



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

September 6, 2023

Mrs. Lesley A. Pacey  
The Government Accountability Project  
P.O. Box 62  
Point Clear, AL 36564

**Re: Freedom of Information Act Request – EPA-R5-2023-006256  
Fee Waiver Determination**

Dear Mrs. Lesley A. Pacey:

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA), National FOIA Office (NFO) on August 25, 2023 in which you are seeking: “The Government Accountability Project requests any and all records from the U.S. Environmental Protection Agency (USEPA) including drafts and electronic records as defined by the FOIA. Records shall include electronic records, as defined by the FOIA, of official and unofficial reports, meeting notes, emails, and other communications, along with records in any other media, such as photos and videos, drafts of documents, jottings, and other records in possession of the EPA related to the requested information. The request covers the period from February 3, 2023, to present regarding the East Palestine Train Derailment (EPTD) for the following records which are in possession of and/or generated by the USEPA: 1. Any and all records from the aforementioned time period regarding the USEPA and the Federal On-Scene Coordinator (FOSC) the National Response Team (NRT), the US Coast Guard (USCG), Unified Area Command (UAC), East Palestine Fire Department and Norfolk Southern (NS) regarding the decision to do a controlled burn the chemicals spilled by the EPTD. a. Records including but not limited to the terms: burn, controlled burn, ignite, plume, fire, ablaze, blaze, smoke, atmospheric and dioxin(s) b. A full list of chemicals including quantities that were spilled and ignited during the EPTD disaster. 2. Any and all records from the aforementioned time period related to evacuating residents and announcing it was safe to return home. 3. Any and all records from the aforementioned time period regarding the USEPA and the decision to delay, forgo, postpone and eventually to test for dioxins and dioxin-related compounds in the soil, water and in homes. a. Key terminology includes but is not limited to “sampling,” “monitoring,” “air,” “air quality,” air monitoring,” “community,” “communities,” “exposure,” “CTEH,” “Dixon,” “health effects,” “toxic,” “delay,” “postpone,” “panic,” “liability” and “detection.” 4. Any and all records from the aforementioned time period regarding the USEPA’s work with NS and its contractor Center for Toxicology and Environmental Health (CTEH) to do environmental sampling of air, water and soil as well as in residential homes and businesses, and to test or not test for dioxins and dioxin-related compounds. a. Key terminology

**Exhibit 6**

includes but is not limited to “sampling,” “monitoring,” “air,” “air quality,” air monitoring,” “community,” “communities,” “detection limits,” “exposure,” “CTEH,” “Dixon,” “health effects,” “toxic,” “delay,” “postpone,” “panic,” “liability,” and “detection.” b. Results should include all sampling data, lab reports, lab data packages and QAQC documents provided to EPA by CTEH and NS and created by the EPA through its own testing and sampling. c. Email searches should include but not be limited to durno.mark@epa.gov; reagan.michael@epa.gov; Chen.Karen01@epa.gov; William.Burgess2@nscorp.com; Alan.Shaw@nscorp.com; and emails ending in @cteh.com; @nscorp.com; @epa.gov and @ceq.oep.gov. CTEH employee emails should include but are not limited to those of Dr. Phil Goad, Dr. Alan Nye, Dr. Glenn Millner, Ted Snider, Cory Davis, Paul Nony, Karen Chen and John Kind. Searches should also include the email address: R5\_EastPalestine@epa.gov. 5. Any and all records in possession of the EPA regarding independent scientist Scott Smith and his dioxin and dioxin-related compound testing and sampling at EPTD. a. Email addresses to include but not limited to: ssmith@aqflx.com (Scott Smith); durno.mark@epa.gov; reagan.michael@epa.gov; William.Burgess2@nscorp.com, Alan.Shaw@nscorp.com; and all other emails ending in @nscorp.com; @cteh.com; @epa.gov; and @epa.ohio.gov. b. Any and all records from the aforementioned time period regarding EPA’s decision in June 2023 and offer to clean residents’ homes in East Palestine. Includes all communications involving the email addresses ending in @epa.gov; @nscorp.com; @ceq.oep.gov; and @cteh.com. c. NOTE: In addition to email addresses ending in @epa.ohio.gov; @epa.gov; @nscorp.com; @ceq.oep.gov; and @cteh.com, please also include in all the above searches: William.Burgess2@nscorp.com, Alan.Shaw@nscorp.com; ssmith@aqflx.com; Utech.Dan@epa.gov; Saucedo.Alfred@epa.gov; durno.mark@epa.gov; Jakob.Avivah@epa.gov; Regan.Michael@epa.gov; McCabe.Janet@epa.gov; Shore.Debra@epa.gov; Ortiz.Adam@epa.gov; Tejada.Matthew@epa.gov; Breen.Barry@epa.gov; Heard.Anne@epa.gov; Douchand.Larry@epa.gov; ballotti.douglas@epa.gov; leonard.paul@epa.gov; Cope.Grant@epa.gov; R5\_PIO@epa.gov; press@epa.gov; milbourn.cathy@epa.gov; white.terri-A@epa.gov; linduska.rachel@epa.gov; Brenda.Mallory@ceq.oep.gov; Jessica.A.Ennis@ceq.eop.gov; Jonathan.y.black@ceq.eop.gov; mschade@toxicfreefuture.org; jamiwallace77@outlook.com; unitycouncil2023@gmail.com; and no-rx@sbcglobal.net. Records requested above may include, but are not limited to, any and all investigative documents, notes, photographs, videos, research, scientific studies, assessments, laboratory conducted sampling, testing, and results, and any final determinations or action plans resulting from said findings. If any of the material covered by this request has been destroyed or removed, please provide all surrounding documentation including, but not limited to, a description of the action taken regarding the materials and justification for those actions taken. For any documents or portions you deny due to a specific FOIA exemption, please provide a detailed justification of your grounds for claiming such exemption, explaining why the exemption is relevant to the document or portion of the document withheld. We anticipate that any responsive documents will be unclassified. If any of the responsive documents contain classified information, please segregate all unclassified material within the classified documents and provide all unclassified information. We are not interested in generic news clippings or newsletters that just happen to mention a keyword, so please do not include those as responsive documents, unless the author of the correspondence adds to the newsletter.”

You requested a waiver of fees to process your FOIA request. EPA regulations provide a mechanism for requesters to seek records responsive to a FOIA request “without charge or at a charge reduced below” the agency FOIA fee schedule when the NFO determines “based on all available information, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government” (public interest requirement) and “is not primarily in the commercial interest of the requester” (non-commercial interest requirement). Freedom of Information Act Regulations Update, 84 Fed. Reg. 30,028, 30,037-38 (June 26, 2019) (to be codified at 40 C.F.R. pt. 2).

To evaluate the public interest requirement, the EPA considers each of four factors: (1) the subject of the request; (2) the informative value of the information to be disclosed; (3) the contribution to an understanding of the subject by the public is likely to result from disclosure; and (4) the significance of the contribution to public understanding. Freedom of Information Act Regulations Update, 84 Fed. Reg. at 30,037-38; *see also* 40 C.F.R. §§ 2.107(1)(2)(i)-(iv) (2018).

To determine the non-commercial interest requirement, the EPA considers each of two factors: (1) the existence and magnitude of a commercial interest; and (2) the requester’s primary interest in the information disclosure. Freedom of Information Act Regulations Update, 84 Fed. Reg. at 30,038; *see also* 40 C.F.R. §§ 2.107(1)(3)(i)-(ii). If the EPA determines the requester has a commercial interest that is furthered by disclosure of the requested information and the commercial interest is primary to any specified public interest, the requester is not entitled to a waiver of fees.

Fee waiver requests must specifically address each, and all, of the factors. Freedom of Information Act Regulations Update, 84 Fed. Reg. at 30,038; *see also* 40 C.F.R. § 2.107(1)(5). If a requester’s written justification for a fee waiver fails to address or substantiate each of the factors discussed below, the EPA will deny the request for a fee waiver. *Id.* The NFO evaluated the information you provided in support of your request for a fee waiver and applicable EPA regulations. For the reasons explained below, your request for a fee waiver is denied.

For the second factor above, EPA’s regulations state that “The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding.” *See* 40 C.F.R. § 2.107(1)(2)(ii).

For the reasons below, your fee waiver justification failed to adequately demonstrate the informative value of the information to be disclosed *See* 40 C.F.R. § 2.107(1)(2)(ii). Your fee waiver justification stated: “GAP requests that all fees incurred in connection with the attached request be waived, primarily as members of the news media and secondary because “disclosure of the information is in the public interest and is not primarily in the commercial interest of the requester.” 5 U.S.C. §552 (a)(4)(A)(iii). 1. Members of the News Media Under the language of

the EPA Regulations, “The Agency will charge no search or review fees for requests by educational institutions or noncommercial scientific institutions, or representatives of the news media.” Moreover, “a representative of the news media” in this clause means “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. In this clause, the term “news” means information that is about current events or that would be of current interest to the public.” GAP uses editorial skills to author public disclosures, which very often include FOIA-Requested documentation reference, and via our Blog, weekly newsletter, and published to our 16,000+ followers on Twitter, and are picked up by top news outlets on a regular basis, including NBC News. As such, we request a determination on whether we are included in the news media fee category. Additionally, if for some reason you determined that we are not news media under the meanings and definitions of this regulation, we also request you provide explanation as to how you made that determination. Finally, we also request to reserve our right to appeal such determination after it has been made. GAP employees are members of the public media. Its employees’ work has been published in outlets including The Washington Post, Just Security, and The Daily Beast. This request is made as part of the news gathering process. If there is any newsworthy material discovered from this FOIA request, there is a reasonable expectation of its publication. Moreover, it is unnecessary for GAP to demonstrate the relevance of this particular subject in advance. Additionally, despite our past record, case law states that “proof of the ability to disseminate the released information to a broad cross-section of the public is not required.” *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004); see *Carney v. U.S. Department of Justice*, 19 F.3d 807, 814-15 (2d Cir. 1994). Further, courts have held that “qualified because it also had “firm” plans to “publish a number of . . . ‘document sets’” concerning United States foreign and national security policy.” Under this criterion, as well, we qualify as members of the news media. Additionally, courts have held that the news media status “focuses on the nature of the requester, not its request. The provision requires that the request be ‘made by’ a representative of the news media. *Id.* § 552(a)(4)(A)(ii)(II). A newspaper reporter, for example, is a representative of the news media regardless of how much interest there is in the story for which he or she is requesting information.” As such, the details of the request itself are moot for the purposes of determining the appropriate fee category. 2. Public Interest To be overly inclusive, GAP also includes a request for a waiver on the basis of the 6 public interest factors. Please accept the detailed explanation below of GAP’s intended use of such information and status as a 501(c)(3) nonprofit as sufficient justification in order to waive fees connected with GAP’s request. The Requesters’ Public Interest Status and History GAP is a non-profit, non-partisan, public interest organization chartered under IRS Code §501 (C)(3) as a non-profit, educational and charitable organization. We seek to serve the public through achieving governmental accountability by protecting and encouraging federal and corporate employees who observe or are victimized by wrongdoing, gross waste of public funds, threats to public health and safety, environmental contamination, corruption, abuse of the public trust and other abuses of power. GAP accomplishes these goals primarily by conducting advocacy campaigns before Congress, through the media, and for the general public and by providing legal representation to whistleblowers to combat the retaliation they have suffered in exercising their right of occupational free speech. Our twin aims are to promote corporate and government accountability and to expose, investigate, and correct substantive problems that formed the basis of protected whistleblowing disclosures. GAP’s role

is well-recognized by the courts and, as an organization, has informational standing under the First Amendment protecting its receipt of disclosed information. Taylor v. RTC. 56 F.3d 1437 (D.C. 1995); United States v. Garde, 573 F. Supp. 604 (D.D.C. 1987); ~ Generally Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 756-57 (1976). GAP has an almost 45-year history of working in the public interest. GAP does not take individual cases based on the client's ability to pay, how much money GAP believes it can recover in legal fees through litigation or any other commercial interest. Rather, GAP takes cases of legitimately harassed whistleblowers, often pro-bono (without charge), that further public policy or legislative changes that make the law stronger for workers who witness and choose to tell the truth about corporate and taxpayer-financed wrongdoing and to pursue exposure and resolution of the wrongdoing. It is through this work and with the help of whistleblowers that GAP has, among other things, pushed for enactment of several whistleblower protection statutes, exposed unhealthy food at supermarket chains, pushed for independent reviews of the safety of the Alaska pipeline, exposed the threat of explosion in waste tanks at the Hanford nuclear site, and pushed for policy reform within numerous executive agencies. All this activity is done primarily with the interest of the public in mind. Dissemination of the Requested Information In our efforts to promote government accountability, GAP works closely with Members of Congress, the media, and the public to alert them to irregularities. The information requested will be used in connection with a campaign aimed at key decision-makers at the federal level, the general public, and self-selected subscribers. More specifically, GAP will publicize the responsive records so that all federal employees who seek assistance at OSC can be fully- informed about the office's methods for investigating their complaints. The combined circulation and viewer-base of our national, regional, and self-subscribed outlets ensure that the information will, indeed, be widely distributed to diverse segments of the public who will benefit from knowing the manner in which OSC investigates complaints, and the efforts that OSC has taken to ensure the highest quality training and instruction for its staff. As a consequence, public understanding, and trust in government operations will certainly be enhanced. Non-Commercial Use of the Requested Information Disclosure of this information by GAP is in no way connected with any commercial interest since GAP is a non-profit, tax-exempt organization under § 501 (c)(3) of the IRS Code. The information we are seeking is crucial to advance public knowledge and will not be put to any commercial use. Please be reminded that under the Freedom of Information Act, we are entitled to receive a response to this request within twenty working days. Should this request be denied for any reason, we ask that a detailed explanation be provided along with the name of the person to whom administrative appeals should be addressed.”

Your justification did not detail the informative value of the requested records and what would be shared for an increased public understanding. Although your justification provided past examples of your organization's disclosure of records, your justification did not address why these specific records concerning the East Palestine Train Derailment would have informative value for the public. Therefore, your statement did not address the required second factor on informative value in enough detail for EPA to grant your fee waiver request.

You may appeal this fee waiver determination by email at [hq.foia@epa.gov](mailto:hq.foia@epa.gov), by mail to the EPA's National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460, or through FOIAonline if you are an account holder. You may also



submit your appeal by hand delivery, courier service, or overnight delivery; you must address your correspondence to 1200 Pennsylvania Avenue, N.W., WJC-N Building, Room 7309C, Washington, DC 20460. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals *received* after the 90-calendar-day limit. Appeals received after 5:00 p.m. EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal."

Your fee waiver request is denied because you did not address with enough detail the factor described above, under EPA's FOIA Regulations, located at 40 C.F.R. § 2.107(l). Because your fee waiver request did not provide enough detail on the one identified factor, the National FOIA Office did not make a determination on the sufficiency of your request with respect to the other factors. Should you choose to appeal this determination, please be sure to provide information to address all six factors required by EPA's FOIA Regulations in your appeal. For more information about the FOIA fee waiver factors, please visit our website at: <https://www.epa.gov/foia/requesting-foia-fee-waivers>.

Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at [hq.foia@epa.gov](mailto:hq.foia@epa.gov) or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, [ogis@nara.gov](mailto:ogis@nara.gov); telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

Sincerely,

 Digitally signed by KEVIN HILL  
Date: 2023.09.06 13:51:19 -04'00'

Kevin W. Hill  
Attorney-Adviser  
National FOIA Office