jim,

(b)(5)

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) (C)

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----- Forwarded message -----

From: **FOIA Office - NOAA Service Account** <foia@noaa.gov>

Date: Mon, Aug 21, 2017 at 2:41 PM

Subject: Fwd: DOC-OS-2017-001150

To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Hi Mark (b)(5)

Lola

----- Forwarded message -----

From: **James LeDuc - NOAA Federal** <james.leduc@noaa.gov>

Date: Thu, Aug 17, 2017 at 11:56 AM

Subject: DOC-OS-2017-001150

To: FOIA Office - NOAA Service Account <foia@noaa.gov>

Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Mark Graff - NOAA Federal

<mark.graff@noaa.gov>, Devin Brakob - NOAA Federal <devin.r.brakob@noaa.gov>

(b)(5) ?

This is a request under the Freedom of Information Act, 5 U.S.C. § 552 et. seq. The materials requested relate to presidential designations of national monuments . As such, I request all records relating to, or consisting of, communications — in any format — generated or received by the Department of Commerce related to: a. Any public communication to the Department of Commerce and/or its Bureaus on or since January 20, 2017 requesting a review of the national monuments identified in President Trump’s Executive Order dated April 26, 2017. A list of the monuments at issue is found in the DOI fact sheet on the Executive Order. That memo can be found here. <https://morningconsult.com/wp-content/uploads/2017/05/Executive-Order-Fact-Sheet-Reviewing-Abuses-of-the-Antiquities-Act-of-19....pdf> b. Any Department of Commerce data or studies on the impacts to local, regional, and national economies produced by the monuments at issue. These requests are not meant to be exclusive of any other records that, although not specifically requested, have a reasonable relationship to the subject matter of this request. If you or your office has destroyed or determines to withhold any documents 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.

Jim LeDuc

NOAA HCHB Room 58020

Office [202-482-0965](tel:202-482-0965)

Ce (b)(6)

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

lola.m.stith@noaa.gov

Lola Stith - NOAA Affiliate

From: Lola Stith - NOAA Affiliate
Sent: Thursday, August 31, 2017 10:48 AM
To: James LeDuc - NOAA Federal
Cc: Mark Graff - NOAA Federal; Devin Brakob - NOAA Federal; Samuel Dixon - NOAA Affiliate
Subject: Re: DOC-OS-2017-001150

Good morning Jim (b)(5)

Lola

On Thu, Aug 31, 2017 at 9:15 AM, James LeDuc - NOAA Federal <james.leduc@noaa.gov> wrote:

(b)(5)

Jim LeDuc

NOAA HCHB Room 58020

Office [202-482-0965](tel:202-482-0965)

Ce (b)(6)

From: Lola Stith - NOAA Affiliate [mailto:lola.m.stith@noaa.gov]
Sent: Wednesday, August 30, 2017 10:10 AM
To: James LeDuc - NOAA Federal
Cc: Mark Graff - NOAA Federal; Devin Brakob - NOAA Federal; Samuel Dixon - NOAA Affiliate
Subject: Re: DOC-OS-2017-001150

Good morning Jim (b)(5)

R/

Lola

On Tue, Aug 29, 2017 at 1:17 PM, James LeDuc - NOAA Federal <james.leduc@noaa.gov> wrote:

(b)(5) [REDACTED] ?

Jim LeDuc

NOAA HCHB Room 58020

Office [202-482-0965](tel:202-482-0965)

Ce (b)(6) [REDACTED]

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]

Sent: Tuesday, August 29, 2017 1:10 PM

To: James LeDuc - NOAA Federal

Cc: Lola Stith - NOAA Affiliate; Devin Brakob - NOAA Federal; Samuel Dixon - NOAA Affiliate

Subject: Re: DOC-OS-2017-001150

Hi Jim,

(b)(5) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:301-628-5658) (O)

(b)(6) [REDACTED] (C)

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On Tue, Aug 29, 2017 at 12:57 PM, James LeDuc - NOAA Federal <james.leduc@noaa.gov> wrote:

Hi Mark,

(b)(5) [Redacted]

Jim LeDuc

NOAA HCHB Room 58020

Office [202-482-0965](tel:202-482-0965)

Ce (b)(6) [Redacted]

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Monday, August 21, 2017 3:29 PM
To: James LeDuc - NOAA Federal
Cc: Lola Stith - NOAA Affiliate
Subject: Fwd: DOC-OS-2017-001150

Hi Jim,

(b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted] ?

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:301-628-5658) (O)

(b)(6) [Redacted] (C)

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----- Forwarded message -----

From: **FOIA Office - NOAA Service Account** <foia@noaa.gov>

Date: Mon, Aug 21, 2017 at 2:41 PM

Subject: Fwd: DOC-OS-2017-001150

To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Hi Mark - Can you provide Jim with some guidance regarding how to handle this request? Should this request be reassigned?

Lola

----- Forwarded message -----

From: **James LeDuc - NOAA Federal** <james.leduc@noaa.gov>

Date: Thu, Aug 17, 2017 at 11:56 AM

Subject: DOC-OS-2017-001150

To: FOIA Office - NOAA Service Account <foia@noaa.gov>

Cc: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>, Mark Graff - NOAA Federal <mark.graff@noaa.gov>, Devin Brakob - NOAA Federal <devin.r.brakob@noaa.gov>

(b)(5) [REDACTED] ?

This is a request under the Freedom of Information Act. 5 U.S.C. § 552 et. seq. The materials requested relate to presidential designations of national monuments . As such, I request all records relating to, or consisting of, communications — in any format — generated or received by the Department of Commerce related to: a. Any public communication to the Department of Commerce and/or its Bureaus on or since January 20, 2017 requesting a review of the national monuments identified in President Trump’s Executive Order dated April 26, 2017. A list of the monuments at issue is found in the DOI fact sheet on the Executive Order. That memo can be found here. <https://morningconsult.com/wp-content/uploads/2017/05/Executive-Order-Fact-Sheet-Reviewing-Abuses-of-the-Antiquities-Act-of-19....pdf> b. Any Department of Commerce data or studies on the impacts to local, regional, and national economies produced by the monuments at issue. These requests are not meant to be exclusive of any other records that, although not specifically requested, have a reasonable relationship to the subject matter of this request. If you or your office has destroyed or determines to withhold any documents 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.

Jim LeDuc

NOAA HCHB Room 58020

Office [202-482-0965](tel:202-482-0965)

Ce (b)(6)

--

Lola Stith

Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6)

lola.m.stith@noaa.gov

--

Lola Stith

Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)

((b)(6)

lola.m.stith@noaa.gov

Bogomolny, Michael (Federal)

From: Bogomolny, Michael (Federal)
Sent: Thursday, August 31, 2017 1:01 PM
To: Graff, Mark (Federal)
Cc: Stith, Lola (Contractor); Williams, Maria (Federal); Hogan, Robert (Federal); Allison-Holman, Roxie (Federal)
Subject: RE: CBD lawsuit
Attachments: CBD-Townsend DOC-OS-2017-001456 memo.docx; CBD-Townsend DOC-OS-2017-001456 letter signed.pdf

FYI (b)(5)

-bogo

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]
Sent: Thursday, August 31, 2017 12:52 PM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Cc: Swisher, Robert (Federal) <Robert.Swisher@noaa.gov>; Stith, Lola (Contractor) <Lola.M.Stith@noaa.gov>; Williams, Maria (Federal) <Maria.Williams@noaa.gov>; Hogan, Robert (Federal) <Robert.J.Hogan@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: Re: new lawsuit

(b)(5)

Thanks Bogo--

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)

(b)(6) (C)

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On Thu, Aug 31, 2017 at 12:49 PM, Bogomolny, Michael (Federal) <MBogomolny@doc.gov> wrote:

(b)(5)

Sincerely,
bogo

From: Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]

Sent: Wednesday, August 30, 2017 4:14 PM

To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>

Cc: Swisher, Robert (Federal) <Robert.Swisher@noaa.gov>; Stith, Lola (Contractor) <Lola.M.Stith@noaa.gov>;

Williams, Maria (Federal) <Maria.Williams@noaa.gov>; Hogan, Robert (Federal) <Robert.J.Hogan@noaa.gov>;

Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>

Subject: Re: new lawsuit

(copying relevant FOIA folks)--

Hi Bogo,

(b)(5) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted] Let me know anything you need on this--

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) [Redacted] (C)

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On Wed, Aug 30, 2017 at 3:56 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Thanks Bogo--

(b)(5) [Redacted]
[Redacted] Let me confirm--

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) [Redacted] (C)

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On Wed, Aug 30, 2017 at 3:44 PM, Bogomolny, Michael (Federal) <MBogomolny@doc.gov> wrote:

Mark,

(b)(5) [Redacted text block]

(b)(5) [Redacted text block]

-bogo



UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
Washington, DC 20230

Via FOIAOnline

JUL 26 2017

Ms. Margaret Townsend
Center for Biological Diversity
PO Box 11374
Portland, Oregon 97211
foia@biologicaldiversity.org

Dear Ms. Townsend,

This responds to your administrative appeal under the Freedom of Information Act (FOIA) (5 U.S.C. § 552) submitted on May 1, 2017. As set forth below, your appeal is denied.

The request you submitted sought “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

Your request challenged the adequacy of NOAA’s search. Specifically, you contend that “NOAA did not establish that it made a good faith effort to conduct a search for the requested records, nor did it prove that it used methods that can be reasonably expected to produce the information requested.” Additionally, your request claims that NOAA failed to show that there are no non-exempt, segregable portions of the withheld records.

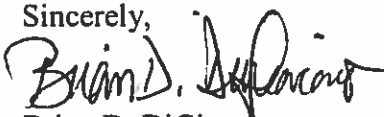
The primary legal issue presented in this appeal is whether the NOAA performed an adequate search for documents responsive to this FOIA request. The courts have held that agencies are required to undertake a search that is “reasonably calculated to uncover all relevant documents.” *See Weisberg v. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). The factual question raised by a challenge to the adequacy of a search is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant.” *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). The adequacy of a search is also based, in part, on how the agency conducted its search in light of the scope of the request and the requester’s description of the records sought. *See Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986).

Records indicate that a search was tasked to the NOAA National Environmental Satellite Data and Information Services (NESDIS) and that a search of the NESDIS correspondence unit was performed. The NESDIS correspondence unit is responsible for maintaining a repository of memorandums, directives, and instructions signed by or issued by NESDIS senior leadership. NESDIS is the primary NOAA business unit working on climate change issues. Their mission is

to provide secure and timely access to global environmental data and information from satellites and other sources to promote and protect the Nation's security, environment, economy, and quality of life. The National Center for Environmental Information, the Nation's leading authority for environmental information, falls under the purview of NESDIS. As such, it is reasonable to assume that the NESDIS correspondence unit would hold any and all documents responsive to your request. Overall, it appears that the search was properly tasked to NESDIS and no other office is likely to have responsive information.

The secondary legal issue presented in this appeal is whether NOAA segregated all non-exempt portions of the withheld records. FOIA requires that "any reasonably segregable portion of a record" must be released "after deletion of the portions which are exempt" under the Act's nine exemptions. Courts have held that when nonexempt information is "inextricably intertwined" with exempt information, reasonable segregation is not possible. *Mead Data Center, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 n. 55 (D.C. Cir. 1977). When agencies demonstrate that the withheld records are entirely exempt, courts have upheld the determination that no segregation is possible. Department of Justice Guide to the Freedom of Information Act at p. 60 (2009 ed.). As no responsive documents were found, NOAA withheld no documents and thus had no information to segregate. Therefore, your contention that NOAA failed to show that there are no non-exempt, segregable portions of the withheld documents is either without merit or moot.

Given the above information, we are satisfied that NOAA has conducted an adequate search for records in response to your request and that all reasonably segregable information has been released. Your appeal is therefore denied. This is the final decision of the Department of Commerce. You have the right to obtain judicial review as provided for in 5 U.S.C. § 552(a)(4)(B).

Sincerely,

Brian D. DiGiacomo
Assistant General Counsel
for Employment, Litigation, and Information



UNITED STATES DEPARTMENT OF COMMERCE
Office of the Assistant General Counsel for
Employment, Litigation, and Information
Washington, DC 20230

Memorandum

To: Brian D. DiGiacomo
Assistant General Counsel
for Employment, Litigation, and Information

Through: Michael Bogomolny
Acting Chief, Information Law Division

From: Jessica Leonard
Information Law Division

Date: July 25, 2017

Re: FOIA Appeal of Margaret Townsend
Request No. DOC-NOAA-001066
Appeal No. DOC-OS-2017-001456

(b) (5)

(b) (5)

(b) (5)

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Thursday, August 31, 2017 1:05 PM
To: Rodney Vieira - NOAA Federal
Cc: Roxie Allison-Holman - NOAA Federal; Robert Hogan; Lola Stith - NOAA Affiliate
Subject: Fwd: new lawsuit
Attachments: Amended Complaint.pdf; Original Request.pdf

Hi Rod--

(b)(5)
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted].

I'm attaching the amended complaint, as well as the original request.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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From: Mark Graff - NOAA Federal <mark.graff@noaa.gov>
Date: Thu, Aug 31, 2017 at 12:52 PM
Subject: Re: new lawsuit
To: "Bogomolny, Michael (Federal)" <MBogomolny@doc.gov>
Cc: "Swisher, Robert (Federal)" <Robert.Swisher@noaa.gov>, "Stith, Lola (Contractor)" <Lola.M.Stith@noaa.gov>, "Williams, Maria (Federal)" <Maria.Williams@noaa.gov>, "Hogan, Robert (Federal)" <Robert.J.Hogan@noaa.gov>, "Allison-Holman, Roxie (Federal)" <Roxie.Allison-Holman@noaa.gov>

(b)(5)
[Redacted]
[Redacted]. Thanks Bogo--

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) (C)

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On Thu, Aug 31, 2017 at 12:49 PM, Bogomolny, Michael (Federal) <MBogomolny@doc.gov> wrote:

(b)(5)

Sincerely,

bogo

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Sent: Wednesday, August 30, 2017 4:14 PM
To: Bogomolny, Michael (Federal) <MBogomolny@doc.gov>
Cc: Swisher, Robert (Federal) <Robert.Swisher@noaa.gov>; Stith, Lola (Contractor) <Lola.M.Stith@noaa.gov>; Williams, Maria (Federal) <Maria.Williams@noaa.gov>; Hogan, Robert (Federal) <Robert.J.Hogan@noaa.gov>; Allison-Holman, Roxie (Federal) <Roxie.Allison-Holman@noaa.gov>
Subject: Re: new lawsuit

(copying relevant FOIA folks)--

Hi Bogo,

(b)(5)

Let me know anything you need on this--

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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On Wed, Aug 30, 2017 at 3:56 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

Thanks Bogo--

(b)(5)

Let me confirm--

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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On Wed, Aug 30, 2017 at 3:44 PM, Bogomolny, Michael (Federal) <MBogomolny@doc.gov> wrote:

Mark,

(b)(5)

[REDACTED]

[REDACTED] ? I'm

happy with whatever works best for you.

-bogo

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY
378 North Main Avenue
Tucson, AZ 85701,

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW
Washington, D.C. 20240,

U.S. ENVIRONMENTAL PROTECTION
AGENCY
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460,

U.S. DEPARTMENT OF ENERGY
1000 Independence Avenue, SW
Washington, D.C. 20585,

U.S. DEPARTMENT OF STATE
2201 C. Street, NW
Washington, D.C. 20037,

U.S. DEPARTMENT OF COMMERCE
1401 Constitution Avenue, NW
Washington, D.C. 20230,

and

U.S. NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
1315 East-West Highway
Silver Spring, MD 20910

Defendants.

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

Case No.: 1:17-cv-0974 (KBJ)

INTRODUCTION

1. The Center for Biological Diversity (“Center”)—an environmental conservation organization that works to protect native wildlife species and their habitats—challenges the failure of the U.S. Department of Interior, U.S. Environmental Protection Agency, U.S. Department of Energy, U.S. Department of State, U.S. Department of Commerce, and U.S. National Oceanic and Atmospheric Administration to provide records concerning the Trump administration’s censorship of these federal departments’ and their component agencies’ discussion or dissemination of information about climate change, in violation of the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA” or “Act”), or alternatively, the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (“APA”).

2. From January through March 2017, news outlets reported that the Trump administration directed numerous federal departments and agencies to remove information from their websites about climate change and/or to cease use of phrases such as “climate change,” “emissions reduction,” or “Paris agreement” in agency documents. These departments and agencies include the six named defendants in this action.

3. To understand these actions, the Center filed FOIA requests with each of the defendants, seeking directives or communications barring or removing climate change-related words or phrases from formal communications as well as the information, such as webpages about climate change, that has been removed from public view.

4. However, although each defendant acknowledged the Center’s request, none have provided any responsive records or stated when they might do so.

5. Defendants are unlawfully withholding the records by failing to search for and provide all responsive records to the Center. The defendants’ failure to comply with FOIA by

releasing all records related to the censorship of climate change-related words and phrases is contrary to FOIA and undermines FOIA's policy of government transparency.

6. Because prompt access to these records is necessary to effectuate FOIA's purpose, the Center seeks declaratory relief establishing that defendants are in violation of FOIA, or alternatively, the APA. The Center also seeks injunctive relief directing defendants to provide responsive records without any further delay.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under FOIA, the APA, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

8. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district, because a portion of the responsive records may be found in this district.

9. Declaratory relief is appropriate under 28 U.S.C. § 2201.

10. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

PARTIES

11. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit conservation organization with offices throughout the United States. The Center has more than 58,000 members. The Center and its members are harmed by EPA's violations of FOIA, or alternatively the APA, as such violations preclude the Center from gaining a full understanding of the circumstances, rationales, and individuals involved in the Trump administration's censorship of climate change-related information.

12. Defendant U.S. DEPARTMENT OF THE INTERIOR (“Interior Department”) is an independent agency of the executive branch of the U.S. government. The Interior Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

13. Defendant U.S. ENVIRONMENTAL PROTECTION AGENCY (“EPA”) is an independent agency of the executive branch of the U.S. government. EPA is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

14. Defendant U.S. DEPARTMENT OF ENERGY (“Energy Department”) is an independent agency of the executive branch of the U.S. government. The Energy Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

15. Defendant U.S. DEPARTMENT OF STATE (“State Department”) is an independent agency of the executive branch of the U.S. government. The State Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

16. Defendant U.S. DEPARTMENT OF COMMERCE (“Commerce Department”) is an independent agency of the executive branch of the U.S. government. The Commerce Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

17. Defendant U.S. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (“NOAA”) is an independent agency of the executive branch of the U.S.

government. NOAA is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

STATUTORY BACKGROUND

18. FOIA's basic purpose is government transparency. It establishes the public's right to access all federal agency records unless such records may be withheld pursuant to one of nine, narrowly construed FOIA exemptions. 5 U.S.C. § 552(b)(1)-(9).

19. FOIA imposes strict and rigorous deadlines on federal agencies when they receive a request for records pursuant to FOIA. Specifically, an agency must determine whether to disclose responsive records and notify the requester of its determination within 20 working days of receiving a FOIA request, and it must make records "promptly" available unless it can establish that certain unusual circumstances are present and/or that it may lawfully withhold records, or portions thereof, from disclosure. *Id.* § 552(a)(3)(A), (a)(6). Also within 20 working days, the agency must inform the requester that it has a right to appeal the agency's determination. *Id.* § 552(a)(6)(A)(i).

20. FOIA places the burden on the agency to prove that it may withhold responsive records from a requester. *Id.* § 552(a)(4)(B).

21. Congress has specified limited circumstances in which federal agencies may obtain more time to make the determination that is required by 5 U.S.C. § 552(a)(6)(A)(i).

22. First, an agency may toll the 20-working-day deadline to seek additional information or clarification from a requester, but that tolling period ends when the agency receives such information or clarification. *Id.* § 552(a)(6)(A)(ii).

23. Second, an agency may extend the 20-working-day deadline for an additional 10 working days by giving a written notice to the requester that sets forth "unusual circumstances"

to justify a deadline extension which also requires that it provide the date by which the agency expects to make the determination. *Id.* § 552(a)(6)(B)(i). However, to invoke such “unusual circumstances,” the agency must provide the requester with “an opportunity to limit the scope of the request so that it may be processed within [20 working days] or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.” *Id.* § 552(a)(6)(B)(ii). In addition, when asserting unusual circumstances, the agency “shall make available its FOIA Public Liaison” to “assist in the resolution of any disputes between the requester and the agency.” *Id.*

24. FOIA requires each agency to make reasonable efforts to search for records in a manner that is reasonably calculated to locate all records that are responsive to the FOIA request. *Id.* § 552(a)(3)(C)-(D).

25. FOIA requires federal agencies to expeditiously disclose requested records, *see id.* § 552, and mandates a policy of broad disclosure of government records. Any inquiry under FOIA brings with it a strong presumption in favor of disclosure.

26. Congress recognized that in certain, limited instances, records may be withheld as exempt from FOIA’s broad disclosure mandate, and thus created nine categories of exemptions. *Id.* § 552(b). These exemptions, however, are narrowly construed in light of FOIA’s dominant objective of disclosure, not secrecy.

27. The U.S. district courts have jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

28. Alternatively, an agency’s response to a FOIA request and/or a FOIA appeal is subject to judicial review under the APA, which confers a right of judicial review on any person

who is adversely affected by agency action, 5 U.S.C. § 702, and authorizes district courts to compel agency action that is unlawfully withheld or unreasonably delayed. *Id.* § 706(1). District courts must set aside any agency action that is found to be “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” *Id.* § 706(2)(A).

FACTUAL BACKGROUND

Interior Department FOIA Request (OS-2017-00384)

29. On March 30, 2017, the Center submitted a FOIA request to the Interior Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

30. The same day, the Interior Department acknowledged the Center’s request and assigned it tracking number OS-2017-00384 (“Interior Department FOIA Request”).

31. A determination on the Center’s FOIA request to the Interior Department was due by April 27, 2017, which is 20 working days after the date of the Interior Department’s acknowledgement of the request.

32. As of the date of the filing of this amended complaint, which is 77 working days past the 20-working-day deadline, the Interior Department has not requested additional time to respond, provided any responsive records, or provided a determination in response to the Center’s FOIA request.

EPA FOIA Request (EPA-HQ-2017-005517)

33. On March 30, 2017, the Center submitted a FOIA request to the EPA, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

34. The same day, the EPA acknowledged the Center’s request and assigned it tracking number EPA-HQ-2017-005517 (“EPA FOIA Request”). On March 12, 2017, EPA granted a waiver of fees in connection with the request.

35. A determination on the Center’s FOIA request to the EPA was due by April 27, 2017, which is 20 working days after the date of the EPA’s acknowledgement of the request.

36. After receiving no further communications from EPA regarding this request, by letter dated May 8, 2017, the Center informed EPA that its determination was overdue and offered to assist EPA in making a determination on the Center’s EPA FOIA Request. The Center also requested an estimate for when EPA would make a determination on the Center’s FOIA request.

37. As of the date of the filing of this amended complaint, which is 77 working days past the 20-working-day deadline, EPA has not responded to the Center’s May 8, 2017 letter, requested additional time to respond to the Center’s FOIA request, provided any responsive records, made a determination, or provided an estimated date of completion of the Center’s FOIA request.

Energy Department FOIA Request (HQ-2017-00806)

38. On March 30, 2017, the Center submitted a FOIA request to the Energy Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

39. The next day, on March 31, 2017, the Energy Department acknowledged the Center’s request and assigned it tracking number HQ-2017-00806 (“Energy Department FOIA Request”).

40. On April 11, 2017, a representative of the Energy Department, Ms. Natalie Anderson, contacted Ms. Margaret E. Townsend of the Center for Biological Diversity by phone and email. Ms. Anderson stated that she wanted to clarify the timeframe for records that are responsive to the Center’s Energy Department FOIA Request. In response, Ms. Townsend informed Ms. Anderson that the Energy Department could search for and provide all responsive records that were generated on or after November 9, 2016.

41. Ms. Anderson also stated that the Energy Department had received many FOIA requests that are similar to the Center’s Energy Department FOIA Request, and in an email dated April 11, 2017, suggested that if the Center would agree to limit the department’s search to two of its program offices—specifically, the Office of International Affairs (“OIA”) and the Office of Energy Policy and Systems Analysis (“EPSA”)—this “should allow [the Energy Department] to

provide a response more quickly.” Accordingly, the Center agreed to limit the department’s search to the OIA and EPSA.

42. Also in her April 11, 2017 email, Ms. Anderson asked if the Center would agree to eliminate the phrases “including but not limited to” and “any related words or phrases” from its request, and if the Center would like to include any search terms in addition to “climate change,” “global warming,” “climate disruption,” “greenhouse gas emissions,” “emissions reductions,” and/or “Paris agreement.” In response, Ms. Townsend added the terms “climate” and “fossil fuels” to the search terms to be used by the Energy Department during its search for responsive records from the OIA and EPSA.

43. By email dated April 13, 2017, Ms. Anderson confirmed the scope of the department’s search for responsive records, stating that the department would “move forward with processing.”

44. By letter dated April 26, 2017, Energy Department FOIA Officer Alexander C. Morris confirmed the agreement of Ms. Anderson and Ms. Townsend regarding the scope of the department’s search, informed the Center that the request was assigned to OIA and EPSA, and granting the Center’s request for a waiver of fees.

45. A determination on the Center’s Energy Department FOIA Request was due on May 11, 2017, which is 20 working days after the date of Ms. Anderson’s email stating that the department was prepared to “move forward with processing.”

46. By letter dated August 11, 2017, which was 65 working days past the 20-working-day deadline, the Energy Department provided a determination in response to the Center’s FOIA request.

47. In its determination, the Energy Department stated that it possessed no responsive records.

48. News articles indicate that the Energy Department likely possesses responsive records. For example, in an article dated March 29, 2017, *Politico* reported that “[a] supervisor at the Energy Department’s international climate office told staff this week not to use the phrases ‘climate change,’ ‘emissions reduction’ or ‘Paris Agreement’ in written memos, briefings or other written communication” See Eric Wolff, Energy Department climate office bans use of phrase “climate change”, *Politico* (Mar. 29, 2017), <http://www.politico.com/story/2017/03/energy-department-climate-change-phrases-banned-236655>.

49. The Center challenges the adequacy of the Energy Department’s search for responsive records and the Energy Department’s failure to provide all responsive records to the Center.

State Department FOIA Request

50. On April 3, 2017, the Center submitted a FOIA request to the State Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

51. The next day, on April 4, 2017, the State Department acknowledged the Center’s request and assigned it tracking number F-2017-08517 (“State Department FOIA Request”).

52. By form letter dated April 10, 2017, the Requester Communications Branch of the State Department's Office of Information Programs & Services re-acknowledged receipt of the Center's FOIA request, and it also granted a public interest waiver of fees that are incurred in processing the request.

53. After receiving no further communications from the State Department regarding this request, by letter dated May 31, 2017, the Center informed the State Department that its determination was overdue and offered to assist the State Department in making a determination on the Center's State Department FOIA Request. The Center also requested an estimate for when the State Department would make a determination on the Center's FOIA request.

54. By email dated June 1, 2017, Charlotte W. Duckett confirmed the State Department's receipt of the Center's May 31, 2017 communication. Ms. Duckett stated that a copy of the Center's May 31, 2017 communication "was forwarded to the office that is processing your request" and that "our office has requested an estimated completion date for your request." Ms. Duckett did not provide an estimated date of completion of the State Department's determination on the Center's request.

55. A determination on the Center's FOIA request to the State Department was due by May 2, 2017, which is 20 working days after the date of the State Department's acknowledgement of the request.

56. As of the date of the filing of this amended complaint, which is 74 working days past the 20-working-day deadline, the State Department has not requested additional time to respond, provided any responsive records, or provided a determination in response to the Center's FOIA request.

Commerce Department FOIA Request (DOC-OS-2017-000939)

57. On April 3, 2017, the Center submitted a FOIA request to the Commerce Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

58. The same day, the Commerce Department acknowledged the Center’s request and assigned it tracking number DOC-OS-2017-000939 (“Commerce Department FOIA Request”). On April 10, 2017, the Commerce Department granted a waiver of fees in connection with the request.

59. On April 13, 2017, the Commerce Department sent a letter to the Center requesting clarification of (1) the time frame of the records request and (2) the type of records requested.

60. The Center provided the requested clarification to the Commerce Department via electronic mail on April 17, 2017. The Center informed the Commerce Department that “[t]he timeframe of the records request is November 9, 2016 to the date of the search,” and that

[t]he type of records requested is all records, as defined by FOIA, and included in the following paragraph from our request:

For purposes of this request, “records” is consistent with the meaning of the term under FOIA. This includes, but is not limited to, documents of any kind including electronic as well as paper documents, e-mails, writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), correspondence, letters, memoranda, reports, consultations, papers, studies, notes, field notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, data, data bases, drawings, surveys, graphs, charts,

photographs, videos, meeting notes or minutes, electronic and magnetic recordings of meetings, maps, GIS layers, GPS, UTM, LiDAR, CDs, and any other compilations of data from which information can be obtained.

61. On May 23, 2017, Commerce Department FOIA Specialist Ms. Ayana Crawford called Ms. Townsend to ask if the Center would respond to the agency's request for clarification before Ms. Crawford took action to close the request. Ms. Townsend informed Ms. Crawford that the Center had already provided the requested clarification on April 17, 2017. Ms. Crawford asked Ms. Townsend to resend it. Ms. Townsend resent the email clarification the same day.

62. A determination on the Center's Commerce Department FOIA Request was due on May 3, 2017, which is 20 working days after the Commerce Department received the Center's FOIA request.

63. Even if the Commerce Department had reasonably suspended its timeline for a determination on the Center's FOIA request, by relying on May 23, 2017 as the date that the Center provided clarification, then the Center's Commerce Department FOIA Request would have been due on June 9, 2017.

64. As of the date of the filing of this Amended complaint, which is 47 workdays past the June 9, 2017 deadline, the Commerce Department has not requested additional time to respond, provided any responsive records, or provided a determination in response to the Center's Commerce Department FOIA request.

NOAA FOIA Request (DOC-NOAA-2017-001066)

65. On April 21, 2017, the Center submitted a FOIA request to NOAA, requesting "all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-

related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

66. The same day, NOAA acknowledged the Center’s request and assigned it tracking number DOC-NOAA-2017-001066 (“NOAA FOIA Request”). On April 24, 2014, NOAA provided a formal acknowledgement letter to the Center.

67. On May 3, 2017, NOAA informed the Center that it determined that a waiver of fees in connection with the request was not applicable as the request was “not billable.”

68. On May 10, 2017, NOAA provided a final “no records” determination to the Center and informed the Center of its right to appeal the determination.

69. The Center appealed NOAA’s “no records” determination on June 30, 2017. The same day, NOAA acknowledged the Center’s appeal and assigned it tracking number DOC-OS-2017-001456 (“NOAA FOIA Appeal”)

70. NOAA affirmed its decision on the Center’s NOAA FOIA Appeal on July 3, 2017. In the letter, the agency informed the Center that “[r]ecords indicate that a search was tasked to the NOAA National Environmental Satellite Data and Information Services (NESDIS) and that a search of the NESDIS correspondence unit was performed.” NOAA stated that “it is reasonable to assume that the NESDIS correspondence unit would hold any and all documents responsive to [the Center’s] request.” NOAA also informed the Center that it has “the right to obtain judicial review as provided for in 5 U.S.C. § 552(a)(4)(8).”

71. News articles indicate that NOAA possesses responsive records. For example, in an article date July 13, 2017, the *New York Times* reported that phrasing in a NOAA news release accompanying a report about the warming ability of global emissions of greenhouse

gases omitted any link of “human activity” to emissions. *See* Lisa Friedman, Climate-Altering Gases Spiked in 2016, Federal Scientists Report, NY Times (July 13, 2017), <https://www.nytimes.com/2017/07/13/climate/greenhouse-gases-spike-noaa-global-warming.html>.

72. The Center challenges the adequacy of NOAA’s search for responsive records and NOAA’s failure to provide all responsive records to the Center.

All Requests

73. None of FOIA’s nine exemptions to the statute’s disclosure mandate apply to the records that are responsive to any of the Center’s FOIA requests. *Id.* § 552(b).

74. The Center has been required to expend resources to prosecute this action.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF **VIOLATION OF THE FREEDOM OF INFORMATION ACT** **Failure to Comply with FOIA’s Mandatory Determination Deadline**

COUNT ONE: The Interior Department Missed FOIA’s Mandatory Determination Deadline for the Center’s Interior Department FOIA Request Number OS-2017-00384

75. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

76. The Interior Department has violated FOIA by refusing to disclose records that are responsive to the Center’s Interior Department FOIA Request Number OS-2017-00384.

77. The Center has a statutory right to a final determination from the Interior Department on FOIA Request Number OS-2017-00384 in a manner that complies with FOIA. The Interior Department has violated the Center’s rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

78. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Interior Department in the foreseeable future.

79. The Center's organizational activities will be adversely affected if the Interior Department continues to violate FOIA's disclosure provisions as it has in this case.

80. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, the Interior Department will continue to violate Plaintiff's rights to receive public records under FOIA.

COUNT TWO: EPA Missed FOIA's Mandatory Determination Deadline for the Center's EPA FOIA Request Number EPA-HQ-2017-005517

81. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

82. EPA has violated FOIA by refusing to disclose records that are responsive to the Center's EPA FOIA Request Number EPA-HQ-2017-005517.

83. The Center has a statutory right to a final determination from EPA on its EPA FOIA Request Number EPA-HQ-2017-005517 in a manner that complies with FOIA. EPA has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

84. The Center's organizational activities will be adversely affected if EPA is allowed to continue violating FOIA's decision deadlines as it has in this case.

85. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Missed FOIA's Mandatory Determination Deadline for the Center's Energy Department FOIA Request Number EPA-HQ-2017-005517

86. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

87. The Energy Department has violated FOIA by refusing to disclose records that are responsive to the Center's Energy Department FOIA Request Number HQ-2017-00806.

88. The Center has a statutory right to a final determination from the Energy Department on its Energy Department FOIA Request Number HQ-2017-00806 in a manner that complies with FOIA. The Energy Department has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

89. The Center's organizational activities will be adversely affected if the Energy Department is allowed to continue violating FOIA's decision deadlines as it has in this case.

90. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Missed FOIA's Mandatory Determination Deadline for the Center's State Department FOIA Request Number F-2017-08517

91. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

92. The State Department has violated FOIA by refusing to disclose records that are responsive to the Center's State Department FOIA Request Number F-2017-08517.

93. The Center has a statutory right to a final determination from the State Department on its State Department FOIA Request Number F-2017-08517 in a manner that

complies with FOIA. The State Department has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

94. The Center's organizational activities will be adversely affected if the State Department is allowed to continue violating FOIA's decision deadlines as it has in this case.

95. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Missed FOIA's Mandatory Determination Deadline for the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939

96. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

97. The Commerce Department has violated FOIA by refusing to disclose records that are responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939.

98. The Center has a statutory right to a final determination from the Commerce Department on its Commerce Department FOIA Request Number DOC-OS-2017-000939 in a manner that complies with FOIA. The Commerce Department has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

99. The Center's organizational activities will be adversely affected if the Commerce Department is allowed to continue violating FOIA's decision deadlines as it has in this case.

100. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

SECOND CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Disclose All Responsive Records to the Center

COUNT ONE: The Interior Department Has Unlawfully Withheld Records Responsive to Interior Department FOIA Request Number OS-2017-00384

101. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

102. The Center has a statutory right to the records it seeks, and there is no legal basis for the Interior Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

103. The Interior Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's Interior Department FOIA Request Number OS-2017-00384.

104. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the Interior Department in the foreseeable future.

105. The Center's organizational activities will be adversely affected if the Interior Department continues to violate FOIA's disclosure provisions as it has in this case.

106. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Interior Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT TWO: EPA Has Unlawfully Withheld Records Responsive to EPA FOIA Request Number EPA-HQ-2017-005517

107. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

108. The Center has a statutory right to the records it seeks, and there is no legal basis for EPA to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

109. EPA has violated the Center's rights in this regard by withholding records that are responsive to the Center's EPA FOIA Request Number EPA-HQ-2017-005517.

110. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to EPA in the foreseeable future.

111. The Center's organizational activities will be adversely affected if EPA continues to violate FOIA's disclosure provisions as it has in this case.

112. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Has Unlawfully Withheld Records Responsive to Energy Department FOIA Request Number HQ-2017-00806

113. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

114. The Center has a statutory right to the records it seeks, and there is no legal basis for the Energy Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

115. The Energy Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's Energy Department FOIA Request Number HQ-2017-00806.

116. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the Energy Department in the foreseeable future.

117. The Center's organizational activities will be adversely affected if the Energy Department continues to violate FOIA's disclosure provisions as it has in this case.

118. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Has Unlawfully Withheld Records Responsive to The State Department FOIA Request Number F-2017-08517

119. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

120. The Center has a statutory right to the records it seeks, and there is no legal basis for the State Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

121. The State Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's State Department FOIA Request Number F-2017-08517.

122. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the State Department in the foreseeable future.

123. The Center's organizational activities will be adversely affected if the State Department continues to violate FOIA's disclosure provisions as it has in this case.

124. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Has Unlawfully Withheld Records Responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939

125. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

126. The Center has a statutory right to the records it seeks, and there is no legal basis for the Commerce Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

127. The Commerce Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939.

128. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the Commerce Department in the foreseeable future.

129. The Center's organizational activities will be adversely affected if the Commerce Department continues to violate FOIA's disclosure provisions as it has in this case.

130. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT SIX: NOAA Has Failed to Conduct an Adequate Search for All Records Responsive to the Center's Commerce Department FOIA Request Number DOC-NOAA-2017-001066

131. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

132. The Center has a statutory right to the records it seeks, and there is no legal basis for NOAA to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

133. NOAA has violated the Center's rights in this regard by withholding records that are responsive to the Center's NOAA FOIA Request Number DOC- NOAA-2017-001066.

134. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to NOAA in the foreseeable future.

135. The Center's organizational activities will be adversely affected if NOAA continues to violate FOIA's disclosure provisions as it has in this case.

136. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

THIRD CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Conduct an Adequate Search for Responsive Records

COUNT ONE: The Interior Department Has Failed to Conduct an Adequate Search for All Records Responsive to Interior Department FOIA Request Number OS-2017-00384

137. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

138. The Center has a statutory right to have the Interior Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Interior Department

violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to Interior Department FOIA Request Number OS-2017-00384.

139. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Interior Department in the foreseeable future.

140. The Center's organizational activities will be adversely affected if the Interior Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

141. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Interior Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT TWO: EPA Has Failed to Conduct an Adequate Search for All Records Responsive to EPA FOIA Request Number EPA-HQ-2017-005517

142. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

143. The Center has a statutory right to have EPA process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). EPA violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517.

144. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

145. The Center's organizational activities will be adversely affected if EPA continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

146. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Has Failed to Conduct an Adequate Search for All Records Responsive to Energy Department FOIA Request Number HQ-2017-00806

147. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

148. The Center has a statutory right to have the Energy Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Energy Department violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to Energy Department FOIA Request Number HQ-2017-00806.

149. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Energy Department in the foreseeable future.

150. The Center's organizational activities will be adversely affected if the Energy Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

151. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Has Failed to Conduct an Adequate Search for All Records Responsive to State Department FOIA Request Number F-2017-08517

152. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

153. The Center has a statutory right to have the State Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The State Department violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to State Department FOIA Request Number F-2017-08517.

154. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the State Department in the foreseeable future.

155. The Center's organizational activities will be adversely affected if the State Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

156. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Has Failed to Conduct an Adequate Search for All Records Responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939

157. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

158. The Center has a statutory right to have the Commerce Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Commerce

Department violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939.

159. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Commerce Department in the foreseeable future.

160. The Center's organizational activities will be adversely affected if the Commerce Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

161. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT SIX: NOAA Has Failed to Conduct an Adequate Search for All Records Responsive to the Center's NOAA FOIA Request Number DOC-NOAA-2017-001066

162. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

163. The Center has a statutory right to have NOAA process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). NOAA violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066.

164. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NOAA in the foreseeable future.

165. The Center's organizational activities will be adversely affected if NOAA continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

166. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

FOURTH CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records

COUNT ONE: The Interior Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

167. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

168. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

169. The Interior Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to Interior Department FOIA Request Number OS-2017-00384.

170. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Interior Department in the foreseeable future.

171. The Center's organizational activities will be adversely affected if the Interior Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

172. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Interior Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT TWO: EPA Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

173. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

174. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

175. EPA violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517.

176. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

177. The Center's organizational activities will be adversely affected if EPA is allowed to continue violating FOIA's disclosure provisions as it has in this case.

178. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

179. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

180. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

181. The Energy Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to Energy Department FOIA Request Number HQ-2017-00806.

182. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Energy Department in the foreseeable future.

183. The Center's organizational activities will be adversely affected if the Energy Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

184. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

185. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

186. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

187. The State Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to State Department FOIA Request Number F-2017-08517.

188. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the State Department in the foreseeable future.

189. The Center's organizational activities will be adversely affected if the State Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

190. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

191. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

192. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

193. The Commerce Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939.

194. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Commerce Department in the foreseeable future.

195. The Center's organizational activities will be adversely affected if the Commerce Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

196. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT SIX: NOAA Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

197. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

198. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

199. NOAA violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066.

200. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NOAA in the foreseeable future.

201. The Center's organizational activities will be adversely affected if NOAA is allowed to continue violating FOIA's disclosure provisions as it has in this case.

202. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

FIFTH CLAIM FOR RELIEF
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
(In the Alternative to the First through Fourth Claims)
Unlawfully Withheld or Unreasonably Delayed Actions that FOIA Requires

COUNT ONE: The Interior Department Withheld or Unreasonably Delayed Actions that FOIA Requires

203. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

204. The Interior Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose

records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (2) make a timely and lawful determination on Interior Department FOIA Request Number OS-2017-00384; (3) conduct a search that is reasonably calculated to locate all responsive records to Interior Department FOIA Request Number OS-2017-00384; (4) provide the Center with records that are responsive to Interior Department FOIA Request Number OS-2017-00384 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to Interior Department FOIA Request Number OS-2017-00384 in the event that records may be subject to an exemption. The Interior Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

205. Alternatively, the Interior Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (2) make a timely and lawful determination on to Interior Department FOIA Request Number OS-2017-00384; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (4) provide the Center with records that are responsive to OS-2017-00384 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Interior Department FOIA Request Number OS-2017-00384 which contain any material that may be lawfully withheld under an exemption(s). The Interior Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

206. As alleged above, the Interior Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

207. The Center has suffered a legal wrong as a result of the Interior Department's failure to comply with the mandates of FOIA. As alleged above, the Interior Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

208. The Center has no other adequate remedy at law to redress the violations noted above.

209. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT TWO: EPA Withheld or Unreasonably Delayed Actions that FOIA Requires

210. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

211. EPA unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (2) make a timely and lawful determination on EPA FOIA Request Number EPA-HQ-2017-005517; (3) conduct a search that is reasonably calculated to locate all responsive records to EPA FOIA Request Number EPA-HQ-2017-005517; (4) provide the Center with records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to EPA FOIA Request Number EPA-HQ-2017-005517 in the event that records may be subject to an exemption. EPA's failures constitute agency actions that are

unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

212. Alternatively, EPA unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (2) make a timely and lawful determination on EPA FOIA Request Number EPA-HQ-2017-005517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (4) provide the Center with records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to EPA FOIA Request Number EPA-HQ-2017-005517 which contain any material that may be lawfully withheld under an exemption(s). EPA's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

213. As alleged above, EPA's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

214. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, EPA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

215. The Center has no other adequate remedy at law to redress the violations noted above.

216. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT THREE: The Energy Department Withheld or Unreasonably Delayed Actions that FOIA Requires

217. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

218. The Energy Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (2) make a timely and lawful determination on Energy Department FOIA Request Number HQ-2017-00806; (3) conduct a search that is reasonably calculated to locate all responsive records to Energy Department FOIA Request Number HQ-2017-00806; (4) provide the Center with records that are responsive to Energy Department FOIA Request Number HQ-2017-00806 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to Energy Department FOIA Request Number HQ-2017-00806 in the event that records may be subject to an exemption. The Energy Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

219. Alternatively, the Energy Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (2) make a timely and lawful determination on Energy Department FOIA Request Number HQ-2017-00806; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (4) provide the Center with records that are responsive to Energy Department FOIA Request Number HQ-2017-00806 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions

to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Energy Department FOIA Request Number HQ-2017-00806 which contain any material that may be lawfully withheld under an exemption(s). The Energy Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

220. As alleged above, the Energy Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

221. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, the Energy Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

222. The Center has no other adequate remedy at law to redress the violations noted above.

223. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FOUR: The State Department Withheld or Unreasonably Delayed Actions that FOIA Requires

224. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

225. The State Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to State Department FOIA Request Number F-2017-08517; (2) make a timely and lawful determination on State Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all responsive records to State Department FOIA Request Number F-2017-08517; (4) provide the Center with records that are

responsive to State Department FOIA Request Number F-2017-08517 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to State Department FOIA Request Number F-2017-08517 in the event that records may be subject to an exemption. The State Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

226. Alternatively, the State Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to F-2017-085177; (2) make a timely and lawful determination on State Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to State Department FOIA Request Number F-2017-08517; (4) provide the Center with records that are responsive to State Department FOIA Request Number F-2017-08517 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to State Department FOIA Request Number F-2017-08517 which contain any material that may be lawfully withheld under an exemption(s). The State Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

227. As alleged above, the State Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

228. The Center has suffered a legal wrong as a result of the State Department's failure to comply with the mandates of FOIA. As alleged above, the State Department violated its

statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

229. The Center has no other adequate remedy at law to redress the violations noted above.

230. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FIVE: The Commerce Department Withheld or Unreasonably Delayed Actions that FOIA Requires

231. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

232. The Commerce Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (2) make a timely and lawful determination on Commerce Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all responsive records to Commerce Department FOIA Request Number DOC-OS-2017-000939; (4) provide the Center with records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to Commerce Department FOIA Request Number DOC-OS-2017-000939 in the event that records may be subject to an exemption. The Commerce Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

233. Alternatively, the Commerce Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search

for and disclose records that are responsive to DOC-OS-2017-000939; (2) make a timely and lawful determination on Commerce Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (4) provide the Center with records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 which contain any material that may be lawfully withheld under an exemption(s). The Commerce Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

234. As alleged above, the Commerce Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

235. The Center has suffered a legal wrong as a result of the Commerce Department's failure to comply with the mandates of FOIA. As alleged above, the Commerce Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

236. The Center has no other adequate remedy at law to redress the violations noted above.

237. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT SIX: NOAA Withheld or Unreasonably Delayed Actions that FOIA Requires

238. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

239. NOAA unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) conduct a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066; (2) provide the Center with records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (3) provide the Center with reasonably segregable portions of records responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which contain any material that may be withheld lawfully under an exemption(s). NOAA's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

240. Alternatively, NOAA unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal (1) conduct a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066; (2) provide the Center with records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (3) provide the Center with reasonably segregable portions of records responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which contain any material that may be withheld lawfully under an exemption(s). NOAA's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

241. As alleged above, NOAA's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

242. The Center has suffered a legal wrong as a result of NOAA's failure to comply with the mandates of FOIA. As alleged above, NOAA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

243. The Center has no other adequate remedy at law to redress the violations noted above.

244. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

SIXTH CLAIM FOR RELIEF
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
(In the Alternative to the First through Eighth Claims)
Violations of FOIA's Requirements Are Arbitrary, Capricious,
an Abuse of Discretion, or Otherwise Not in Accordance with Law

COUNT ONE: The Interior Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

245. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

246. The Interior Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to OS-2017-00384; (2) make a timely and lawful determination on OS-2017-00384; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (4) provide the Center with records that are responsive to Interior Department FOIA Request Number OS-2017-00384 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Interior Department FOIA Request

Number OS-2017-00384 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the Interior Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

247. As alleged above, the Interior Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

248. The Center has suffered a legal wrong as a result of the Interior Department's failure to comply with the mandates of FOIA. As alleged above, the Interior Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

249. The Center has no other adequate remedy at law to redress the violations noted above.

250. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT TWO: EPA's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

251. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

252. EPA violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (2) make a timely and lawful determination on EPA FOIA Request Number EPA-HQ-2017-005517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (4) provide the Center with records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517 which may

not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to EPA FOIA Request Number EPA-HQ-2017-005517 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, EPA's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

253. As alleged above, EPA's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

254. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, EPA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

255. The Center has no other adequate remedy at law to redress the violations noted above.

256. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT THREE: The Energy Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

257. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

258. The Energy Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (2) make a timely and lawful determination on Energy Department FOIA Request Number HQ-2017-00806; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Energy Department FOIA Request Number

HQ-2017-00806s; (4) provide the Center with records that are responsive to Energy Department FOIA Request Number HQ-2017-00806 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Energy Department FOIA Request Number HQ-2017-00806 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the Energy Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

259. As alleged above, the Energy Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

260. The Center has suffered a legal wrong as a result of the Energy Department's failure to comply with the mandates of FOIA. As alleged above, the Energy Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

261. The Center has no other adequate remedy at law to redress the violations noted above.

262. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FOUR: The State Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

263. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

264. The State Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to State Department FOIA

Request Number F-2017-08517; (2) make a timely and lawful determination on State Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to State Department FOIA Request Number F-2017-08517; (4) provide the Center with records that are responsive to State Department FOIA Request Number F-2017-08517 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to State Department FOIA Request Number F-2017-08517 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the State Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

265. As alleged above, the State Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

266. The Center has suffered a legal wrong as a result of the State Department's failure to comply with the mandates of FOIA. As alleged above, the State Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

267. The Center has no other adequate remedy at law to redress the violations noted above.

268. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FIVE: The Commerce Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

269. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

270. The Commerce Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (2) make a timely and lawful determination on Commerce Department FOIA Request Number DOC-OS-2017-000939; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (4) provide the Center with records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the Commerce Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

271. As alleged above, the Commerce Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

272. The Center has suffered a legal wrong as a result of the Commerce Department's failure to comply with the mandates of FOIA. As alleged above, the Commerce Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

273. The Center has no other adequate remedy at law to redress the violations noted above.

274. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT SIX: NOAA's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

275. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

276. NOAA violated FOIA's statutory mandates due to its failure and refusal to (1) conduct a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066; (2) provide the Center with records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (3) provide the Center with reasonably segregable portions of records responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, NOAA's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

277. As alleged above, NOAA's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

278. The Center has suffered a legal wrong as a result of NOAA's failure to comply with the mandates of FOIA. As alleged above, NOAA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

279. The Center has no other adequate remedy at law to redress the violations noted above.

280. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Order Defendants to conduct searches that are reasonably calculated to locate all records responsive to Plaintiff's FOIA Requests, numbers OS-2017-00384, EPA-HQ-2017-005517, HQ-2017-00806, F-2017-08517, DOC-OS-2017-000939, and DOC-NOAA-2017-001066 with the cut-off date for such searches being the date the searches are conducted, and to provide Plaintiff, by a date certain, with all responsive records and reasonably segregable portions of lawfully exempt records sought in this action.

2. Declare that Defendants' failures to timely make determinations on Plaintiff's FOIA Requests are unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(i), or in the alternative, are an agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

3. Declare that Defendants' failures to properly apply FOIA exemptions, 5 U.S.C. § 552(b), are unlawful under FOIA, or in the alternative, are an agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

4. Declare that Defendants' failures to undertake a search for and disclose to Plaintiff all records that are responsive to Plaintiff's FOIA Requests, as alleged above, are unlawful under FOIA, U.S.C. § 552(a)(6)(A)(i), or in the alternative, are an agency action that

has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

5. Declare that Defendants' failures to provide Plaintiff with reasonably segregable portions of records which may be lawfully subject to a FOIA exemption, as alleged above, are unlawful under FOIA, U.S.C. § 552(a)(7)(b), or in the alternative, are agency actions that have been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

6. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.

7. Grant such other and further relief as the Court may deem just and proper.

DATED: August 16, 2017

Respectfully submitted,

/s/ Margaret E. Townsend

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/s/ Amy R. Atwood

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY
378 North Main Avenue
Tucson, AZ 85701,

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, NW
Washington, D.C. 20240,

U.S. ENVIRONMENTAL PROTECTION
AGENCY
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460,

U.S. DEPARTMENT OF ENERGY
1000 Independence Avenue, SW
Washington, D.C. 20585,

U.S. DEPARTMENT OF STATE
2201 C. Street, NW
Washington, D.C. 20037,

U.S. DEPARTMENT OF COMMERCE
1401 Constitution Avenue, NW
Washington, D.C. 20230,

and

U.S. NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
1315 East-West Highway
Silver Spring, MD 20910

Defendants.

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

Case No.: 1:17-cv-0974 (KBJ)

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INTRODUCTION

1. The Center for Biological Diversity (“Center”)—an environmental conservation organization that works to protect native wildlife species and their habitats—challenges the failure of the U.S. Department of Interior, U.S. Environmental Protection Agency, U.S.

Department of Energy, U.S. Department of State, U.S. Department of Commerce, and U.S.

National Oceanic and Atmospheric Administration to provide records concerning the Trump administration’s censorship of these federal departments’ and their component agencies’

discussion or dissemination of information about climate change, in violation of the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA” or “Act”), or alternatively, the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (“APA”).

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2. From January through March 2017, news outlets reported that the Trump administration directed numerous federal departments and agencies to remove information from their websites about climate change and/or to cease use of phrases such as “climate change,” “emissions reduction,” or “Paris agreement” in agency documents. These departments and agencies include the six named defendants in this action.

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3. To understand these actions, the Center filed FOIA requests with each of the defendants, seeking directives or communications barring or removing climate change-related words or phrases from formal communications as well as the information, such as webpages about climate change, that has been removed from public view.

4. However, although each defendant acknowledged the Center’s request, none have provided any responsive records or stated when they might do so.

5. Defendants are unlawfully withholding the records by failing to search for and provide all responsive records to the Center. The defendants’ failure to comply with FOIA by

releasing all records related to the censorship of climate change-related words and phrases is contrary to FOIA and undermines FOIA's policy of government transparency.

6. Because prompt access to these records is necessary to effectuate FOIA's purpose, the Center seeks declaratory relief establishing that defendants are in violation of FOIA, or alternatively, the APA. The Center also seeks injunctive relief directing defendants to provide responsive records without any further delay.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under FOIA, the APA, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

8. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district, because a portion of the responsive records may be found in this district.

9. Declaratory relief is appropriate under 28 U.S.C. § 2201.

10. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

PARTIES

11. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit conservation organization with offices throughout the United States. The Center has more than 58,000 members. The Center and its members are harmed by EPA's violations of FOIA, or alternatively the APA, as such violations preclude the Center from gaining a full understanding of the circumstances, rationales, and individuals involved in the Trump administration's censorship of climate change-related information.

12. Defendant U.S. DEPARTMENT OF THE INTERIOR (“Interior Department”) is an independent agency of the executive branch of the U.S. government. The Interior Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

13. Defendant U.S. ENVIRONMENTAL PROTECTION AGENCY (“EPA”) is an independent agency of the executive branch of the U.S. government. EPA is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

14. Defendant U.S. DEPARTMENT OF ENERGY (“Energy Department”) is an independent agency of the executive branch of the U.S. government. The Energy Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

15. Defendant U.S. DEPARTMENT OF STATE (“State Department”) is an independent agency of the executive branch of the U.S. government. The State Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

16. Defendant U.S. DEPARTMENT OF COMMERCE (“Commerce Department”) is an independent agency of the executive branch of the U.S. government. The Commerce Department is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

17. Defendant U.S. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (“NOAA”) is an independent agency of the executive branch of the U.S.

government. NOAA is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

STATUTORY BACKGROUND

18. FOIA's basic purpose is government transparency. It establishes the public's right to access all federal agency records unless such records may be withheld pursuant to one of nine, narrowly construed FOIA exemptions. 5 U.S.C. § 552(b)(1)-(9).

19. FOIA imposes strict and rigorous deadlines on federal agencies when they receive a request for records pursuant to FOIA. Specifically, an agency must determine whether to disclose responsive records and notify the requester of its determination within 20 working days of receiving a FOIA request, and it must make records "promptly" available unless it can establish that certain unusual circumstances are present and/or that it may lawfully withhold records, or portions thereof, from disclosure. *Id.* § 552(a)(3)(A), (a)(6). Also within 20 working days, the agency must inform the requester that it has a right to appeal the agency's determination. *Id.* § 552(a)(6)(A)(i).

20. FOIA places the burden on the agency to prove that it may withhold responsive records from a requester. *Id.* § 552(a)(4)(B).

21. Congress has specified limited circumstances in which federal agencies may obtain more time to make the determination that is required by 5 U.S.C. § 552(a)(6)(A)(i).

22. First, an agency may toll the 20-working-day deadline to seek additional information or clarification from a requester, but that tolling period ends when the agency receives such information or clarification. *Id.* § 552(a)(6)(A)(ii).

23. Second, an agency may extend the 20-working-day deadline for an additional 10 working days by giving a written notice to the requester that sets forth "unusual circumstances"

to justify a deadline extension which also requires that it provide the date by which the agency expects to make the determination. *Id.* § 552(a)(6)(B)(i). However, to invoke such “unusual circumstances,” the agency must provide the requester with “an opportunity to limit the scope of the request so that it may be processed within [20 working days] or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.” *Id.* § 552(a)(6)(B)(ii). In addition, when asserting unusual circumstances, the agency “shall make available its FOIA Public Liaison” to “assist in the resolution of any disputes between the requester and the agency.” *Id.*

24. FOIA requires each agency to make reasonable efforts to search for records in a manner that is reasonably calculated to locate all records that are responsive to the FOIA request. *Id.* § 552(a)(3)(C)-(D).

25. FOIA requires federal agencies to expeditiously disclose requested records, *see id.* § 552, and mandates a policy of broad disclosure of government records. Any inquiry under FOIA brings with it a strong presumption in favor of disclosure.

26. Congress recognized that in certain, limited instances, records may be withheld as exempt from FOIA’s broad disclosure mandate, and thus created nine categories of exemptions. *Id.* § 552(b). These exemptions, however, are narrowly construed in light of FOIA’s dominant objective of disclosure, not secrecy.

27. The U.S. district courts have jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

28. Alternatively, an agency’s response to a FOIA request and/or a FOIA appeal is subject to judicial review under the APA, which confers a right of judicial review on any person

who is adversely affected by agency action, 5 U.S.C. § 702, and authorizes district courts to compel agency action that is unlawfully withheld or unreasonably delayed. *Id.* § 706(1). District courts must set aside any agency action that is found to be “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” *Id.* § 706(2)(A).

FACTUAL BACKGROUND

Interior Department FOIA Request (OS-2017-00384)

29. On March 30, 2017, the Center submitted a FOIA request to the Interior Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

30. The same day, the Interior Department acknowledged the Center’s request and assigned it tracking number OS-2017-00384 (“Interior Department FOIA Request”).

31. A determination on the Center’s FOIA request to the Interior Department was due by April 27, 2017, which is 20 working days after the date of the Interior Department’s acknowledgement of the request.

32. As of the date of the filing of this amended complaint, which is 77 working days past the 20-working-day deadline, the Interior Department has not requested additional time to respond, provided any responsive records, or provided a determination in response to the Center’s FOIA request.

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EPA FOIA Request (EPA-HQ-2017-005517)

33. On March 30, 2017, the Center submitted a FOIA request to the EPA, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

34. The same day, the EPA acknowledged the Center’s request and assigned it tracking number EPA-HQ-2017-005517 (“EPA FOIA Request”). On March 12, 2017, EPA granted a waiver of fees in connection with the request.

35. A determination on the Center’s FOIA request to the EPA was due by April 27, 2017, which is 20 working days after the date of the EPA’s acknowledgement of the request.

36. After receiving no further communications from EPA regarding this request, by letter dated May 8, 2017, the Center informed EPA that its determination was overdue and offered to assist EPA in making a determination on the Center’s EPA FOIA Request. The Center also requested an estimate for when EPA would make a determination on the Center’s FOIA request.

37. As of the date of the filing of this amended complaint, which is 77 working days past the 20-working-day deadline, EPA has not responded to the Center’s May 8, 2017 letter, requested additional time to respond to the Center’s FOIA request, provided any responsive records, made a determination, or provided an estimated date of completion of the Center’s FOIA request.

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Energy Department FOIA Request (HQ-2017-00806)

38. On March 30, 2017, the Center submitted a FOIA request to the Energy Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

39. The next day, on March 31, 2017, the Energy Department acknowledged the Center’s request and assigned it tracking number HQ-2017-00806 (“Energy Department FOIA Request”).

40. On April 11, 2017, a representative of the Energy Department, Ms. Natalie Anderson, contacted Ms. Margaret E. Townsend of the Center for Biological Diversity by phone and email. Ms. Anderson stated that she wanted to clarify the timeframe for records that are responsive to the Center’s Energy Department FOIA Request. In response, Ms. Townsend informed Ms. Anderson that the Energy Department could search for and provide all responsive records that were generated on or after November 9, 2016.

41. Ms. Anderson also stated that the Energy Department had received many FOIA requests that are similar to the Center’s Energy Department FOIA Request, and in an email dated April 11, 2017, suggested that if the Center would agree to limit the department’s search to two of its program offices—specifically, the Office of International Affairs (“OIA”) and the Office of Energy Policy and Systems Analysis (“EPSA”)—this “should allow [the Energy Department] to

provide a response more quickly.” Accordingly, the Center agreed to limit the department’s search to the OIA and EPSA.

42. Also in her April 11, 2017 email, Ms. Anderson asked if the Center would agree to eliminate the phrases “including but not limited to” and “any related words or phrases” from its request, and if the Center would like to include any search terms in addition to “climate change,” “global warming,” “climate disruption,” “greenhouse gas emissions,” “emissions reductions,” and/or “Paris agreement.” In response, Ms. Townsend added the terms “climate” and “fossil fuels” to the search terms to be used by the Energy Department during its search for responsive records from the OIA and EPSA.

43. By email dated April 13, 2017, Ms. Anderson confirmed the scope of the department’s search for responsive records, stating that the department would “move forward with processing.”

44. By letter dated April 26, 2017, Energy Department FOIA Officer Alexander C. Morris confirmed the agreement of Ms. Anderson and Ms. Townsend regarding the scope of the department’s search, informed the Center that the request was assigned to OIA and EPSA, and granting the Center’s request for a waiver of fees.

45. A determination on the Center’s Energy Department FOIA Request was due on May 11, 2017, which is 20 working days after the date of Ms. Anderson’s email stating that the department was prepared to “move forward with processing.”

46. ~~By letter dated August 11, 2017, which was 65 working days past the 20-~~
working-day deadline, the Energy Department provided a determination in response to the
Center’s FOIA request.

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47. In its determination, the Energy Department stated that it possessed no responsive records.

48. News articles indicate that the Energy Department likely possesses responsive records. For example, in an article date March 29, 2017, *Politico* reported that “[a] supervisor at the Energy Department’s international climate office told staff this week not to use the phrases ‘climate change,’ ‘emissions reduction’ or ‘Paris Agreement’ in written memos, briefings or other written communication” See Eric Wolff, Energy Department climate office bans use of phrase “climate change”, *Politico* (Mar. 29, 2017), <http://www.politico.com/story/2017/03/energy-department-climate-change-phrases-banned-236655>.

49. The Center challenges the adequacy of the Energy Department’s search for responsive records and the Energy Department’s failure to provide all responsive records to the Center.

State Department FOIA Request

50. On April 3, 2017, the Center submitted a FOIA request to the State Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

51. The next day, on April 4, 2017, the State Department acknowledged the Center’s request and assigned it tracking number F-2017-08517 (“State Department FOIA Request”).

52. By form letter dated April 10, 2017, the Requester Communications Branch of the State Department's Office of Information Programs & Services re-acknowledged receipt of the Center's FOIA request, and it also granted a public interest waiver of fees that are incurred in processing the request.

53. After receiving no further communications from the State Department regarding this request, by letter dated May 31, 2017, the Center informed the State Department that its determination was overdue and offered to assist the State Department in making a determination on the Center's State Department FOIA Request. The Center also requested an estimate for when the State Department would make a determination on the Center's FOIA request.

54. By email dated June 1, 2017, Charlotte W. Duckett confirmed the State Department's receipt of the Center's May 31, 2017 communication. Ms. Duckett stated that a copy of the Center's May 31, 2017 communication "was forwarded to the office that is processing your request" and that "our office has a requested an estimated completion date for your request." Ms. Duckett did not provide an estimated date of completion of the State Department's determination on the Center's request.

55. A determination on the Center's FOIA request to the State Department was due by May 2, 2017, which is 20 working days after the date of the State Department's acknowledgement of the request.

56. As of the date of the filing of this amended complaint, which is 74 working days past the 20-working-day deadline, the State Department has not requested additional time to respond, provided any responsive records, or provided a determination in response to the Center's FOIA request.

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Commerce Department FOIA Request (DOC-OS-2017-000939)

57. On April 3, 2017, the Center submitted a FOIA request to the Commerce Department, requesting “all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

58. The same day, the Commerce Department acknowledged the Center’s request and assigned it tracking number DOC-OS-2017-000939 (“Commerce Department FOIA Request”). On April 10, 2017, the Commerce Department granted a waiver of fees in connection with the request.

59. On April 13, 2017, the Commerce Department sent a letter to the Center requesting clarification of (1) the time frame of the records request and (2) the type of records requested.

60. The Center provided the requested clarification to the Commerce Department via electronic mail on April 17, 2017. The Center informed the Commerce Department that “[t]he timeframe of the records request is November 9, 2016 to the date of the search,” and that

[t]he type of records requested is all records, as defined by FOIA, and included in the following paragraph from our request:

For purposes of this request, “records” is consistent with the meaning of the term under FOIA. This includes, but is not limited to, documents of any kind including electronic as well as paper documents, e-mails, writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), correspondence, letters, memoranda, reports, consultations, papers, studies, notes, field notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, data, data bases, drawings, surveys, graphs, charts,

photographs, videos, meeting notes or minutes, electronic and magnetic recordings of meetings, maps, GIS layers, GPS, UTM, LiDAR, CDs, and any other compilations of data from which information can be obtained.

61. On May 23, 2017, Commerce Department FOIA Specialist Ms. Ayana Crawford called Ms. Townsend to ask if the Center would respond to the agency's request for clarification before Ms. Crawford took action to close the request. Ms. Townsend informed Ms. Crawford that the Center had already provided the requested clarification on April 17, 2017. Ms. Crawford asked Ms. Townsend to resend it. Ms. Townsend resent the email clarification the same day.

62. A determination on the Center's Commerce Department FOIA Request was due on May 3, 2017, which is 20 working days after the Commerce Department received the Center's FOIA request.

63. Even if the Commerce Department had reasonably suspended its timeline for a determination on the Center's FOIA request, by relying on May 23, 2017 as the date that the Center provided clarification, then the Center's Commerce Department FOIA Request would have been due on June 9, 2017.

64. As of the date of the filing of this Amended complaint, which is 47 workdays past the June 9, 2017 deadline, the Commerce Department has not requested additional time to respond, provided any responsive records, or provided a determination in response to the Center's Commerce Department FOIA request.

NOAA FOIA Request (DOC-NOAA-2017-001066)

65. On April 21, 2017, the Center submitted a FOIA request to NOAA, requesting "all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-

related words or phrases, including but not limited to ‘climate change,’ ‘global warming,’ ‘climate disruption,’ ‘greenhouse gas emissions,’ ‘emissions reductions,’ and/or ‘Paris agreement,’ and any related words or phrases.”

66. The same day, NOAA acknowledged the Center’s request and assigned it tracking number DOC-NOAA-2017-001066 (“NOAA FOIA Request”). On April 24, 2014, NOAA provided a formal acknowledgement letter to the Center.

67. On May 3, 2017, NOAA informed the Center that it determined that a waiver of fees in connection with the request was not applicable as the request was “not billable.”

68. On May 10, 2017, NOAA provided a final “no records” determination to the Center and informed the Center of its right to appeal the determination.

69. The Center appealed NOAA’s “no records” determination on June 30, 2017. The same day, NOAA acknowledged the Center’s appeal and assigned it tracking number DOC-OS-2017-001456 (“NOAA FOIA Appeal”)

70. NOAA affirmed its decision on the Center’s NOAA FOIA Appeal on July 3, 2017. In the letter, the agency informed the Center that “[r]ecords indicate that a search was tasked to the NOAA National Environmental Satellite Data and Information Services (NESDIS) and that a search of the NESDIS correspondence unit was performed.” NOAA stated that “it is reasonable to assume that the NESDIS correspondence unit would hold any and all documents responsive to [the Center’s] request.” NOAA also informed the Center that it has “the right to obtain judicial review as provided for in 5 U.S.C. § 552(a)(4)(8).”

71. News articles indicate that NOAA possesses responsive records. For example, in an article date July 13, 2017, the *New York Times* reported that phrasing in a NOAA news release accompanying a report about the warming ability of global emissions of greenhouse

gases omitted any link of “human activity” to emissions. *See* Lisa Friedman, *Climate-Altering Gases Spiked in 2016, Federal Scientists Report*, NY Times (July 13, 2017), <https://www.nytimes.com/2017/07/13/climate/greenhouse-gases-spike-noaa-global-warming.html>.

72. The Center challenges the adequacy of NOAA’s search for responsive records and NOAA’s failure to provide all responsive records to the Center.

All Requests

73. None of FOIA’s nine exemptions to the statute’s disclosure mandate apply to the records that are responsive to any of the Center’s FOIA requests. *Id.* § 552(b).

74. The Center has been required to expend resources to prosecute this action.

CLAIMS FOR RELIEF

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FIRST CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Comply with FOIA’s Mandatory Determination Deadline

COUNT ONE: The Interior Department Missed FOIA’s Mandatory Determination Deadline for the Center’s Interior Department FOIA Request Number OS-2017-00384

75. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

76. The Interior Department has violated FOIA by refusing to disclose records that are responsive to the Center’s Interior Department FOIA Request Number OS-2017-00384.

77. The Center has a statutory right to a final determination from the Interior Department on FOIA Request Number OS-2017-00384 in a manner that complies with FOIA. The Interior Department has violated the Center’s rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

78. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Interior Department in the foreseeable future.

79. The Center's organizational activities will be adversely affected if the Interior Department continues to violate FOIA's disclosure provisions as it has in this case.

80. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, the Interior Department will continue to violate Plaintiff's rights to receive public records under FOIA.

COUNT TWO: EPA Missed FOIA's Mandatory Determination Deadline for the Center's EPA FOIA Request Number EPA-HQ-2017-005517

81. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

82. EPA has violated FOIA by refusing to disclose records that are responsive to the Center's EPA FOIA Request Number EPA-HQ-2017-005517.

83. The Center has a statutory right to a final determination from EPA on its EPA FOIA Request Number EPA-HQ-2017-005517 in a manner that complies with FOIA. EPA has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

84. The Center's organizational activities will be adversely affected if EPA is allowed to continue violating FOIA's decision deadlines as it has in this case.

85. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Missed FOIA's Mandatory Determination Deadline for the Center's Energy Department FOIA Request Number EPA-HQ-2017-005517

86. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

87. The Energy Department has violated FOIA by refusing to disclose records that are responsive to the Center's Energy Department FOIA Request Number HQ-2017-00806.

88. The Center has a statutory right to a final determination from the Energy Department on its Energy Department FOIA Request Number HQ-2017-00806 in a manner that complies with FOIA. The Energy Department has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

89. The Center's organizational activities will be adversely affected if the Energy Department is allowed to continue violating FOIA's decision deadlines as it has in this case.

90. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Missed FOIA's Mandatory Determination Deadline for the Center's State Department FOIA Request Number F-2017-08517

91. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

92. The State Department has violated FOIA by refusing to disclose records that are responsive to the Center's State Department FOIA Request Number F-2017-08517.

93. The Center has a statutory right to a final determination from the State Department on its State Department FOIA Request Number F-2017-08517 in a manner that

complies with FOIA. The State Department has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

94. The Center's organizational activities will be adversely affected if the State Department is allowed to continue violating FOIA's decision deadlines as it has in this case.

95. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Missed FOIA's Mandatory Determination Deadline for the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939

96. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

97. The Commerce Department has violated FOIA by refusing to disclose records that are responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939.

98. The Center has a statutory right to a final determination from the Commerce Department on its Commerce Department FOIA Request Number DOC-OS-2017-000939 in a manner that complies with FOIA. The Commerce Department has violated the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

99. The Center's organizational activities will be adversely affected if the Commerce Department is allowed to continue violating FOIA's decision deadlines as it has in this case.

100. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

SECOND CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Disclose All Responsive Records to the Center

COUNT ONE: The Interior Department Has Unlawfully Withheld Records Responsive to Interior Department FOIA Request Number OS-2017-00384

101. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

102. The Center has a statutory right to the records it seeks, and there is no legal basis for the Interior Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

103. The Interior Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's Interior Department FOIA Request Number OS-2017-00384.

104. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the Interior Department in the foreseeable future.

105. The Center's organizational activities will be adversely affected if the Interior Department continues to violate FOIA's disclosure provisions as it has in this case.

106. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Interior Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT TWO: EPA Has Unlawfully Withheld Records Responsive to EPA FOIA Request Number EPA-HQ-2017-005517

107. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

108. The Center has a statutory right to the records it seeks, and there is no legal basis for EPA to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

109. EPA has violated the Center's rights in this regard by withholding records that are responsive to the Center's EPA FOIA Request Number EPA-HQ-2017-005517.

110. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to EPA in the foreseeable future.

111. The Center's organizational activities will be adversely affected if EPA continues to violate FOIA's disclosure provisions as it has in this case.

112. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Has Unlawfully Withheld Records Responsive to Energy Department FOIA Request Number HQ-2017-00806

113. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

114. The Center has a statutory right to the records it seeks, and there is no legal basis for the Energy Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

115. The Energy Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's Energy Department FOIA Request Number HQ-2017-00806.

116. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the Energy Department in the foreseeable future.

117. The Center's organizational activities will be adversely affected if the Energy Department continues to violate FOIA's disclosure provisions as it has in this case.

118. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Has Unlawfully Withheld Records Responsive to The State Department FOIA Request Number F-2017-08517

119. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

120. The Center has a statutory right to the records it seeks, and there is no legal basis for the State Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

121. The State Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's State Department FOIA Request Number F-2017-08517.

122. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the State Department in the foreseeable future.

123. The Center's organizational activities will be adversely affected if the State Department continues to violate FOIA's disclosure provisions as it has in this case.

124. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Has Unlawfully Withheld Records Responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939

125. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

126. The Center has a statutory right to the records it seeks, and there is no legal basis for the Commerce Department to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. See 5 U.S.C. § 552(b)(1)-(9).

127. The Commerce Department has violated the Center's rights in this regard by withholding records that are responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939.

128. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to the Commerce Department in the foreseeable future.

129. The Center's organizational activities will be adversely affected if the Commerce Department continues to violate FOIA's disclosure provisions as it has in this case.

130. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT SIX: NOAA Has Failed to Conduct an Adequate Search for All Records Responsive to the Center's Commerce Department FOIA Request Number DOC-NOAA-2017-001066

131. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

132. The Center has a statutory right to the records it seeks, and there is no legal basis for NOAA to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

133. NOAA has violated the Center's rights in this regard by withholding records that are responsive to the Center's NOAA FOIA Request Number DOC- NOAA-2017-001066.

134. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in FOIA requests to NOAA in the foreseeable future.

135. The Center's organizational activities will be adversely affected if NOAA continues to violate FOIA's disclosure provisions as it has in this case.

136. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

THIRD CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Conduct an Adequate Search for Responsive Records

COUNT ONE: The Interior Department Has Failed to Conduct an Adequate Search for All Records Responsive to Interior Department FOIA Request Number OS-2017-00384

137. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

138. The Center has a statutory right to have the Interior Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Interior Department

violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to Interior Department FOIA Request Number OS-2017-00384.

139. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Interior Department in the foreseeable future.

140. The Center's organizational activities will be adversely affected if the Interior Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

141. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Interior Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT TWO: EPA Has Failed to Conduct an Adequate Search for All Records Responsive to EPA FOIA Request Number EPA-HQ-2017-005517

142. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

143. The Center has a statutory right to have EPA process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). EPA violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517.

144. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

145. The Center's organizational activities will be adversely affected if EPA continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

146. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Has Failed to Conduct an Adequate Search for All Records Responsive to Energy Department FOIA Request Number HQ-2017-00806

147. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

148. The Center has a statutory right to have the Energy Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Energy Department violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to Energy Department FOIA Request Number HQ-2017-00806.

149. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Energy Department in the foreseeable future.

150. The Center's organizational activities will be adversely affected if the Energy Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

151. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Has Failed to Conduct an Adequate Search for All Records Responsive to State Department FOIA Request Number F-2017-08517

152. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

153. The Center has a statutory right to have the State Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The State Department violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to State Department FOIA Request Number F-2017-08517.

154. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the State Department in the foreseeable future.

155. The Center's organizational activities will be adversely affected if the State Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

156. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Has Failed to Conduct an Adequate Search for All Records Responsive to the Center's Commerce Department FOIA Request Number DOC-OS-2017-000939

157. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

158. The Center has a statutory right to have the Commerce Department process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Commerce

Department violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939.

159. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Commerce Department in the foreseeable future.

160. The Center's organizational activities will be adversely affected if the Commerce Department continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

161. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT SIX: NOAA Has Failed to Conduct an Adequate Search for All Records Responsive to the Center's NOAA FOIA Request Number DOC-NOAA-2017-001066

162. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

163. The Center has a statutory right to have NOAA process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). NOAA violated the Center's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066.

164. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NOAA in the foreseeable future.

165. The Center's organizational activities will be adversely affected if NOAA continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

166. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

FOURTH CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT
Failure to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records

COUNT ONE: The Interior Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

167. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

168. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

169. The Interior Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to Interior Department FOIA Request Number OS-2017-00384.

170. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Interior Department in the foreseeable future.

171. The Center's organizational activities will be adversely affected if the Interior Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

172. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Interior Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT TWO: EPA Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

173. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

174. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

175. EPA violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517.

176. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

177. The Center's organizational activities will be adversely affected if EPA is allowed to continue violating FOIA's disclosure provisions as it has in this case.

178. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, EPA will continue to violate the Center's rights to receive public records under FOIA.

COUNT THREE: The Energy Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

179. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

180. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

181. The Energy Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to Energy Department FOIA Request Number HQ-2017-00806.

182. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Energy Department in the foreseeable future.

183. The Center's organizational activities will be adversely affected if the Energy Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

184. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Energy Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FOUR: The State Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

185. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

186. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

187. The State Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to State Department FOIA Request Number ~~F-2017-08517~~.

188. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the State Department in the foreseeable future.

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189. The Center's organizational activities will be adversely affected if the State Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

190. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the State Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT FIVE: The Commerce Department Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

191. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

192. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

193. The Commerce Department violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939.

194. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Commerce Department in the foreseeable future.

195. The Center's organizational activities will be adversely affected if the Commerce Department is allowed to continue violating FOIA's disclosure provisions as it has in this case.

196. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, the Commerce Department will continue to violate the Center's rights to receive public records under FOIA.

COUNT SIX: NOAA Failed to Provide all Reasonably Segregable Portions of Any Lawfully Exempt Records

197. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

198. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

199. NOAA violated the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066.

200. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to NOAA in the foreseeable future.

201. The Center's organizational activities will be adversely affected if NOAA is allowed to continue violating FOIA's disclosure provisions as it has in this case.

202. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, NOAA will continue to violate the Center's rights to receive public records under FOIA.

FIFTH CLAIM FOR RELIEF
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
(In the Alternative to the First through Fourth Claims)
Unlawfully Withheld or Unreasonably Delayed Actions that FOIA Requires

COUNT ONE: The Interior Department Withheld or Unreasonably Delayed Actions that FOIA Requires

203. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

204. The Interior Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose

records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (2) make a timely and lawful determination on Interior Department FOIA Request Number OS-2017-00384; (3) conduct a search that is reasonably calculated to locate all responsive records to Interior Department FOIA Request Number OS-2017-00384; (4) provide the Center with records that are responsive to Interior Department FOIA Request Number OS-2017-00384 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to Interior Department FOIA Request Number OS-2017-00384 in the event that records may be subject to an exemption. The Interior Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

205. Alternatively, the Interior Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (2) make a timely and lawful determination on to Interior Department FOIA Request Number OS-2017-00384; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (4) provide the Center with records that are responsive to OS-2017-00384 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Interior Department FOIA Request Number OS-2017-00384 which contain any material that may be lawfully withheld under an exemption(s). The Interior Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

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206. As alleged above, the Interior Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

207. The Center has suffered a legal wrong as a result of the Interior Department's failure to comply with the mandates of FOIA. As alleged above, the Interior Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

208. The Center has no other adequate remedy at law to redress the violations noted above.

209. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT TWO: EPA Withheld or Unreasonably Delayed Actions that FOIA Requires

210. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

211. EPA unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (2) make a timely and lawful determination on EPA FOIA Request Number EPA-HQ-2017-005517; (3) conduct a search that is reasonably calculated to locate all responsive records to EPA FOIA Request Number EPA-HQ-2017-005517; (4) provide the Center with records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to EPA FOIA Request Number EPA-HQ-2017-005517 in the event that records may be subject to an exemption. EPA's failures constitute agency actions that are

unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

212. Alternatively, EPA unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (2) make a timely and lawful determination on EPA FOIA Request Number EPA-HQ-2017-005517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (4) provide the Center with records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to EPA FOIA Request Number EPA-HQ-2017-005517 which contain any material that may be lawfully withheld under an exemption(s). EPA's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

213. As alleged above, EPA's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

214. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, EPA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

215. The Center has no other adequate remedy at law to redress the violations noted above.

216. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT THREE: The Energy Department Withheld or Unreasonably Delayed Actions that FOIA Requires

217. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

218. The Energy Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (2) make a timely and lawful determination on Energy Department FOIA Request Number HQ-2017-00806; (3) conduct a search that is reasonably calculated to locate all responsive records to Energy Department FOIA Request Number HQ-2017-00806; (4) provide the Center with records that are responsive to Energy Department FOIA Request Number HQ-2017-00806 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to Energy Department FOIA Request Number HQ-2017-00806 in the event that records may be subject to an exemption. The Energy Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

219. Alternatively, the Energy Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (2) make a timely and lawful determination on Energy Department FOIA Request Number HQ-2017-00806; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (4) provide the Center with records that are responsive to Energy Department FOIA Request Number HQ-2017-00806 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions

to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Energy Department FOIA Request Number HQ-2017-00806 which contain any material that may be lawfully withheld under an exemption(s). The Energy Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

220. As alleged above, the Energy Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

221. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, the Energy Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

222. The Center has no other adequate remedy at law to redress the violations noted above.

223. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FOUR: The State Department Withheld or Unreasonably Delayed Actions that FOIA Requires

224. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

225. The State Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to State Department FOIA Request Number F-2017-08517; (2) make a timely and lawful determination on State Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all responsive records to State Department FOIA Request Number F-2017-08517; (4) provide the Center with records that are

responsive to State Department FOIA Request Number F-2017-08517 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to State Department FOIA Request Number F-2017-08517 in the event that records may be subject to an exemption. The State Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

226. Alternatively, the State Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to F-2017-085177; (2) make a timely and lawful determination on State Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to State Department FOIA Request Number F-2017-08517; (4) provide the Center with records that are responsive to State Department FOIA Request Number F-2017-08517 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to State Department FOIA Request Number F-2017-08517 which contain any material that may be lawfully withheld under an exemption(s). The State Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

227. As alleged above, the State Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

228. The Center has suffered a legal wrong as a result of the State Department's failure to comply with the mandates of FOIA. As alleged above, the State Department violated its

statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

229. The Center has no other adequate remedy at law to redress the violations noted above.

230. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FIVE: The Commerce Department Withheld or Unreasonably Delayed Actions that FOIA Requires

231. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

232. The Commerce Department unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search for and disclose records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (2) make a timely and lawful determination on Commerce Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all responsive records to Commerce Department FOIA Request Number DOC-OS-2017-000939; (4) provide the Center with records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 that are not within the scope of any of FOIA's exemptions to mandatory disclosure; and (5) provide the Center with all reasonably segregable portions of responsive records to Commerce Department FOIA Request Number DOC-OS-2017-000939 in the event that records may be subject to an exemption. The Commerce Department's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

233. Alternatively, the Commerce Department unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) search

for and disclose records that are responsive to DOC-OS-2017-000939; (2) make a timely and lawful determination on Commerce Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (4) provide the Center with records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 that may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 which contain any material that may be lawfully withheld under an exemption(s). The Commerce Department's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

234. As alleged above, the Commerce Department's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

235. The Center has suffered a legal wrong as a result of the Commerce Department's failure to comply with the mandates of FOIA. As alleged above, the Commerce Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

236. The Center has no other adequate remedy at law to redress the violations noted above.

237. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT SIX: NOAA Withheld or Unreasonably Delayed Actions that FOIA Requires

238. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

239. NOAA unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal to (1) conduct a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066; (2) provide the Center with records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (3) provide the Center with reasonably segregable portions of records responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which contain any material that may be withheld lawfully under an exemption(s). NOAA's failures constitute agency actions that are unlawfully withheld, and therefore, these actions are actionable pursuant to the APA, 5 U.S.C. § 706(1).

240. Alternatively, NOAA unreasonably delayed agency action by failing to comply with the mandates of FOIA consequent to its failure and refusal (1) conduct a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066; (2) provide the Center with records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (3) provide the Center with reasonably segregable portions of records responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which contain any material that may be withheld lawfully under an exemption(s). NOAA's failures constitute agency action unreasonably delayed and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

241. As alleged above, NOAA's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

242. The Center has suffered a legal wrong as a result of NOAA's failure to comply with the mandates of FOIA. As alleged above, NOAA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

243. The Center has no other adequate remedy at law to redress the violations noted above.

244. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

SIXTH CLAIM FOR RELIEF
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
(In the Alternative to the First through Eighth Claims)
Violations of FOIA's Requirements Are Arbitrary, Capricious,
an Abuse of Discretion, or Otherwise Not in Accordance with Law

COUNT ONE: The Interior Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

245. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

246. The Interior Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to OS-2017-00384; (2) make a timely and lawful determination on OS-2017-00384; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Interior Department FOIA Request Number OS-2017-00384; (4) provide the Center with records that are responsive to Interior Department FOIA Request Number OS-2017-00384 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Interior Department FOIA Request

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Number OS-2017-00384 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the Interior Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

247. As alleged above, the Interior Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

248. The Center has suffered a legal wrong as a result of the Interior Department's failure to comply with the mandates of FOIA. As alleged above, the Interior Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

249. The Center has no other adequate remedy at law to redress the violations noted above.

250. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT TWO: EPA's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

251. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

252. EPA violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (2) make a timely and lawful determination on EPA FOIA Request Number EPA-HQ-2017-005517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517; (4) provide the Center with records that are responsive to EPA FOIA Request Number EPA-HQ-2017-005517 which may

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not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to EPA FOIA Request Number EPA-HQ-2017-005517 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, EPA's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

253. As alleged above, EPA's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

254. The Center has suffered a legal wrong as a result of EPA's failure to comply with the mandates of FOIA. As alleged above, EPA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

255. The Center has no other adequate remedy at law to redress the violations noted above.

256. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT THREE: The Energy Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

257. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

258. The Energy Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to Energy Department FOIA Request Number HQ-2017-00806; (2) make a timely and lawful determination on Energy Department FOIA Request Number HQ-2017-00806; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Energy Department FOIA Request Number

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HQ-2017-00806s; (4) provide the Center with records that are responsive to Energy Department FOIA Request Number HQ-2017-00806 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Energy Department FOIA Request Number HQ-2017-00806 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the Energy Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

259. As alleged above, the Energy Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

260. The Center has suffered a legal wrong as a result of the Energy Department's failure to comply with the mandates of FOIA. As alleged above, the Energy Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

261. The Center has no other adequate remedy at law to redress the violations noted above.

262. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT FOUR: The State Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

263. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

264. The State Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to State Department FOIA

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Request Number F-2017-08517; (2) make a timely and lawful determination on State Department FOIA Request Number F-2017-08517; (3) conduct a search that is reasonably calculated to locate all records that are responsive to State Department FOIA Request Number F-2017-08517; (4) provide the Center with records that are responsive to State Department FOIA Request Number F-2017-08517 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to State Department FOIA Request Number F-2017-08517 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the State Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

265. As alleged above, the State Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

266. The Center has suffered a legal wrong as a result of ~~the State Department's failure~~ to comply with the mandates of FOIA. As alleged above, the State Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

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267. The Center has no other adequate remedy at law to redress the violations noted above.

268. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

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COUNT FIVE: The Commerce Department's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

269. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

270. The Commerce Department violated FOIA's statutory mandates due to its failure and refusal to (1) search for and disclose records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (2) make a timely and lawful determination on Commerce Department FOIA Request Number DOC-OS-2017-000939; (3) conduct a search that is reasonably calculated to locate all records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939; (4) provide the Center with records that are responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the Center with reasonably segregable portions of records responsive to Commerce Department FOIA Request Number DOC-OS-2017-000939 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, the Commerce Department's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

271. As alleged above, the Commerce Department's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

272. The Center has suffered a legal wrong as a result of the Commerce Department's failure to comply with the mandates of FOIA. As alleged above, the Commerce Department violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

273. The Center has no other adequate remedy at law to redress the violations noted above.

274. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

COUNT SIX: NOAA's Violations of FOIA are Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

275. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

276. NOAA violated FOIA's statutory mandates due to its failure and refusal to (1) conduct a search that is reasonably calculated to locate all records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066; (2) provide the Center with records that are responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which may not be withheld pursuant to any of FOIA's narrowly construed exemptions to mandatory disclosure; and (3) provide the Center with reasonably segregable portions of records responsive to NOAA FOIA Request Number DOC-NOAA-2017-001066 which contain any material that may be withheld lawfully under an exemption(s). By repeatedly violating FOIA's statutory mandates, NOAA's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

277. As alleged above, NOAA's repeated failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

278. The Center has suffered a legal wrong as a result of NOAA's failure to comply with the mandates of FOIA. As alleged above, NOAA violated its statutory duties under the APA and injured the Center's interests in public oversight of governmental operations.

279. The Center has no other adequate remedy at law to redress the violations noted above.

280. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Order Defendants to conduct searches that are reasonably calculated to locate all records responsive to Plaintiff's FOIA Requests, numbers OS-2017-00384, EPA-HQ-2017-005517, HQ-2017-00806, F-2017-08517, DOC-OS-2017-000939, and DOC-NOAA-2017-001066 with the cut-off date for such searches being the date the searches are conducted, and to provide Plaintiff, by a date certain, with all responsive records and reasonably segregable portions of lawfully exempt records sought in this action.

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2. Declare that Defendants' failures to timely make determinations on Plaintiff's FOIA Requests are unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(i), or in the alternative, are an agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

3. Declare that Defendants' failures to properly apply FOIA exemptions, 5 U.S.C. § 552(b), are unlawful under FOIA, or in the alternative, are an agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

4. Declare that Defendants' failures to undertake a search for and disclose to Plaintiff all records that are responsive to Plaintiff's FOIA Requests, as alleged above, are unlawful under FOIA, U.S.C. § 552(a)(6)(A)(i), or in the alternative, are an agency action that

has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

5. Declare that Defendants' failures to provide Plaintiff with reasonably segregable portions of records which may be lawfully subject to a FOIA exemption, as alleged above, are unlawful under FOIA, U.S.C. § 552(a)(7)(b), or in the alternative, are agency actions that have been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

6. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.

7. Grant such other and further relief as the Court may deem just and proper.

DATED: August 16, 2017

Respectfully submitted,

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/s/ Margaret E. Townsend
Margaret E. Townsend (D.C. Bar No OR0008)
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
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mtownsend@biologicaldiversity.org

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/s/ Amy R. Atwood
Amy R. Atwood (D.C. Bar No. 470258)
Center for Biological Diversity
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Portland, OR 97211-0374
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Attorneys for Plaintiff

Deleted: Attorney



March 30, 2017

VIA ELECTRONIC MAIL

FOIA Officer
Public Reference Facility (SOU1000)
1305 East-West Highway, Room 9719 (SSMC3)
Silver Spring, MD 20910
FOIA@noaa.gov

Re: Freedom of Information Act Request: Climate Censorship

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), from the Center for Biological Diversity (“Center”), a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process.

REQUESTED RECORDS

The Center requests from the National Oceanic and Atmospheric Administration (“NOAA”) all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to “climate change,” “global warming,” “climate disruption,” “greenhouse gas emissions,” “emissions reductions,” and/or “Paris agreement,” and any related words or phrases.

For purposes of this request, “records” is consistent with the meaning of the term under FOIA. This includes, but is not limited to, documents of any kind including electronic as well as paper documents, e-mails, writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), correspondence, letters, memoranda, reports, consultations, papers, studies, notes, field notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, data, data bases, drawings, surveys, graphs, charts, photographs, videos, meeting notes or minutes, electronic and magnetic recordings of meetings, maps, GIS layers, GPS, UTM, LiDAR, CDs, and any other compilations of data from which information can be obtained. All of the foregoing is included in this request if it is in NOAA’s possession and control. If such records are no longer under the control of

NOAA but were at any time, please refer this request to the relevant federal agency or agencies. This request is being sent to the headquarters for NOAA with the understanding that it will be forwarded to any other agency offices where responsive records may be located.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request. 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 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).

If 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, 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.

In addition, if you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

The Center 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). Please provide all records in a readily-accessible, electronic .pdf format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or excel spreadsheet, or if that is not possible; (2) in .pdf format, without any “portfolios” or “embedded files.” Portfolios and embedded files within files are not readily-accessible. Please do not provide the records in a single, or “batched,” .pdf file. We appreciate the inclusion of an index.

RECORD DELIVERY

We appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). Failure to comply within the statutory timeframe may result in the Center taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. You may email or mail copies of the requested records to:

Margaret E. Townsend
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211
mtownsend@biologicaldiversity.org

If you find that this request is unclear, or if the responsive records are voluminous, please call me at (971) 717-6409 to discuss the scope of this request.

REQUEST FOR FEE WAIVER

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 the Center 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. The Center 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 Commerce FOIA regulations at 15 C.F.R. § 4.11(l) establish the same standard.

Thus, the NOAA 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. 40 C.F.R. § 2.107(1)(2). As shown below, the Center 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 NOAA. This request asks for all agency directives, instructions, and/or other communications, including communications with the Trump administration transition team, instructing agency and/or department staff to not use, or to remove from formal agency communications, any climate change-related or energy-related words or phrases, including but not limited to “climate change,” “global warming,” “climate disruption,” “greenhouse gas emissions,” “emissions reductions,” and/or “Paris agreement,” and any related words or phrases.

This FOIA will provide the Center and the public with crucial insight into government activities by making public any directives, instructions, or other communications instructing agency or department staff to not use, or to remove from formal agency communications, any climate- or energy-related words or phrases. It is clear that the NOAA’s communications policies involve a specific and identifiable activity of the government, in this case the executive branch agency, the NOAA. *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, the Center meets this factor.

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

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 the Center to convey to the public information about the factors and motives underlying department or agency communications relating to climate change, as they may bear on agency or department abilities to accurately communicate information about climate change impacts, science, policy, or government information previously developed that may affect public’s understanding of government activity as it relates to the quality of the human environment. Once the information is made available, the Center will analyze it and present it to its 1.2 million members and online activists and the general public in a manner that will meaningfully enhance the public’s understanding of government activities by making public any directives, instructions, or other communications instructing agency or department staff to not use, or to remove from formal agency communications, any climate- or energy-related words or phrases.

Thus, the requested records are likely to contribute to an understanding of NOAA operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of Any Federal Directive to Remove References to "Climate Change" in Government Materials.

The requested records will contribute to public understanding of how public directives, instructions, or other communications instructing agency or department staff to not use, or to remove from formal agency communications, any climate- or energy-related words or phrases are consistent with the goals and purposes of the agency, as well as whether they are aligned with federal environmental laws and regulations. Whether there are directives to remove references to "climate change" in government records generally, and specifically whether the NOAA has received a directive to remove references to "climate change" or ban the use of the phrase and other related phrases, are areas of interest to a reasonably-broad segment of the public. The Center will use the information it obtains from the disclosed records to educate the public at large about factors and motives underlying department or agency communications relating to climate change, as they may bear on agency or department abilities to accurately communicate information about climate change impacts, science, policy, or government information previously developed that may affect public's understanding of government activity as it relates to the quality of the human environment. *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 the Center's synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained in 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 factors and motives underlying department or agency communications relating to climate change, as they may bear on agency or department abilities to accurately communicate information about climate change impacts, science, policy, or government information previously developed that may affect public's understanding of government activity as it relates to the quality of the human environment that are not currently in the public domain. *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... .”¹

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of government activities by making public any directives, instructions, or other communications instructing agency or department staff to not use, or to remove from formal agency communications, any climate- or energy-related words or phrases. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about factors and motives underlying department or agency communications relating to climate change, as they may bear on agency or department abilities to accurately communicate information about climate change impacts, science, policy, or government information previously developed that may affect public’s understanding of government activity as it relates to the quality of the human environment.

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

The Center is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public’s understanding of government activities by making public any directives, instructions, or other communications instructing agency or department staff to not use, or to remove from formal agency communications, any climate- or energy-related words or phrases, 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 because the requested records will help reveal the factors and motives underlying department or agency communications relating to climate change, as they may bear on agency or department abilities to accurately communicate information about climate change impacts, science, policy, or government information previously developed that may affect public’s understanding of government activity as it relates to the quality of the human environment.

The records are also certain to shed light on NOAA’s compliance with its own purpose and goals, as well as federal environmental laws and regulations. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Center meets this factor as well.

II. The Center has a Demonstrated Ability to Disseminate the Requested Information Broadly.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been

¹ In this connection, it is immaterial whether any portion of the Center’s request may currently be in the public domain because the Center requests considerably more than any piece of information that may currently be available to other individuals. *See Judicial Watch*, 326 F.3d at 1315.

substantially involved in the activities of numerous government agencies for over 25 years, and has consistently displayed its ability to disseminate information granted to it through FOIA. In consistently granting the Center's fee-waivers, agencies have recognized: (1) that the information requested by the Center 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 the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center's track record of active participation in oversight of governmental activities and decision-making, and its consistent contribution to the public's understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

The Center intends to use the records requested here similarly. The Center's work appears in more than 2,500 news stories online and in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, and *Los Angeles Times*. Many media outlets have reported on government agencies removing references to climate change from communications, utilizing information obtained by the Center from federal agencies including NOAA. In 2016, more than 2 million people visited the Center's extensive website, viewing a total of more than 5.2 million pages. The Center sends out more than 277 email newsletters and action alerts per year to more than 1.2 million members and supporters. Three times a year, the Center sends printed newsletters to more than 52,343 members. More than 199,000 people have "liked" the Center on Facebook, and there are regular postings regarding the removal of terms related to climate change from federal government materials. The Center also regularly tweets to more than 49,700 followers on Twitter. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Public oversight and enhanced understanding of the NOAA'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). The Center 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 the Center to show how it distributes information to the public generally. *Id.*

III. Obtaining the Requested Records is of No Commercial Interest to the Center.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than 1.2 million members and online activists dedicated to the protection of endangered and threatened species and wild places. The Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

IV. Conclusion

For all of the foregoing reasons, the Center qualifies for a full fee-waiver. We hope that the NOAA 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 (971) 717-6409 or foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,

A handwritten signature in black ink, appearing to read "Margaret E. Townsend". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Margaret E. Townsend
Open Government Staff Attorney
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
foia@biologicaldiversity.org

Beverly Smith - NOAA Federal

From: Beverly Smith - NOAA Federal
Sent: Thursday, August 31, 2017 2:44 PM
To: Mark Graff - NOAA Federal
Cc: Carolyn Sramek; Beverly Smith
Subject: Re: NMFS FOIA HQ Assistance Needed - Rauch's Foreseeable Harm Analysis Checklist, Harm Statement and Express Statement re: DPP Withholdings Needed - Fwd: b5 Deliberative Process Privilege Question - FOIA Assignment for DOC-NOAA-2017-001394
Attachments: NOAA Foreseeable harm checklist 8-2017.doc

FYI, attached is the harm checklist that I mentioned in the meeting that I gave to Sam D. Bev.

On Thu, Aug 31, 2017 at 2:16 PM, Beverly Smith - NOAA Federal <beverly.smith@noaa.gov> wrote:

----- Forwarded message -----

From: **Samuel Dixon** <samuel.dixon@noaa.gov>

Date: Thu, Aug 31, 2017 at 1:33 PM

Subject: Re: NMFS FOIA HQ Assistance Needed - Rauch's Foreseeable Harm Analysis Checklist, Harm Statement and Express Statement re: DPP Withholdings Needed - Fwd: b5 Deliberative Process Privilege Question - FOIA Assignment for DOC-NOAA-2017-001394

To: Beverly Smith - NOAA Federal <beverly.smith@noaa.gov>

Cc: Steven Goodman - NOAA Federal <Steven.Goodman@noaa.gov>, Carolyn Sramek <carolyn.sramek@noaa.gov>

Hi Bev,

(b)(5)

Thanks,

Sam

Samuel Dixon
NMFS Assistant FOIA Liaison
Contractor - IBSS Corp
(301) 427-8739
samuel.dixon@noaa.gov

On Thu, Aug 31, 2017 at 1:29 PM, Beverly Smith - NOAA Federal <beverly.smith@noaa.gov> wrote:

Hi Sam,

(b)(5)

?

(b)(5) [Redacted]

[Redacted]

[Redacted] ?

Thanks,
Brianne

On Monday, July 17, 2017, Beverly Smith - NOAA Federal <beverly.smith@noaa.gov> wrote:

(b)(5) [Redacted] ?

Thank you.
Bev.

On Mon, Jul 17, 2017 at 11:18 AM, Brianne Szczepanek - NOAA Federal <brianne.szczepanek@noaa.gov> wrote:

Hi Beverly,

I am on leave today. I will discuss with Sam when I'm back in the office tomorrow, and get back to you.

Brianne

On Monday, July 17, 2017, Beverly Smith - NOAA Federal <beverly.smith@noaa.gov> wrote:

Hi Brianne,

(b)(5) [Redacted] ?

Thank you for your assistance.

Beverly

On Wed, Jul 12, 2017 at 12:49 PM, Beverly Smith - NOAA Federal <beverly.smith@noaa.gov> wrote:

(b)(5) [redacted]
[redacted].

Bev.

On Wed, Jul 12, 2017 at 12:42 PM, Samuel Dixon <samuel.dixon@noaa.gov> wrote:

Briann (b)(5) [redacted]
[redacted].

Sam

Samuel Dixon
Contractor - IBSS Corp
NMFS Assistant FOIA Liaison
[\(301\) 427-8739](tel:3014278739)
samuel.dixon@noaa.gov

On Wed, Jul 12, 2017 at 12:41 PM, Brianne Szczepanek - NOAA Federal <brianne.szczepanek@noaa.gov> wrote:

Sorry for the confusio (b)(5) [redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted].

On Wednesday, July 12, 2017, Beverly Smith - NOAA Federal <beverly.smith@noaa.gov> wrote:

(b)(5) [redacted]
[redacted]
[redacted].

Bev.

On Wed, Jul 12, 2017 at 11:58 AM, Samuel Dixon <samuel.dixon@noaa.gov> wrote:

(b)(5) [redacted]
[redacted]
[redacted]
[redacted].

Sam

Samuel Dixon
Contractor - IBSS Corp
NMFS Assistant FOIA Liaison
[\(301\) 427-8739](tel:3014278739)
samuel.dixon@noaa.gov

On Wed, Jul 12, 2017 at 11:53 AM, Brianne Szczepanek - NOAA Federal <brianne.szczepanek@noaa.gov> wrote:

Thanks Sam (b)(5) [REDACTED]

On Wed, Jul 12, 2017 at 11:18 AM, Samuel Dixon <samuel.dixon@noaa.gov> wrote:

Hi Lindsey,

(b)(5) [REDACTED]
[REDACTED]
[REDACTED]

Thanks,

Samuel Dixon
Contractor - IBSS Corp
NMFS Assistant FOIA Liaison
[\(301\) 427-8739](tel:3014278739)
samuel.dixon@noaa.gov

----- Forwarded message -----

From: **Samuel Dixon** <samuel.dixon@noaa.gov>
Date: Wed, Jul 12, 2017 at 9:38 AM
Subject: Re: SER FOIA Reply - Re: ASAP TODAY - Fwd: PLEASE REASSIGN TO DOC FOIA - Fwd: Please contact me - Fwd: FOIA Assignment for DOC-NOAA-2017-001394
To: Brianne Szczepanek - NOAA Federal <brianne.szczepanek@noaa.gov>, Beverly Smith - NOAA Federal <beverly.smith@noaa.gov>
Cc: Emma Htun - NOAA Affiliate <emma.htun@noaa.gov>, Alesia Read - NOAA Federal <alesia.read@noaa.gov>

Hi All,

(b)(5) [REDACTED]
[REDACTED]
[REDACTED]

(b)(5) [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

Thanks,

Sam

Samuel Dixon
Contractor - IBSS Corp
NMFS Assistant FOIA Liaison
[\(301\) 427-8739](tel:3014278739)
samuel.dixon@noaa.gov

On Fri, Jul 7, 2017 at 1:19 PM, Brianne Szczepanek - NOAA Federal <brianne.szczepanek@noaa.gov> wrote:

Hey Sam,

Any update on what's going on with this FOIA?

Thanks,
Brianne

--

Brianne Szczepanek
Chief of Staff
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
work: [\(301\) 427-8021](tel:3014278021) cell (b)(6)
brianne.szczepanek@noaa.gov

--

Beverly J. Smith
FOIA Coordinator
Southeast Region
NOAA's National Marine Fisheries Service
[727-551-5762](tel:7275515762)

--

Brianne Szczepanek
Chief of Staff
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
work: [\(301\) 427-8021](tel:3014278021) cell (b)(6)
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Brianne Szczepanek
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Beverly J. Smith
FOIA Coordinator
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NOAA's National Marine Fisheries Service
727-551-5762

FREEDOM OF INFORMATION ACT – NOAA FORESEEABLE HARM CHECKLIST
FOIA REQUEST # DOC-NOAA-2017-001394 Fredrickson

I. Overview

Under the Obama Administration’s Freedom of Information Act (FOIA) policy, agencies are to administer the FOIA with the presumption that: “In the face of doubt, openness prevails.” To advance this policy, the Department of Justice (DOJ) has instructed agencies to make full or partial discretionary disclosures of information. DOJ has stated that an agency should not withhold documents merely because it can demonstrate, as a technical matter, that the documents fall within the scope of a “discretionary” FOIA Exemption. To be certain, not all FOIA Exemptions are discretionary. Some Exemptions either constrain an agency’s ability to make a discretionary disclosure of information (i.e., the privilege belongs to a third-party), or affirmatively prohibit it.¹ Documents protected by other Exemptions can, however, be the subject of discretionary release. FOIA Exemption (b)(5) in particular holds the greatest potential for discretionary disclosure. FOIA Exemption (b)(5), includes:

- The Deliberative Process Privilege, which applies to deliberative, pre-decisional documents (some categories of documents that may qualify are: draft documents, meeting notes, and other types of documents that comprise the agency’s decision-making process);
- The Attorney-Client Privilege, which applies to confidential communications between an attorney and the client on matters for which the client has sought legal advice; and
- The Attorney Work Product Privilege/Doctrine, which applies to materials prepared by an attorney, or at an attorney’s direction, in anticipation of foreseeable litigation.²

Should agencies choose to withhold information under a discretionary Exemption, the DOJ will defend the withholding only if the agency reasonably foresees that disclosure of the requested information would harm an interest protected by the asserted Exemption. The DOJ refers to this policy as the “foreseeable harm” standard and agencies must complete foreseeable harm statements for the documents they seek to withhold under the discretionary FOIA Exemptions. In sum, offices responding to a FOIA request are required to apply the foreseeable harm standard when they determine that information can be withheld under a discretionary FOIA Exemption, particularly Exemption (b)(5).

The checklist in Section II, below, is intended to assist you in making foreseeable harm determinations, and provides a process for properly completing this analysis. Careful application of this process to every new FOIA request is crucial. With passage of Section 4 of the OPEN Government Act of 2007, an agency that reverses its position and releases documents at District Court must now pay any judicially-awarded attorney fees and costs from its own appropriations. Thus, failure to take the required foreseeable harm analysis seriously could ultimately result in thousands of dollars in attorneys fees liability against your office’s budget. **Foreseeable harm determinations only need to be made for documents originated by NOAA. Documents originating from other parts of the Department (e.g., Census, NIST, Office of the Secretary, Office of the General Counsel, etc.) or other Federal agencies must be referred to that DOC Bureau or Federal agency for processing under the FOIA.**

¹ See, for example, FOIA Exemptions (b)(1) (national security information), (b)(3) (nondisclosure provisions contained in other federal statutes), (b)(4) (confidential commercial/financial information), (b)(6) (personal privacy information), and (b)(7)(C) (personal privacy information contained in law enforcement records).

² For information that is subject to either the attorney-client privilege or attorney work-product privilege, offices should consult their regional or headquarters NOAA Office of General Counsel.

II. Checklist -- Making the Foreseeable Harm Determination

(b) (5)

(b) (5)

in a document will apply to a series of responsive documents. In other cases, the harm will apply only to portions of a document. In still other cases, the content of responsive documents will vary to such a degree as to require a different articulation of foreseeable harm for each individual document. If you're unsure, please consult your FOIA Liaison or the appropriate NOAA GC FOIA Expert.

Signature

Date

Signature

Date

Examples for Step 4:

Use the rationale(s) for withholding the information indicated in Step 3, above, to articulate a specific factual explanation about the documents at issue. Utilizing information contained within the withheld document itself, explain why release of the information would cause “foreseeable harm” to the agency or contact NOAA GC if it concerns attorney-client or attorney work product privilege.

Example 1: This document(s) (email, briefing paper, report, etc.) concerns a pending regulatory decision that has not yet been made. Releasing this information could lead to public confusion where the regulated community may misunderstand and misinterpret these exchanges of preliminary ideas and alternatives as the agency’s position on the matter. Further, release of this document would likely inhibit or chill the exchange of views between agency personnel, thereby diminishing the deliberative quality of the agency’s decision-making process. In these documents, a number of agency employees debate the relative merits of taking this particular action. These communications occurred in the very early stages of the decision-making process and can be described as brainstorming and thought-provoking dialogue on a range of alternatives. The release of this information, in particular, could impair the decision-(regulatory) making process as staff would become reluctant to freely and openly interact with one another and offer such preliminary observations and analyses.

Example 2: The document is an investigative report into a personnel matter that contains employees’ opinions and recommendations. Given that this is an investigative report into potential wrongdoing, there are foreseeable harms in releasing portions of the report. First, release of certain information would have a chilling effect on the free-flow of information. The release of certain portions of investigative report could very well impact future internal investigations as employees would not be as forthcoming and open when speaking to investigators were there a possibility that their names and comments could be made available to the public. The discretionary release of the investigator’s findings and recommendations could also cause harm to the agency as only one recommendation from the report has been implemented to date and there would be a likelihood of confusion as to which actions were in fact taken by agency management. Further, since only some of the corrective actions were taken, the release of the recommendations could very well impair agency management’s ability to implement additional recommended actions due to the sensitivity involved in the proposed actions.

Example 3: This document contains information related to an ongoing agency law enforcement investigation. Release of this information would not only disrupt the agency’s investigation, but it could be used by the potential violators to avoid capture. This document also contains information related to two law enforcement techniques the agency uses in investigating potential illegal commercial fishing practices. Releasing the techniques or information about them would enable violators and potential violators to modify their behavior and enable them to find ways of getting around inspections and become more successful in violating commercial fishing statutes and regulations. Release of these techniques would also allow violators and potential violators to discern investigative tendencies used to target potential violators. Ultimately, the foreseeable harm in releasing this information would be a diminished effect the agency would have in investigating potential violations of the commercial fishing statutes it is authorized to enforce.

Mark Graff - NOAA Federal

From: Mark Graff - NOAA Federal
Sent: Thursday, August 31, 2017 3:59 PM
To: Lola Stith - NOAA Affiliate
Subject: Re: ACTION REQUIRED: Closeout for NOAA FOIA Request DOC-NOAA-2017-001527(REVIEW/SIGN)
Attachments: Draft FAL - DOC-NOAA-2017-001527 mhg.pdf

Here you go--no issues.

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
(301) 628-5658 (O)
(b)(6) (C)

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On Thu, Aug 31, 2017 at 3:42 PM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Mark (b)(5)
[Redacted]
[Redacted]
[Redacted]
[Redacted].

Please let me know if you have questions or if I may have missed something.

R/
Lola

--
[Lola Stith](#)
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c (b)(6))
lola.m.stith@noaa.gov



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications

August 31, 2017

Mr. Russ Kick
PO Box 36914
Tucson, AZ 85740-6914

Re: Request No. DOC-NOAA-2017-001527

Dear Mr. Kick,

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on 7/19/2017, in which you requested:

I am requesting all previously released FOIA logs, covering any time period from 2000 to the present. This refers to FOIA logs released for any reason - FOIA request, appeal, or lawsuit; court order; Congressional request; proactive release; etc. I ask that these logs include fields indicating the subject and the disposition of the requests. Further, I request that these files be sent in any digital formats in which they exist (PDF, Excel, Word, etc.). Under the terms of the E-FOIA Amendments of 1996, Section 5, if a document exists in electronic format, it must be released in that format upon request.

We have located one (1) document responsive to your request. You are granted full access to this record, and a copy is enclosed. Your request is now completed.

Although we do not consider this to be a denial of your request, you have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:

Assistant General Counsel for Litigation, Employment, and Oversight
U.S. Department of Commerce
Office of General Counsel
Room 5875
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, by facsimile (fax) to 202-482-2552, or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

For your appeal to be complete, it must include the following items:

- a copy of the original request,
- our response to your request,
- a statement explaining why the withheld records should be made available, and why the denial of the records was in error.

- “Freedom of Information Act Appeal” must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

Email: ogis@nara.gov

Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

If you have questions regarding this correspondence please contact Lola Stith at foia@noaa.gov, or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

GRAFF.MARK.H
YRUM.1514447
892

Digitally signed by
GRAFF.MARK.HYRUM.1514447892
DN: c=US, o=U.S. Government,
ou=DoD, ou=PKI, ou=OTHER,
cn=GRAFF.MARK.HYRUM.1514447892
2
Date: 2017.08.31 15:54:53 -04'00'

Lola Stith - NOAA Affiliate

From: Lola Stith - NOAA Affiliate
Sent: Thursday, August 31, 2017 4:47 PM
To: Mark Graff - NOAA Federal
Subject: Re: ACTION REQUIRED: Closeout for NOAA FOIA Request DOC-NOAA-2017-000299 (REVIEW/SIGN)
Attachments: Draft FAL - DOC-NOAA-2017-000299.docx

Updated FAL attached.

On Thu, Aug 31, 2017 at 4:37 PM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:
Understood (b)(5).

Lola

On Thu, Aug 31, 2017 at 4:36 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

(b)(5)
[Redacted]
[Redacted]. Sorry, I know it seems like a hassle...

Mark H. Graff
FOIA Officer/Bureau Chief Privacy Officer (BCPO)
National Oceanic and Atmospheric Administration
[\(301\) 628-5658](tel:3016285658) (O)
(b)(6) (C)

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On Thu, Aug 31, 2017 at 4:34 PM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:

Hi Mark (b)(5)
[Redacted]
[Redacted]
[Redacted].

Please let me know if you have questions.

R/

--
Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)

(b)(6)

(c (b)(6) [REDACTED])
lola.m.stith@noaa.gov

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Lola Stith
Contractor - The Ambit Group, LLC
NOAA Office of the Chief Information Officer (OCIO)
(c (b)(6) [REDACTED])
lola.m.stith@noaa.gov

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Lola Stith
Contractor - The Ambit Group, LLC
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((b)(6) [REDACTED])
lola.m.stith@noaa.gov

(b)(5)

(b)(5)

