



FREEDOM OF INFORMATION ACT REQUEST

April 9, 2021

Dionne Hardy
Office of Management and Budget
725 17th Street NW, Suite 9204
Washington, DC 20503

Re: FOIA Request - Certain Agency Records (Correspondence)

Dear Ms. Hardy:

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

1. all electronic correspondence, whether email, text, SMS, etc., and any accompanying information, including also any attachments, a) sent to or from or which copies (whether as cc: or bcc:) National Climate Advisor Gina McCarthy, that b) was sent to or from or which copies (again, whether as cc: or bcc:) any email address ending in i) @nrdc.org, ii) @environmentamerica.org, iii) @sierraclub.org, iv) @mjbradley.com, and/or v) @usclimatealliance.org, and c) is dated January 21, 2021 through the date you process this request, inclusive; and
2. all electronic correspondence, whether email, text, SMS, etc., and any accompanying information, including also any attachments, a) sent to or from or which copies (whether as cc: or bcc:) Special Assistant to the President for Climate Policy David Hayes, that b) was sent to or from or which copies (again, whether as cc: or bcc:) Elizabeth Klein, and c) is dated January 21, 2021 through the date you process this request, inclusive.

We request entire “threads” of which any responsive electronic correspondence is a part, regardless whether any portion falls outside of the above time parameter.

Please consider as non-responsive electronic correspondence that merely receives or forwards newsletters or press summaries or ‘clippings’, such as news services or stories or opinion pieces, if that correspondence has no comment or no substantive comment added by a party other than the original sender in the thread (an electronic mail message that includes any expression of opinion or viewpoint would be considered as including substantive comment; examples of non-responsive emails would be those forwarding a news report or opinion piece with no comment or only “fyi”, or “interesting”).

Additionally, please consider all published or docketed materials, including pleadings, regulatory comments, ECF notices, news articles, and/or newsletters, as non-responsive, unless forwarded to or from the named persons with substantive commentary added by the sender.

Energy Policy Advocates requests records on your system, e.g., its backend logs, and does not seek only those records which survive on an employee’s own machine or account. We do not demand your office produce requested information in any particular form, instead **we request records in their native form**, with specific reference to the U.S. Securities and Exchange Commission Data Delivery Standards. The covered information we seek is electronic information, this includes electronic *records*, and other public *information*.

To quote the SEC Data Delivery Standards, “Electronic files must be produced in their native format, i.e. the format in which they are ordinarily used and maintained during the normal course of business. For example, an MS Excel file must be produced as an MS Excel file rather than an image of a spreadsheet. (*Note: An Adobe PDF file is not considered a native file unless the document was initially created as a PDF.*)” (emphases in original).

In many native-format productions, certain public information remains contained in the record (e.g., metadata). Under the same standards, to ensure production of all information requested, if your production will be de-duplicated it is vital that you 1) preserve any unique metadata associated with the duplicate files, for example, custodian name, and, 2) make that unique metadata part of your production.

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

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

Request for Fee Waiver

We request the Office of Management and Budget waive or substantially reduce any fees associated with this request. **Our request for fee waiver is in the alternative, first for reasons of significant public interest, and second, on the basis of the Energy Policy Advocates' status as a media outlet.** We do not seek the information for a commercial purpose. Energy Policy Advocates is organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization. It

actively publishes and broadly disseminates public records pertaining to energy and environmental policymaking. The requester has no commercial interest possible in these records.

The below clearly demonstrates that:

The requested information is of widespread public, media and legislative interest.

Requester is a non-profit classified as such by the Internal Revenue Service.

Requester does not seek these records for a commercial purpose and has no commercial interest possible in these records.

1. The Requester intends to broadly disseminate the information requested.

The Requester has both the intent and the ability to convey any information obtained through this request to the public. Energy Policy Advocates publishes its finding regularly through the organization's website, www.epadvocates.org. This work is frequently cited in newspapers and trade and political publications.¹ Requester intends to broadly disseminate public information obtained under this FOIA as it has other information relevant to its mission and work.

2. Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request.

The requested records, if they exist, pertain to the sweeping environmental regulatory agenda of the Biden Administration, which is of major media, public and policy interest. Any records responsive to this request therefore are likely to have an informative value and are "likely

¹ See, e.g., https://www.wsj.com/articles/bidens-backdoor-climate-plan-11616020338?mod=opinion_lead_pos1; also, Stuart Parker, "Conservative Group Says States' Ozone Suit 'Trojan Horse' for GHG Limits," Inside EPA, February 24, 2021 (last assessed April 8, 2021).

to contribute to an understanding of Federal government operations or activities”. We note President Biden's environmental agenda has been the subject of substantial media interest.²

3. The disclosure will contribute to the understanding of the public at large, as opposed to merely that of the requester or a narrow segment of interested persons.

Energy Policy Advocates is dedicated to and has a documented record of promoting the public interest, advocating sensible policies to protect human health and the environment, broadly disseminating information relevant to the policy issues on which its experts work. With a demonstrated interest and record in the relevant policy debates and expertise in the subject of energy- and environment-related regulatory policies, Energy Policy Advocates unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public at-large.”

4. The disclosure will contribute “significantly” to public understanding of government operations or activities.

The Requester repeats and incorporates here by reference the arguments above from the discussion of how disclosure is “likely to contribute” to an understanding of specific government operations or activities.

The Requester has stated “with reasonable specificity that its request pertains to operations of the government,” and that it intends to broadly disseminate responsive records. Therefore, **Energy Policy Advocates first seeks waiver of any fees** under FOIA on the above significant public interest basis.

² See, e.g., <https://www.washingtonpost.com/climate-environment/2021/01/26/biden-environmental-justice-climate/>; <https://www.washingtonpost.com/climate-environment/2021/01/14/biden-climate-staff/> (last assessed April 8, 2021).

Disclosure of records responsive to this request will contribute “significantly” to public understanding of government operations or activities. 5 U.S.C. § 552(a) (4)(A)(iii) (“Documents shall be furnished without any charge...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester”).

In the alternative, Energy Policy Advocates requests a waiver or reduction of fees as a representative of the news media. The provisions for determining whether a requesting party is a representative of the news media, and the “significant public interest” provision, are not mutually exclusive. As Energy Policy Advocates is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F.Supp.2d. 1 (D.D.C. 2010). Alternately and only in the event the Agency refuses to waive our fees under the “significant public interest” test, which Requester would then appeal while requesting the Office proceed with processing on the grounds that Energy Policy Advocates is a media organization, a designation the federal government has acknowledged for the purposes of FOIA.³ Requester asks for a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) (“fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media...”).

The Agency must address both of these requests for fee waiver in the event it denies one; failure to do so is *prima facie* arbitrary and capricious.

Request for Expedited Treatment

³ See, e.g., Securities & Exchange Commission Request No. 21-00769-FOIA; Department of the Interior Request No. DOI-OS-2021-003335.

Additionally, Energy Policy Advocates requests expedited processing of this FOIA request. In light of the Administration's recent announcements that it will be hosting a summit on Earth Day,⁴ and statements from the U.S. Climate Envoy that executive action on climate is imminent,⁵ release of the requested records should be expedited pursuant to 40 CFR 2.104 (f)(1)(ii). Specifically, there is a "compelling need" under the relevant regulation for the records to be released imminently because there is "[a]n urgency to inform the public about an actual or alleged Federal government activity," and because "the information is requested by a person primarily engaged in disseminating information to the public." As set forth above, Energy Policy Advocates is an organization that disseminates information about the activities to the public, including through research and media publications. Further, media reports currently reveal that the Administration is preparing to host a climate conference, and perhaps also announce executive actions, on Earth Day (April 22). In light of such actual or alleged (and widely reported) federal government activity, it is urgent that the records requested here be released to the public in an expedited fashion that will allow them to understand the actions of their government and to respond appropriately in a timely and contemporaneous manner. Quite simply, a delayed release of records will deprive the public of the opportunity to understand what role the records at issue in this request played in the anticipated regulatory and/or executive actions.

⁴ <https://www.bloomberg.com/news/articles/2021-01-22/biden-to-convene-world-leaders-to-talk-climate-on-earth-day> (last assessed April 8, 2021).

⁵ <https://www.detroitnews.com/story/news/politics/2021/04/07/biden-poised-issue-order-climate-disclosures-kerry-says/7134466002/> (last assessed April 8, 2021).

Energy Policy Advocates looks forward to your response. In the event you have any questions, please feel free to contact me at ncornettlaw@gmail.com.

Sincerely,
Neal Cornett
Attorney at Law