

Exhibit 16

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FREEDOM OF INFORMATION ACT APPEAL

November 9, 2022

Appeals Officer
Office of Information Programs & Services
U.S. Department of State
2201 C Street, NW, Room B266
Washington, D.C. 20520

**Re: Appeal of Partial Denial of Freedom of Information Request F-2022-08430
by Friends of the Earth**

This is an appeal of the August 12, 2022 partial denial of a request for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to the U.S. Department of State (“State Department”), by the requestor, Friends of the Earth. Friends of the Earth’s FOIA request here at issue was received by the State Department on May 17, 2022, and was assigned the tracking number F-2022-8430. *See* Attach. A (Friends of the Earth’s FOIA request). The request at issue sought:

- Any and all ethics forms, agreements, or documentation for Amos Hochstein, Senior Advisor for Energy Security, including but not limited to: ethics agreements; recusal agreements, lists, or other documentation; written waivers; regulatory exemptions; conflict of interest disclosures or other documentation; and disclosures of investments in and/or divestments from fossil fuel companies from August 10, 2021 through the date the records search is made for this request;
- Communications between Mr. Hochstein and the DOS’s Office of the Assistant Legal Advisor for Ethics and Financial Disclosure from August 10, 2021 through the date the records search is made for this request;
- Communications between Mr. Hochstein and members of and participants in the Task Force [on Energy Security (“Task Force”)] from March 25, 2022 through the date the records search is made for this request;
- All calendar entries from Mr. Hochstein’s official calendar from August 10, 2021 through the date the records search is made for this request, including but not limited to: calendar entry titles; dates; times; meeting locations; meeting attendees; and the meeting descriptions from the electronic calendar entries; and
- Any communications generated or received by Mr. Hochstein concerning the encouragement or facilitation of the expansion of domestic natural gas production

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and infrastructure from August 10, 2021 through the date the records search is made for this request.

In light of the urgent need to inform the public and lawmakers about the State Department's highly consequential actions being undertaken in response to the energy crisis precipitated by the Russo-Ukrainian War—and the extent to which those actions are influenced behind closed doors by special-interest groups and potential conflict of interest in the Task Force leadership—Friends of the Earth's FOIA request included a well-substantiated request for expedited processing, including a sworn declaration attesting to the urgency of obtaining information about how the agency was being lobbied to support the expansion of, and investment in, natural gas production and infrastructure, and how the requested information would become substantially less useful if the State Department delayed its release until after the agency has exercised the United States' authority and influence to address the energy crisis, including by helping secure financing for new natural gas facilities.

By email on May 24, 2022, the State Department acknowledged receipt of Friends of the Earth's FOIA request on May 17, 2022, assigned it a tracking number, and explicitly denied Friends of the Earth's request for expedited processing. Notably, in denying Friends of the Earth's request for expedited processing, the State Department did not address any of the detailed explanations for the need for expedition in this matter, and did not even acknowledge that Friends of the Earth had provided a highly detailed sworn declaration as to the urgency associated with this FOIA request. Instead, entirely ignoring the evidence Friends of the Earth actually supplied, the State Department falsely stated that Friends of the Earth's "request does not demonstrate a 'compelling need' for the requested information." Moreover, at the same time that the State Department informed Friends of the Earth that it would not expedite processing of this FOIA request, the agency also informed Friends of the Earth that it would not comply with FOIA's 20 working-day deadline. Instead, the State Department claimed that an additional 10 working day extension was necessary due to ostensibly "unusual circumstances." However, despite FOIA's explicit requirement that when an agency claims an extension due to unusual circumstances, it must inform the requester of the specific "date on which a determination is expected to be dispatched," 5 U.S.C. § 552(a)(6)(B)(i), the State Department violated FOIA by failing to provide any such information.

Faced with the State Department's explicit—but unsubstantiated—unwillingness to expedite processing of Friends of the Earth's FOIA request and a brief and rapidly closing window of opportunity to exert meaningful oversight of the agency's actions with respect to the Task Force and energy crisis, Friends of the Earth filed suit on May 31, 2022, to compel the State Department to grant Friends of the Earth's request for expedited processing, as required by FOIA.

On June 9, 2022, Friends of the Earth emailed government counsel to confer on a proposed schedule for a preliminary injunction motion. On June 10, 2022, Friends of the Earth conferred with government counsel via phone. Friends of the Earth reiterated the urgency of its FOIA request and its commitment to obtaining the requested information in a timely manner; however, Friends of the Earth also expressed its willingness to work out a mutually agreeable production schedule.

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On June 13, 2022, the State Department abruptly reversed course and granted Friends of the Earth's request for expedited processing. The State Department explained that it "reconsidered [Friends of the Earth's] request for expedited processing based on the additional information provided since [Friends of the Earth] submitted [its] request in [May] 2022, and [the agency] ha[s] determined that [Friends of the Earth's] request does meet the established criteria for expedited processing." The State Department also informed Friends of the Earth that it had "further determined to process [Friends of the Earth's] request, which is now in [the] 'expedited' queue, and to release any responsive, non-exempt records as soon as practicable."

On August 12, 2022, the State Department informed Friends of the Earth that the agency conducted a search for "potentially responsive records" to subpart 3 of Friends of the Earth's request, which sought "[c]ommunications between Mr. Hochstein and members of and participants in the Task Force." The State Department "determined that two records, responsive to subpart three of your request are exempt from disclosure in their entirety pursuant to 5 U.S.C. § 552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of an individual's personal privacy." The State Department did not offer any meaningful explanation for why the two records at issue fell under the claimed FOIA exemption.

The State Department's August 12, 2022 partial denial also addressed subparts 2 and 4 of Friends of the Earth's FOIA request, which sought, *inter alia*, communications between Mr. Hochstein and the State Department's Office for the Assistant Legal Advisor for Ethics and Financial Disclosure, and calendar entries from Mr. Hochstein's official calendar, respectively. The State Department informed Friends of the Earth that it had conducted a search for records responsive to both subparts. The State Department identified four records responsive to subpart 2 appropriate for partial disclosure. Additionally, the State Department informed Friends of the Earth that it "continue[s] to process" subparts 2-4 of Friends of the Earth's request.

On November 4, 2022, the State Department informed Friends of the Earth by letter that the agency "has continued to review and process records responsive to your request, but as of today's date these records are not yet ready for production." The State Department additionally stated that it "will continue to process your request and keep you apprised of its progress."

Because this appeal is postmarked within 90 days of the date of the denial letter, this appeal is timely.

A. The State Department's Partial Denial Fails To Adequately Justify The Withholding

The "'mandate of FOIA calls for broad disclosure of Government records,' and for this reason [the Supreme Court] ha[s] consistently stated that FOIA exemptions are to be narrowly construed." *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988) (quoting *CIA v. Sims*, 471 U.S. 159, 166 (1985)). The government bears the burden of demonstrating that the withheld information is exempt from disclosure under one of FOIA's nine narrowly construed exemptions. 5 U.S.C. §552(a)(4)(B) ("the burden is on the agency to sustain its action"); *see also*

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Multnomah Cty. Med. Soc’y v. Scott, 825 F.2d 1410, 1413 (9th Cir. 1987). Even if one of the exemptions applies, agencies must determine whether non-exempt material within the record is reasonably segregable from the information that is exempt from disclosure. *Nw. Coal. for Alternatives to Pesticides v. Browner*, 941 F. Supp. 197, 201 (D.D.C. 1996). If so, agencies must disclose such information. 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”).

Exemption 6 of FOIA provides that agencies need not disclose “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). To be properly withheld under Exemption 6, information must be “personnel, medical, or ‘similar’ files,” the disclosure of which “would constitute a clearly unwarranted invasion of personal privacy.” *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Rev.*, 830 F.3d 667, 673 (D.C. Cir. 2016). The agency must “balance the public interest in disclosure against the interest Congress intended [Exemption 6] to protect,” and can only withhold the information if “disclosure would compromise a substantial, as opposed to a *de minimis*, privacy interest.” *Id.* at 673-74. Even then, information is only properly withheld if the privacy interest at stake outweighs the public interest in the release of the records. *Id.* at 974. As the Supreme Court has held, “the only relevant ‘public interest in disclosure’ to be weighed in this balance is the extent to which disclosure would serve the ‘core purpose of the FOIA,’ which is ‘contribut[ing] significantly to public understanding of the operations or activities of the government.’” *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994). Exemption 6’s requirement that disclosure be “‘clearly unwarranted’ instructs us to ‘tilt the balance (of disclosure interests against privacy interests) in favor of disclosure.’” *Wash. Post Co. v. U.S. Dep’t of Health & Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982) (quoting *Ditlow v. Shultz*, 517 F.2d 166, 169 (D.C. Cir. 1975)). This exemption imposes a “heavy burden” on agencies; indeed, “under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act.” *Id.*

Friends of the Earth appeals the State Department’s August 12, 2022 Exemption 6 withholdings because the denial is overbroad, vague, and fails to provide segregable records in response to Friends of the Earth’s FOIA request. As an initial matter, the State Department’s cursory partial denial letter is woefully insufficient to satisfy the agency’s obligation under FOIA to produce responsive records or adequately explain its refusal to do so. *See* 5 U.S.C. § 552(b). The agency “bears the burden of establishing the applicability of the claimed exemption.” *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 57 (D.C. Cir. 2003). Here, the State Department makes a bare assertion that disclosure of the withheld records would constitute a “clearly unwarranted invasion of an individual’s personal privacy.” The agency does not identify whether the two records in question are “personnel, medical, or similar files.” Nor does the agency explain how the files Friends of the Earth seeks constitute the type of “detailed [g]overnment records on an individual” that fall under Exemption 6. *Dep’t of State v. Wash. Post*, 456 U.S. 595, 602 (1982). Therefore, it is unclear whether the withheld records meet even this threshold requirement for protection under Exemption 6.

Moreover, the agency’s conclusory assertion that the records are exempt from disclosure under Exemption 6 “fail[s] even to articulate the privacy interest in the records, let alone

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demonstrate that such privacy interests meet the standard for an agency's withholding under Exemption 6.” *Morley v. CIA*, 508 F.3d 1108, 1128 (D.C. Cir. 2007). To be protected under Exemption 6, disclosure must “compromise a *substantial*” privacy interest. *Am. Immigration Lawyers Ass’n*, 830 F.3d at 673–74 (emphasis added). “If no significant privacy interest is implicated . . . FOIA demands disclosure.” *Nat’l Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). Here, the State Department has not identified *any* privacy interest implicated by the disclosure of the two records at issue. As a result, it is impossible to determine “whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy.” *Id.* Accordingly, the State Department has failed to adequately justify its withholding as required by FOIA. 5 U.S.C. § 552(a)(8)(A)(i); *Founding Church of Scientology of Wash., D.C., Inc. v. Nat’l Sec. Agency*, 610 F.2d 824, 830 (D.C. Cir. 1979) (noting that “conclusory and generalized allegations of exemptions are unacceptable” (internal quotation marks and citation omitted)).

The State Department’s failure to disclose the two records at issue is even more egregious in light of the highly significant public interest in the disclosure of these records. Even where a substantial privacy interest does exist, such finding does not conclude the inquiry; the agency must then “address the question whether the public interest in disclosure outweighs the individual privacy concerns.” *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 35 (D.C. Cir. 2002); *see also Am. Immigration Lawyers Ass’n*, 830 F.3d at 674 (explaining that the second step is to “weigh the privacy interest at stake ‘against the public interest in the release of the records’” (quoting *Norton*, 309 F.3d at 33)). As the Supreme Court has explained, the public interest to be weighed against the privacy interest in this balancing test is “the extent to which disclosure would serve the ‘core purposes of the FOIA’” by “‘contribut[ing] significantly to public understanding of the operations or activities of the government.’” *Fed. Labor Relations Auth.*, 510 U.S. at 495 (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989)). The key question under this inquiry is whether disclosure will shed light on the “agency’s performance of its statutory duties.” *Bibles v. Or. Nat. Desert Ass’n*, 519 U.S. 355, 356 (1997) (per curiam) (citations omitted).

The disclosure of the requested information clearly satisfies this standard. The two records are responsive to subpart 3 of Friends of the Earth’s request, which sought “[c]ommunications between Mr. Hochstein and members of and participants in the Task Force.” Accordingly, as explained in Friends of the Earth’s FOIA request, the records will help clarify, for the first time, the State Department’s engagement with public and private entities in its efforts to develop and implement a plan to reduce European dependence on Russian natural gas exports; the role of renewable energy (if any) in the State Department’s solution to the energy crisis; the State Department’s efforts to secure financing for domestic LNG facilities; the influence of special interest groups on the State Department’s decisions and actions; and the State Department’s and the European Union’s consideration of climate change. These crucial pieces of information will contribute to the public’s understanding of the federal government’s decision-making process regarding the energy crisis, particularly as it relates to the unprecedented climate crisis. Specifically, the records requested will be meaningfully informative as to the types of communications between State Department officials, their European Union counterparts, and the fossil fuel industry; the types of policy decisions that are being made; and whether/how those decisions are being considered. The records may also shed light on the State Department’s

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support of ongoing and expanded fossil fuel extraction in the United States, as well as what—if any—processes the federal government has undertaken to protect communities and the stability of our financial system from this industry. Under these circumstances—i.e., where the information requested is new and would help clarify the government’s decisionmaking process and rationale with respect to highly consequential decisions and actions related to the United States’ responses to the current energy crisis and how that response will impact global climate change—there is a strong public interest in knowing “what the government is up to.” *Wash. Post Co.*, 690 F.2d at 261. Against this significant public interest in disclosure, the State Department failed to articulate *any* private interest against which the public interest can be weighed. Accordingly, the State Department has “failed to rebut the presumption favoring disclosure, which is at its zenith under Exemption 6, by demonstrating that disclosure would be clearly unwarranted so as to tilt the balance against disclosure.” *Nat’l Ass’n of Home Builders*, 309 F.3d at 37 (citations omitted).

The State Department’s inhospitable approach is especially inappropriate in light of FOIA’s “general philosophy of full agency disclosure,” which is “premised on the notion that ‘an informed citizenry is vital to the functioning of a democratic society.’” *Gov’t Accountability Project v. CIA*, 548 F. Supp. 3d 140, 147 (D.D.C. 2021) (citations omitted). FOIA’s general presumption in favor of public transparency and disclosure applies to Exemption 6 “as strong[ly] as” to the other exemptions. *Wash. Post Co.*, 690 F.2d at 261. However, far from justifying its determination that the records are not subject to disclosure, the State Department merely assumes the exempt status of the information, neglecting any analysis of whether the disclosure would actually “constitute a clearly unwarranted invasion of personal privacy.” Moreover, the agency withholds these records *in full* without even attempting to segregate factual and other non-exempt material. Under any yardstick, the State Department’s approach not only violates the letter of FOIA, but also runs counter to the spirit of the statute’s commitment to transparency and disclosure.

This is especially concerning due to the context of the underlying subject matter of the records. As exhaustively detailed in Friends of the Earth’s FOIA request and the accompanying declaration, the State Department is withholding information of crucial importance to a matter of tremendous public concern, i.e., the agency’s engagement with the European Union and the fossil fuel industry to, *inter alia*, discuss, facilitate, and/or promote the expansion of domestic natural gas extraction and infrastructure development in response to the energy crisis precipitated by the Russo-Ukrainian War, despite the impending climate crisis and the existence of viable sustainable alternatives—e.g., justly sourced renewables and increased energy efficiency—to meeting energy demands. Indeed, as demonstrated by continuing coverage in mainstream news media sources, these issues are of significant public interest and remain highly controversial both inside and outside the federal government.

Thus, particularly in light of the highly controversial nature of the State Department’s actions, the public has a right to know about the communications between State Department officials, their European Union counterparts, and the fossil fuel industry as it acts upon directives issued by the Biden Administration and in connection with a federal Task Force. The State Department may not deploy Exemption 6 as a justification for failing to provide this vitally important information on a matter of indisputable public interest. Accordingly, for these reasons,

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withholding the two responsive records identified in the agency's August 12, 2022 letter in their entirety is not only legally invalid but a clear flouting of the public's right to know.

B. The State Department Must Disclose Responsive Records Expeditiously

FOIA provides for expedited processing of requests where there is a demonstrated "urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(e)(v)(II). 5 U.S.C. § 552(a)(6)(E). When expedition is appropriate, an agency is obligated to process the request "as soon as practicable." *Id.* § 552(a)(6)(E)(iii). Although FOIA does not define "as soon as practicable," it has been held that "[a]n agency that violates the twenty-day deadline applicable to standard FOIA requests presumptively also fails to process an expedited request 'as soon as practicable.'" *EPIC v. Dep't of Justice*, 416 F. Supp. 2d 30, 38 (D.D.C. 2006). In other words, "a *prima facie* showing of agency delay exists when an agency fails to process an expedited FOIA request within the time limit applicable to standard FOIA requests." *Id.*

As explained, the State Department granted Friends of the Earth's request for expedited processing on June 13, 2022 (shortly after Friends of the Earth filed a lawsuit challenging the agency's initial denial of that request). Since that date, the State Department has identified eight responsive records, two of which were withheld in their entirety (i.e., the two at issue in this appeal). On November 4, 2022, the State Department informed Friends of the Earth that the agency "has continued to review and process records responsive to [Friends of the Earth's] request, but as of today's date these records are not yet ready for production. The [State] Department will continue to process [the] request and keep [Friends of the Earth] apprised of its progress."

The State Department's delay in processing Friends of the Earth's FOIA request is unreasonable and unlawful. As an initial matter, because it has been nearly five months since Friends of the Earth's FOIA request was granted expedited processing and the State Department still has not issued a final determination on the request, the State Department is presumptively in violation of FOIA. *EPIC*, 416 F. Supp. 2d at 38. Even worse, the State Department has not provided *any* evidence that it was impracticable to process Friends of the Earth's request within twenty days of the agency's determination that expedition was warranted. *Id.* at 39-40. To the contrary, once again, the agency made a bare assertion—here, that additional time was necessary to process the request—the type of which is insufficient to sustain agency actions under FOIA. *See id.* at 40 (finding the agency's two-month delay in processing an expedited FOIA request unreasonable where the agency "has not attempted to present any evidence either that processing EPIC's FOIA requests within twenty days of the receipt of EPIC's requests was impracticable").

The State Department's delay in processing Friends of the Earth's request is particularly unreasonable under the factual circumstances presented here. Friends of the Earth sought—and was granted—expedited processing of its FOIA request because of a demonstrated "urgency to inform the public concerning" the agency's activities. *See* 5 U.S.C. § 552(a)(6)(e)(v)(II). Specifically, there is an urgency to inform the public of the State Department's engagement with the European Union and the fossil fuel industry to, *inter alia*, develop and implement policy responses to the energy crisis precipitated by the Russo-Ukrainian War. Despite this

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acknowledged urgency, in the nearly five months since Friends of the Earth's request was placed in the expedited track, fewer than ten responsive records have been identified. Meanwhile, the impacts of Russia's actions and threats continue to reverberate through the global economy, and the conflict has only escalated since Friends of the Earth submitted its FOIA request.

For instance, utility rates have reached 40-year highs, and mounting Congressional and public pressure on the Biden Administration to address rising energy prices has conferred a sense of urgency on federal officials to solve the crisis quickly (or at least, appear to be working to solve the crisis quickly). As part of these efforts, Mr. Hochstein and the State Department are reportedly working to encourage and facilitate the financing of new LNG export infrastructure, and the Task Force is moving quickly to develop and implement plans to respond to the rapidly evolving situation in Europe. At the same time, the fossil fuel industry continues to pressure the Biden Administration and federal agencies to explore ways to expedite the permitting of new LNG facilities and infrastructure. Any delay in processing Friends of the Earth's FOIA request risks delivering information that is stale and thus "of little value" to Friends of the Earth's efforts to inform its members, Congress, and the public of matters of extreme public importance and concern. *See Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) ("[S]tale information is of little value."); *see also Prot. Democracy Proj. Inc. v. U.S. Dep't of Def.*, 263 F. Supp. 3d 293, 299 (D.D.C. 2017) (finding that a delay in processing FOIA request would compromise a significant recognized interest where the information sought was highly relevant to ongoing debates regarding "high profile government action").

As courts in this district have recognized, the "failure to process FOIA requests in a timely fashion is 'tantamount to denial.'" *Wash. Post Co.*, 459 F. Supp. 2d at 74 (quoting H.R. Rep. No. 93-876, at 6 (1974)). Although Friends of the Earth is sympathetic to the challenges faced by agencies in responding to FOIA requests within the statutory period, the identification of fewer than ten responsive records in five months violates the letter and intent of the statute's expedited processing provision. Indeed, courts often find that one to two months is sufficient time for an agency to process even broad FOIA requests that may involve classified or exempt material. *See, e.g., Am. Civil Liberties Union v. Dep't of Def.*, 339 F.Supp.2d 501, 504-05 (S.D.N.Y. 2004) (despite the fact that national security issues were raised by the FOIA request at issue, ordering production of all responsive documents within one month); *Judicial Watch, Inc. v. Dep't of Energy*, 191 F.Supp.2d 138, 140-41 (D.D.C. 2002) (ordering agencies to process over 6000 pages of material within 60 days); *NRDC v. Dep't of Energy*, 191 F.Supp.2d 41, 43 (D.D.C. 2002) (ordering the "vast majority" of the processing of 7500 pages to be completed within 32 days). Accordingly, the State Department must immediately process and disclose all records that are responsive to Friends of the Earth's FOIA request.

To facilitate the prompt disclosure of such records, Friends of the Earth requests that the State Department provide an anticipated date for the completion of the processing of all parts of Friends of the Earth's FOIA request with its response to this appeal.

CONCLUSION

On appeal, we request that the State Department expeditiously disclose the two records identified in the agency's August 12, 2022 partial denial that were erroneously withheld pursuant

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to Exemption 6 of FOIA. Additionally, we request that the State Department expeditiously search for and disclose all records sought by Friends of the Earth's May 17, 2022 FOIA request and provide an anticipated date for the completion of their processing. Please let us know if you have any questions concerning this appeal. I can be reached at lizzie@eubankslegal.com. Given the time-sensitive nature of this matter, we look forward to a response to this appeal as soon as possible and in no event later than the twenty working days mandated by FOIA. *See* 5 U.S.C. § 552(a)(6)(A)(ii).

Sincerely,

/s/Elizabeth L. Lewis

Elizabeth L. Lewis