

EXHIBIT C

**Sierra Club's Administrative Appeal of
EPA's Determination Denying Its FOIA Request
(July 11, 2019)**



July 11, 2019

U.S. Environmental Protection Agency
William Jefferson Clinton Federal Building
Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue NW (2822T)
Washington, D.C. 20460

Appeal submitted via email to hq.foia@epa.gov

Re: Freedom of Information Act Appeal: EPA-HQ-2019-005176 (submitted 4/22/2019)

Dear FOIA Officer:

This is an appeal of the U.S. Environmental Protection Agency's ("EPA") June 20, 2019, denial of Sierra Club's Request No. EPA-HQ-2019-005176, submitted pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. EPA determined that Sierra Club's request is not a reasonably specific request for documents but rather is an improper question framed as a FOIA request. That determination violates the plain text of FOIA, contravenes both general judicial precedent as well as specific precedent rejecting EPA's reasoning in materially the same circumstances, and is belied by EPA's own past ability to cognize and comply with the request in that specific case. Accordingly, EPA's determination must be reversed, and the agency must proceed timely to comply with Sierra Club's request.

I. Background: Sierra Club's FOIA Request and EPA's Eventual Denial

Sierra Club submitted its FOIA request on April 22, 2019, following a nationally televised interview with EPA Administrator Andrew Wheeler on March 20, 2019. In that interview, Administrator Wheeler asserted that "most of the threats from climate change are 50 to 75 years out."¹

Sierra Club's FOIA request (attached as Exhibit A hereto) sought the following records:

- (1) All records that Administrator Wheeler relied on in asserting that "most of the threats from climate change are 50 to 75 years out"; and
- (2) All records produced, commissioned, or otherwise obtained by EPA that support the conclusion that "most of the threats from climate change are 50 to 75 years out," other than any encompassed by (1).²

¹ Interview of Administrator Wheeler by CBS News chief Washington correspondent, Major Garrett, aired on March 20, 2019, at segment ~18:30-18:40, available at <https://www.cbsnews.com/news/epa-administrator-andrew-wheeler-exclusive-interview/> (last accessed July 11, 2019).

² FOIA Request from Sierra Club to EPA, No. EPA-HQ-2019-005176 (April 22, 2019) (Exhibit A hereto).

Sierra Club's FOIA request further clarified the meaning of "records" for purposes of its request, *see* Exhibit A at 1 n.1; provided EPA with instructions on the timing, format, and delivery of the agency's response, *id.* at 2; addressed the issues of exemption and failure to respond, *id.*; and requested a fee waiver, *id.* at 3-5. Sierra Club received electronic confirmation of EPA's receipt of the request the same day the request was submitted.

On April 25, 2019, an EPA Government Information Specialist in the National FOIA Office contacted Sierra Club (namely, the undersigned) by phone, asking to set up a broader call to discuss the request. Sierra Club responded that it would be happy to discuss the request, while communicating its belief that the written request was clear on its face and otherwise proper. Sierra Club also offered to email the agency, as instructive guidance for consideration, the 2018 decision by the U.S. District Court for the District of Columbia in *Public Employees for Environmental Responsibility v. U.S. Environmental Protection Agency* (hereinafter "*PEER*")—which the EPA staff member indicated she was not familiar with—along with the associated FOIA request and legal complaint in that case.³ Sierra Club explained that the *PEER* case involved a materially analogous request by another non-profit organization to EPA in connection with a 2017 assertion by then-Administrator Scott Pruitt about climate change on a nationally televised interview; EPA refused to comply with *PEER*'s request on the grounds, *inter alia*, that the request was an improper interrogatory and did not reasonably describe specific documents; the court rejected EPA's reasoning and ordered the agency to comply with *PEER*'s request; and the agency then proceeded to comply with the request by consulting with the Administrator and providing the requester with the Administrator's pre-interview notes as well as confirmation about what records the Administrator had and had not relied on. The EPA staff member said the agency would welcome those materials, which Sierra Club therefore emailed. Sierra Club also agreed to join a call with other EPA staff on April 29, 2019.

On April 29, 2019, the EPA staff member called Sierra Club to advise that the agency would need to reschedule the planned call and would get back in touch about alternative times. On May 1, Sierra Club, having heard nothing, emailed EPA to inquire about the rescheduling EPA signaled would be done. The same day, EPA provided Sierra Club with written notice that its FOIA request was being assigned to EPA's Office of the Administrator for processing. On May 2, the EPA staff member wrote back to Sierra Club that she would not be arranging a follow-up call in light of the assignment of Sierra Club's request to the Office of the Administrator.

On May 3, 2019, EPA provided Sierra Club with written notice that its fee waiver request was "not applicable as the request is not billable." EPA further explained, "we have determined your [fee waiver] request does not reach the minimum billing amount," and "[t]herefore, no charges are associated in processing your request."

On May 17, 2019, an EPA attorney-advisor emailed Sierra Club asking to set up a call to discuss the request on May 20. EPA additionally advised: "As a status update, the EPA has initiated searches for the records you requested and we are currently waiting on the results."

³ *Pub. Emps. for Env'tl. Resp. v. U.S. Env'tl. Prot. Agency* ("*PEER*"), 314 F. Supp. 3d 68 (D.D.C. 2018).

On May 20, 2019, prior to speaking on the phone, the EPA attorney-advisor emailed Sierra Club to advise that the agency was “exercising a ten-day extension for unusual circumstances on this request pursuant to 5 U.S.C. § 552(a)(6)(B)(i).” The email explained: “The reason for the extension is EPA needs to consult with two or more components internally to gather the records you requested. As noted in my previous email, that search is already under way.” Sierra Club and EPA then held their planned call, during which Sierra Club acknowledged but did not concede the validity of EPA’s “unusual circumstances” extension. Also on the call, the EPA attorney-advisor reaffirmed that the agency had initiated searches and reached out to staff across EPA. He further advised that once he received responses, he would review the records produced, redact the records if necessary and appropriate, do a final quality-check review, and then share such documents. He indicated that he expected an update perhaps within a couple weeks’ time.

On June 6, 2019, more than two weeks later, Sierra Club emailed the EPA attorney-advisor to inquire about the status of EPA’s progress. Sierra Club also noted that the statutory deadline for the agency to communicate its determination as to whether it would comply with Sierra Club’s request had passed, even factoring in the agency’s exercise of a 10-day extension based on the purported unusual circumstances.

On June 11, 2019, having heard nothing back, Sierra Club again emailed EPA to inquire. Later that day, the attorney-advisor replied, indicating that the agency was working on Sierra Club’s request and that he would circle back as soon as he knew more. Sierra Club wrote back that same day to ask for explicit clarification whether or not to interpret EPA’s response as affirming that the agency had indeed made the threshold statutory determination, under 5 U.S.C. § 552(a)(6), that it would comply with Sierra Club’s request.

On June 20, 2019, Sierra Club received a phone call from EPA, including the same attorney-advisor as well as a senior agency attorney. On the call, the senior attorney indicated that, after having looked at Sierra Club’s request and having conferred with individuals at its Office of Air & Radiation, at least, EPA had decided that the request was not “reasonably specific.” The senior attorney then asked if there were other records, such as literature about climate change generally (independent of whether the Administrator relied on it as a basis for his aforementioned statement), that Sierra Club might be interested in. Sierra Club responded that it believed its request was already reasonably specific and otherwise proper, and that a request for general records about climate change would be a fundamentally distinct and inadequate substitute. Sierra Club asked whether the EPA decision-makers were familiar with the federal court’s decision in the *PEER* decision as well as EPA’s subsequent compliance with the analogous request in that case, which Sierra Club asserted foreclosed EPA’s present position as a matter of judicial and practical precedent. The senior attorney responded that he had not reviewed the decision personally and was not sure whether others had read it or not, although he thought the Office of Air and Radiation was at least generally aware of it. Sierra Club offered to re-email the *PEER* decision and associated materials to EPA (having previously done so in April) and to give the agency until July 8 (*i.e.*, another 15 days) to review that decision and then respond in light of that review with a reassessment of whether Sierra Club’s request was not reasonably specific. The senior attorney agreed that sounded like a good plan and asked Sierra Club to provide the opinion, indicating they would look at it, see if it changed anyone’s mind or needed to go higher up the chain at the agency, and respond in writing by July 8.

Approximately two hours later, around 7:00 pm on June 20, Sierra Club received an automated email from EPA communicating a “final disposition: Records Not Reasonably Described.” Sierra Club concurrently received another email, from the EPA attorney-advisor on the case, attaching a letter (Exhibit B hereto) that indicated “EPA is unable to process your request because it fails to adequately describe the records sought,” and that “[y]our request does not seek specific records but is rather a question framed as a FOIA request.” Exhibit B at 1. The letter acknowledged the parties’ call earlier that day but did not acknowledge either the *PEER* case or EPA’s pledge two hours earlier to examine that case and to confirm its reassessed determination in light of that examination. *Id.* at 2. The letter also set out the option to appeal that determination within 90 days of the letter’s date. *Id.*

The next day, June 21, 2019, Sierra Club emailed EPA, both to provide the *PEER* materials as promised on the call the day before, and to seek clarification as to whether the final disposition and letter sent to Sierra Club after the parties’ call should be understood to supersede their oral agreement that EPA would be considering whether to reassess its determination in light of the *PEER* decision. On June 25, having received no response, Sierra Club followed up with another email asking for clarification.

On June 27, the EPA attorney-advisor wrote back and confirmed that the letter constituted the agency’s final determination. EPA stated that “[a] copy of the *PEER* decision was made available internally and given appropriate consideration after our conversation.” (As that conversation had ended around 4:30 pm on June 20, and EPA sent its official determination later around 7:00 pm, any such “consideration after our conversation” would have taken place during that timeframe.) “Consequently,” the email continued, “our response was consistent with the agreement to respond in writing before July 8th.” EPA then stated: “Notwithstanding the similarities between your FOIA request (EPA-HQ-2019-005176) and the request submitted by *PEER*, EPA has determined that your request is not reasonably specific. We, nonetheless, welcome the opportunity to clarify your request and will reopen the file for that purpose. If interested, please feel free to contact me so that we may discuss a more precise description of the specific records you are seeking.” The same day, Sierra Club replied to ask if they could speak on the phone that day as a last attempt to clarify the precise reasons for EPA’s denial. EPA responded three working days later, on July 2, indicating that they could speak the following day.

On July 3, 2019, Sierra Club spoke on the phone with the same EPA senior attorney and attorney-advisor. Sierra Club explained that it wanted to make crystal clear, before proceeding with an administrative appeal, whether the agency’s “not reasonably specific” denial, coupled with its “welcom[ing] the opportunity to clarify [the] request” meant—namely, whether EPA in fact did not understand what the existing request sought or, conversely, EPA understood the request but simply deemed it a non-cognizable/improper request. The senior attorney responded that it was “the latter,” and further confirmed that they “do understand” the request but believe it is “not reasonable.” Sierra Club then asked if the agency simply disagreed with the *PEER* decision, which rejected that same reasoning in a materially analogous case. The senior attorney responded that they had reviewed the *PEER* case but believe that Sierra Club’s FOIA request in this case is “different.” Sierra Club asked if would elaborate on how or why the present case is different, and he declined. Sierra Club thanked the EPA staff for their time and efforts, and advised that Sierra Club would proceed to file an administrative appeal.

This administrative appeal now follows.

II. Discussion

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.”⁴ FOIA requires that federal executive agencies release all documents and other records in their possession upon request by a member of the public, except for records that fall under one of the statute’s narrowly-construed exemptions.⁵

Whereas “FOIA does not compel an agency to reply to questions disguised as FOIA requests,” such a situation does not arise when the request “reasonably describe[s] an actual record.”⁶ Accordingly, “each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.”⁷ The requirement for a reasonable description “is ‘not to be used as a method of withholding records,’” but instead calls for simply “‘a reasonable description enabling the Government employee to locate the requested records.’”⁸

Importantly, EPA’s “not reasonably specific” determination is essentially identical in form and specificity to the FOIA request at issue in the *PEER* case discussed above—a request that not only did the district court hold to be reasonably specific and otherwise proper, but that EPA was then in fact able to cognize and comply with after the court ordered it to do so.⁹ Hence, EPA cannot plausibly claim it need not or cannot respond to a type of request it was ordered to respond to, and that it demonstrated its capability to respond to, a year ago.

In *PEER*, the court held that a FOIA request was proper when it sought EPA documents that former Administrator Scott Pruitt relied upon when making policy statements in a television interview, as well as any EPA documents supporting the conclusion that Pruitt had articulated.¹⁰ EPA argued that the request amounted to an impermissible interrogatory rather than a request for documents, but the court disagreed, characterizing the request as “straight-forward” and the

⁴ *U.S. Dep’t of Justice v. Julian*, 486 U.S. 1, 8 (1988) (quoting *C.I.A. v. Sims*, 471 U.S. 159, 166 (1985); additional citations omitted).

⁵ 5 U.S.C. § 522(a)-(b); *see also, e.g., Milner v. Dep’t of the Navy*, 562 U.S. 562, 565 (2011) (exemptions are “explicitly made exclusive” and “must be narrowly construed”); *Bristol-Myers Co. v. Fed. Trade Com.*, 424 F.2d 935, 938 (D.C. Cir. 1970) (“The legislative plan creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed.”).

⁶ *Jean-Pierre v. Fed. Bureau of Prisons*, 880 F. Supp. 2d 95, 103 (D.D.C. 2012) (holding that an inmate’s request to learn information did not qualify as a proper FOIA request when the inmate did not file a corresponding record request).

⁷ 5 U.S.C. § 522(a)(3)(A).

⁸ *Bristol-Meyers Co.*, 424 F.2d at 938 (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965)).

⁹ *PEER*, 314 F. Supp. 3d 68.

¹⁰ *Id.* at 82.

agency’s interpretation as “twisted.”¹¹ Analogously in the instant case, EPA has erroneously determined that Sierra Club’s request—for documents (if any) on which Administrator Wheeler relied in purporting to make assertions of evidence-backed scientific conclusions on national television, and that the agency otherwise possesses (if any) in support of that characterization—“does not seek specific records but is rather a question framed as a FOIA request.”¹² On the contrary, Sierra Club seeks only records that fit a clear, specific description, in connection with a public pronouncement by an agency head; it is not an interrogatory or substantive challenge purporting to elicit new answers, views, or the like.

EPA’s denial letter also alludes to the exception to FOIA compliance when a request is so broad that complying with it would impose an unreasonable burden on an agency.¹³ To be sure, the letter does not explicitly assert that Sierra Club’s current request falls into this category, nor did EPA staff in the parties’ many discussions and emails ever invoke (or even mention) this as an alternative basis for non-production. In any event, to establish undue burden, the agency must “provide sufficient explanation as to why such a search would be unreasonably burdensome.”¹⁴ The denial letter, however, offers no explanation to this end, apart from the conclusory language that the request “fails to adequately describe the records sought” and “does not seek specific records.”¹⁵ These are the same kind of “ cursory” and “bare” allegations that the court in *PEER* found insufficient.¹⁶ And as also recognized in *PEER*, the notion that “the evidentiary basis for a policy or factual statement by an agency head”—including about climate change—“is inherently unknowable” would run counter to axioms of reasoned, lawful agency action.¹⁷

As a final note, while FOIA “encourages agencies to confer with requestors regarding ‘the scope of the request’ and [timing matters],” the agency’s duty to respond to a FOIA request is not conditional upon any modifications to the request or requirements beyond the minimum “reasonably clear” standard.¹⁸ In this case, EPA staff have spoken and corresponded many times with the Sierra Club about the nature of the request. EPA’s offer to provide nonresponsive documents does excuse it from failing to provide those documents actually requested.

III. Conclusion

As discussed above, EPA’s determination—that Sierra Club’s request is not reasonably specific, but rather is an improper question framed as a FOIA request—is unsupported by the record, contrary to statutory text and judicial precedent, belied by past practice, and otherwise arbitrary, capricious, and unreasonable. EPA must therefore reverse its determination and proceed promptly to comply with Sierra Club’s request.

¹¹ *Id.* at 76, 80; *see also id.* at 75 (“[I]n EPA’s view, the request falls short of meeting the statutory threshold of ‘reasonably describ[ing],’ 5 U.S.C. § 552(a)(3)(A), the requested records by ‘enabl[ing] a professional employee ... to conduct a search for responsive Agency records,’ EPA Decl. ¶ 9).

¹² Exhibit B at 1.

¹³ *Id.*

¹⁴ *Nation Magazine, Wa. Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 892 (D.C. Cir. 2014).

¹⁵ Exhibit B at 1.

¹⁶ *PEER*, 314 F. Supp. 3d at 81.

¹⁷ *Id.* at 77 (citing *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 627 (1986)).

¹⁸ *Id.* at 78 (citations omitted); *see also, e.g.*, 5 U.S.C. § 552(a)(3)(A).

I look forward to your timely decision on this appeal. *See* 5 U.S.C. § 552(a)(6)(A)(ii), (B) (requiring agencies to decide FOIA administrative appeals within 20 working days, or within 30 working days in the event the agency provides a written notice and explanation of statutory “unusual circumstances”); *see also* 40 C.F.R. § 2.104(k).

Sincerely,

/s/ Matthew E. Miller
Matthew E. Miller, Esq.
Staff Attorney
Sierra Club Environmental Law Program
50 F Street, NW, 8th Floor
Washington, D.C. 20001
Telephone: 202-650-6069
Email: matthew.miller@sierraclub.org\

Attachments:

- Exhibit 1: Sierra Club FOIA Request # EPA-HQ-2019-005176 (submitted April 22, 2019)
- Exhibit 2: EPA “Not Reasonably Specific Letter” (emailed June 20, 2019)

EXHIBIT A



April 22, 2019

Request submitted via foiaonline.gov

U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Freedom of Information Act Request: Records Supporting Administrator Wheeler's Assertion that "Most of the Threats from Climate Change Are 50 to 75 Years Out"

Dear FOIA Officer:

Andrew Wheeler, the current Administrator of the U.S. Environmental Protection Agency ("EPA"), recently asserted in a televised interview that "most of the threats from climate change are 50 to 75 years out."¹

In light of that public pronouncement by the Administrator, and pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, Sierra Club, a non-profit public interest organization, hereby submits this request for records concerning that statement. Specifically, Sierra Club requests the following²:

- (1) All records that Administrator Wheeler relied on in asserting that "most of the threats from climate change are 50 to 75 years out"; and**
- (2) All records produced, commissioned, or otherwise obtained by EPA that support the conclusion that "most of the threats from climate change are 50 to 75 years out," other than any encompassed by (1).**

¹ See segment ~18:30-18:40 of Administrator Wheeler's interview with CBS News chief Washington correspondent, Major Garrett, aired on March 20, 2019, available at <https://www.cbsnews.com/news/epa-administrator-andrew-wheeler-exclusive-interview/> (last accessed April 22, 2019).

² For purposes of this request, "records" means records of all kinds subject to request under the FOIA, including writings (handwritten, typed, electronic, or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance, policies, telephone conversations, telefaxes, emails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other data; and includes all versions of the foregoing, including proposed, draft, pending, interim, final, or other. "EPA" includes the agency along with its employees, consultants, and agents. Sierra Club requests records in the possession, or otherwise under the control, of EPA, including the agency's National Headquarters as well as its Offices, Regions, and other subdivisions.

TIMING, FORMAT, AND DELIVERY OF RESPONSE

Please respond within 20 working days with the agency's determination of its intent to comply with this request (or within 30 working days in the event the agency were to determine that statutory unusual circumstances apply to this request and were to provide written notice of the same), as required by law. Subsequently, "promptly" provide the records requested herein, delivering the records 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* 5 U.S.C. § 552(a)(6); 40 C.F.R. § 2.104.

When possible, please provide the requested records in an electronic .pdf format, text-searchable and OCR-formatted (portfolios and embedded files within files are not readily-accessible). If the foregoing is not possible for any particular records, provide such records in the most readily-accessible format practicable. Do not provide the records in a single or "batched" file. *See* 5 U.S.C. § 552(a)(3)(B).

In your responsive production (or rolling productions), please clearly segregate records responsive to request (1), above, from records responsive to request (2).

Deliver the records, and direct any other correspondence, to the undersigned at the following electronic and physical addresses, as applicable:

- matthew.miller@sierraclub.org

- Matthew E. Miller
Sierra Club Environmental Law Program
50 F Street NW, 8th Floor
Washington, DC 20001

CLAIMS OF EXEMPTION; FAILURE TO RESPOND

If you determine that any portions of the records requested herein are exempt from disclosure, please segregate such exempt portions and produce the non-exempt portions of such records. Provide a detailed itemization and description of any records or portions of records being withheld in whole or in part. If EPA denies all or part of this request, provide the specific reasons you believe justify your refusal to respond. *See* 5 U.S.C. § 552(b).

Please be advised that a failure by the agency to comply with its legal obligations in responding to this request may result in Sierra Club filing an action in federal court, to pursue the timely production of the requested records to the full extent provided by law. *Cf., e.g., Pub. Employees for Env'tl. Responsibility v. U.S. Env'tl. Prot. Agency*, 314 F. Supp. 3d 68 (D.D.C. 2018) (entering summary judgment against EPA and ordering the agency to respond to an analogous FOIA request that sought records supporting a statement by former Administrator Scott Pruitt during a television interview about his views on the causes of climate change).

FEE WAIVER REQUEST

Sierra Club respectfully requests that you waive all fees in connection with this request, *see* 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l), as EPA and other agencies have done on numerous occasions in connection with similar FOIA requests in the past.

Sierra Club is a non-profit organization whose purpose is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments. The nation's oldest grassroots environmental organization, Sierra Club counts more than 3.5 million members and supporters nationwide. Sierra Club is a leading non-governmental organization seeking to educate and mobilize the public on issues of environmental protection including climate change, fossil fuel energy, clean energy and clean water, among its other goals and activities. Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment. Sierra Club has routinely received fee waivers in connection with a number of previous FOIA requests.³

The FOIA was designed to provide citizens a broad right to access government records. The statute'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, the 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). The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as Sierra Club access to government records without the payment of fees. *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (fee waiver provision 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").

As explained below, the instant FOIA request satisfies the factors governing requests for waiver or reduction of fees, as well as the requirements of fee waiver under the statute—namely, that "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).

³ *See, e.g.*, FOIA Request Reference No. EPA-HQ-2017-8568 (fee letter waiver received June 28, 2017).

1. *The subject matter of the requested records specifically concerns identifiable operations and activities of the government.*

On its face, the instant FOIA request concerns and is limited to identifiable operations and activities of EPA and its employees.

2. *Disclosure of the requested documents will be meaningfully informative and likely to contribute to an understanding of Federal government operations or activities.*

The requested records will inform the public about whether the Administrator is making fact-based statements about important matters within his agency's purview; what those facts may be; whether the Administrator's public pronouncements are consistent with the information and conclusions of his own agency and other agencies; and whether the Administrator is leading his agency to a policy conclusion based on facts and evidence, versus other considerations. The request will allow the public to understand whether the Administrator, in making the above-quoted assertion, was relying on, or ignoring, his own agency's research and analysis on climate change—an issue of intense public concern. Learning these things will enable the public to understand the basis on which the Administrator reached his purported conclusion regarding the scientific question about the timing of the effects of climate change—including whether his pronouncement had a scientific basis, a political or other non-technical basis, or no recorded basis at all.

When Sierra Club obtains EPA's FOIA response, Sierra Club will analyze the records and present its findings, along with the records themselves, to its members, online activists, and the general public, in a manner that will meaningfully enhance the public's understanding of Administrator Wheeler's and EPA's operations and activities. The requested records are not otherwise in the public domain and are not accessible other than through a FOIA request.

Disclosure of the requested records will thus be “meaningfully informative” and “likely to contribute” to an understanding of EPA's activities and operations.

3. *Disclosure of the requested records will contribute to the understanding of the public at large, not merely the individual understanding of the requester or a narrow segment of interested persons.*

Sierra Club has long experience and deep expertise with FOIA requests, including requests related to government accountability and transparency, as well as climate policies, the Clean Air Act, the Clean Water Act, the development and use of energy resources, and other issues related to the protection of the natural environment as well as human health.

Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, such as: distribution to media outlets of records and analysis thereof; distribution through publications and mailings; posting on its website; email distribution to members across the United States; and announcement and distribution at public meetings and events. Every year Sierra Club website receives dozens of millions of unique visits. *Sierra Magazine* is a bi-monthly magazine with a printed circulation of approximately 650,000 copies. *Sierra Club*

Insider, an electronic newsletter, is sent to nearly three million people twice per month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies and through the judicial system, when appropriate.

Sierra Club intends to share the information received from this FOIA request with our impacted members across the country, the media, and our allies who share a common interest in the operations and activities of the EPA under Administrator Wheeler.

Sierra Club therefore has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner outlined above, and to do so in a manner that contributes to the understanding of the “public-at-large.”

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

Administrator Wheeler was speaking for EPA during his CBS News interview. The public should understand the factual basis supporting the Administrator’s statement and the extent to which it reflects EPA’s official posture with respect to the grave, pressing subject of climate change. As outlined above, the information to be obtained through the instant FOIA request will shed light on the informedness, quality, and integrity of EPA leadership. It will also bear directly on the consistency of EPA’s operations and activities with those of other federal agencies, in addition to consistency of the same with the data and determinations about climate change of other governments, non-governmental organizations, academia, and the scientific community at large. The records will also help the public to understand whether EPA’s climate policy either relies on, or has been divorced from, scientific research that the agency possesses.

5. The requester has no commercial interest that will be furthered by the requested disclosure.

Sierra Club has no commercial interest in the requested records, nor does it have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. Sierra Club is a nonprofit, tax-exempt organization under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of Sierra Club’s mission to inform the public on matters of vital importance to the environment and public health.⁴

In conclusion, Sierra Club respectfully requests that EPA waive processing and copying fees under 5 U.S.C. § 552(a)(4)(A). In the event you deny this fee waiver request, please send a detailed written explanation for the denial, and do not incur expenses beyond \$250 without first contacting me for explicit authorization.

⁴ Because Sierra Club has no commercial interest that would be furthered by the requested disclosure, it is unnecessary to consider the final factor for a fee waiver, which weighs an identified commercial interest against the public interest in disclosure (the latter already having been established above).

* * * * *

Thank you for your cooperation with this matter. Please contact me promptly if you find this request ambiguous or problematic in any way, so that I may attempt to clarify the request or otherwise provide assistance.

Sincerely,

/s/ Matthew E. Miller

Matthew E. Miller, Esq.

Staff Attorney

Sierra Club Environmental Law Program

50 F Street, NW, 8th Floor

Washington, DC 20001

Telephone: 202-650-6069

Email: matthew.miller@sierraclub.org

EXHIBIT B



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

June 20, 2019

OFFICE OF THE
EXECUTIVE SECRETARIAT

Matthew E. Miller
Sierra Club
50 F. Street NW, 8th Floor
Washington, DC 20001

Subject: Freedom of Information Act Request EPA-HQ-2019-005176

Dear Mr. Miller:

This responds to your FOIA request dated April 22, 2019, which seeks, "all records that Administrator Wheeler relied on in asserting that most of the threats from climate change are 50 to 75 years out" and "all records, produced, commissioned, or otherwise obtained by EPA that support the conclusion that most of the threats from climate change are 50 to 75 years out." Your request was designated EPA-HQ-2019-005176 and assigned to the Office of the Administrator for response.

The EPA is unable to process your request because it fails to adequately describe the records sought. EPA regulations state that, "whenever possible requesters should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter." 40 C.F.R. § 2.102(c). Your request does not seek specific records but is rather a question framed as a FOIA request.¹

Federal courts have also held that "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors" and that agencies are not required to spend "countless numbers of personnel hours seeking needles in bureaucratic haystacks." *United States Department of Justice Guide to the Freedom of Information Act, 2009 Edition at 47-48*. Even when an agency can identify documents with sufficient precision a request can still be so broad as to impose an unreasonable burden on an agency. This occurs when the request requires the agency to locate, review, redact, and arrange for inspection of a vast quantity of material that is largely unnecessary to the requestor's purpose. *AFGE v. Department of Commerce*, 907 F.2d 203, 208-209 (D.C. Cir. 1990).

¹ "FOIA creates only a right of access to records, not a right to require an agency to disclose its collective reasoning behind agency actions, nor does FOIA provide a mechanism to challenge the wisdom of substantive agency decisions." *Gillin v. Dep't of the Army*, No. 92-325, slip op. at 10 (D.N.H. May 28, 1993), *aff'd*, 21 F.3d 419 (1994).

I understand, based on our June 20, 2019 conversation, that you believe this is a proper request and are not inclined to offer any modifications. If upon reconsideration within the next two weeks you desire to reopen and revise this request, you may contact me at (202) 564-5290 or Yarbrough.Christopher@epa.gov. Please include the tracking number in any communications. You may appeal this response with an email to hq.foia@epa.gov or by writing to the National Freedom of Information Act officer at:

U.S. Environmental Protection Agency
William Jefferson Clinton Federal Building
Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, D.C. 20460

Please note that only the U.S. Postal Service delivers to the address above. If you would like to deliver your appeal in person, via courier service, or via an overnight-delivery service, you must address your correspondence to 1301 Constitution Avenue, NW, Room 6416J, Washington, D.C. 20001.

Your written appeal must be received no later than 90 calendar days from the date of this letter and should include the request number listed above. The EPA will not consider appeals received after the 90 calendar-day limit. In addition, appeals received after 5 p.m. Eastern time are considered as having been received the next business day. For the quickest possible handling, the subject line of your email or the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

If warranted you may seek dispute-resolution services from the EPA's FOIA public liaison at hq.foia@epa.gov, (202) 566-1667, or from the National Archives and Records Administration's Office of Government Information Services. You may contact the Office of Government Information Services with an email to ogis@nara.gov; by calling toll free (877) 684-6448 or (301) 837-1996; with a fax to (301) 837-0348; or by mail to National Archives and Records Administration, Office of Government Information Services, 8610 Adelphi Road, Room 2510, College Park, Maryland 20740-6001.

Sincerely,

A handwritten signature in blue ink, appearing to read "C. Yarbrough", written over a light blue horizontal line.

Chris Yarbrough
Attorney-Advisor