



April 25, 2017

VIA ONLINE PORTAL

Dionne Hardy
U.S. Office of Management and Budget
1800 G Street, NW
Washington, DC 20503
OMBFOIA@omb.eop.gov

Re: Freedom of Information Act Request: Renewable Energy Censorship

Dear FOIA Officer:

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

REQUESTED RECORDS

The Center requests from the U.S. Office of Management and Budget (“OMB”) the following from January 1, 2017 to the date of the search:

1. All records of agency directives, instructions and communications with the Trump administration, electric utilities, and fossil fuel representatives to remove from formal agency communications clean energy, renewable energy, and alternative energy-related words or phrases including, but not limited to, solar energy, wind energy, distributed renewable energy generation, clean energy technology and energy storage; and
2. All records of communications mentioning or including energy subsidy and tax policy, regulatory burdens or communications related to the electric grid study referenced in the DOE April 14, 2017 memorandum;¹ and
3. All records of communications and financial arrangements to and from the OMB including, but not limited to, tax exemptions, research and development budget appropriations, loan and grant guarantees, and direct subsidies for fossil fuels and renewable energy.

¹ See generally, <https://thinkprogress.org/energy-secretary-throws-bone-to-coal-nukes-with-review-of-wind-solar-subsidies-be58bc5af9f1>, website last visited April 24, 2017.

For purposes of this request, “records” is consistent with the meaning of the term under FOIA. This includes, but is not limited to, documents of any kind including electronic as well as paper documents, e-mails, writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), correspondence, letters, memoranda, reports, consultations, papers, studies, notes, field notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, data, data bases, drawings, surveys, graphs, charts, photographs, videos, meeting notes or minutes, electronic and magnetic recordings of meetings, maps, GIS layers, GPS, UTM, LiDAR, CDs, and any other compilations of data from which information can be obtained. All of the foregoing is included in this request if it is in OMB’s possession and control. If such records are no longer under the control of the OMB but were at any time, please refer this request to the relevant federal agency or agencies. This request is being sent to the headquarters for the OMB with the understanding that it will be forwarded to any other agency offices where responsive records may be located.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A). Here, the requested records that are quintessentially factual in nature, and therefore disclosure of these records will not result in any harm to an interest covered by a FOIA exemption.

Nevertheless, should you invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

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

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in a readily-accessible electronic format and in the format requested. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a

person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). “Readily-accessible” means text-searchable and OCR-formatted. *See* 5 U.S.C. § 552(a)(3)(B). Please provide all records in a readily-accessible, electronic .pdf format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or excel spreadsheet, or if that is not possible; (2) in .pdf format, without any “portfolios” or “embedded files.” Portfolios and embedded files within files are not readily-accessible. Please do not provide the records in a single, or “batched,” .pdf file. We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

RECORD DELIVERY

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

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

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

REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA’s basic purpose is to “open agency action to the light of public scrutiny,” with a focus on the public’s “right to be informed about what their government is up to.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA’s fee waiver provision requires that “[d]ocuments shall be furnished without any charge or at a [reduced] charge,” if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA’s fee waiver requirement is “liberally construed.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as the Center access to government records without the payment of fees. Indeed, FOIA’s

fee waiver provision was intended “to prevent government agencies from using high fees to discourage certain types of requesters and requests,” which are “consistently associated with requests from journalists, scholars, and *non-profit public interest groups*.” *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, “[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information” 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

I. The Center Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). OMB FOIA regulations at 5 U.S.C. 111 §§ 1303.40 - 70 establish the same standard.

Thus, OMB must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns “the operations or activities of the Federal government,” (2) whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) whether the disclosure “will contribute to public understanding” of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. 10 C.F.R. § 1004.9(a). As shown below, the Center meets each of these factors.

A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of OMB. This request asks for the following from January 1, 2017 to the date of the search: (1) all records of agency directives, instructions and communications with the Trump administration, electric utilities, and fossil fuel representatives to remove from formal agency communications clean energy, renewable energy, and alternative energy-related words or phrases including, but not limited to, solar energy, wind energy, distributed renewable energy generation, clean energy technology and energy storage; (2) all records of communications mentioning or including energy subsidy and tax policy, regulatory burdens or communications related to the electric grid study referenced in the OMB April 14, 2017 memo;² and (3) all records of communications and financial arrangements to and from the OMB including, but not limited to, tax exemptions, research and development budget appropriations, loan and grant guarantees, and direct subsidies for fossil fuels and renewable energy.

This FOIA will provide the Center and the public with crucial insight into the United States’ energy policymaking process that has become increasingly hostile towards cleaner and healthier sources of renewable energy. It is clear that adhering to directives instructing federal agencies to censor renewable energy-related language is a specific and identifiable activity of the

² See *supra* note at 1.

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

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

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow the Center to convey information to the public concerning directives from the Trump administration to censor federal agencies’ communications from including phrases related to renewable energy. Once the information is made available, the Center will analyze it and present it to its 1.2 million members and online activists and the general public in a manner that will meaningfully enhance the public’s understanding of the Trump administration’s instructions to censor renewable energy language.

Thus, the requested records are likely to contribute to an understanding of OMB operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons’ Understanding of Renewable Energy Censorship.

The requested records will contribute to a higher level of transparency in the country’s energy decision-making process and work to hold the officials involved accountable. As explained above, the records will contribute to public understanding of the Trump administration’s directives to remove from formal agency communications all references to renewable energy.

Federal agency directives generally, and specifically mandates to remove renewable energy phrases from formal communications within the OMB are areas of interest to a reasonably broad segment of the public. The Center will use the information it obtains from the disclosed records to educate the public at large about taxpayer money going towards continued energy policies as opposed to advancements in renewable energy. *See W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.”).

Through the Center’s synthesis and dissemination (by means discussed in Section II, below) by Center scientists, attorneys, and policy experts, disclosure of the requested information – including both the records itself as well as and the information contained and gleaned from it – will contribute to the understanding of the records by a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep’t of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (applying “public” to require a sufficient “breadth of benefit” beyond the requester’s own interests); *Cnty. Legal Servs. v. Dep’t*

of Hous. & Urban Dev., 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester’s “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public that is interested in its work”).

If provided to the Center, the Center will in turn be able to educate the public at large about taxpayer dollars flowing towards energy policies that continue to harm environmental health, instead of advancements in renewable energy (e.g. solar energy). *See W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.”). Hence, this request will foster public understanding of energy policymaking by a reasonably broad segment of the public.

Indeed, the public does not currently have an ability to easily evaluate the requested records, which concern the energy policy-making in light of speech censorship by the Trump administration that are not currently in the public domain – e.g., in the docket on regulations.gov. *See Cmty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested documents “clarify important facts” about agency policy, “the CLS request would likely shed light on information that is new to the interested public.”). As the Ninth Circuit Court of Appeals observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations... ”³

Thus, there can be no dispute that this request will lead to a reasonably broad audience of interested persons’ understanding of energy policies in light of an administration hostile to renewable energy sources.

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

The Center is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will contribute significantly to public understanding of an objective assessment of government support for and against renewable energy with regard to extractive fossil fuels, as compared to the public understanding prior to disclosure. Indeed, public understanding about energy decision-making and censorship of language concerning renewable energy will be significantly increased as a result of this and others’ requests for this information.

The records are also certain to shed light on energy policymaking during an administration that is unsympathetic to environmental progress. Such public oversight of agency action is vital to our

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

democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Center meets this factor as well.

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

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the activities of numerous government agencies for over 25 years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center's fee-waivers, agencies have recognized: (1) that the information requested by the Center contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; and (5) that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center's track record of active participation in oversight of governmental activities and decision-making, and its consistent contribution to the public's understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

The Center intends to use the records requested here similarly. The Center's work appears in more than 2,500 news stories online and in print, radio and TV per month, including regular reporting in such outlets as *The New York Times*, *Washington Post*, and *Los Angeles Times*. Many media outlets have reported on the Trump administration's censorship of language relating to environmental health. In 2016, more than 2 million people visited the Center's extensive website, viewing a total of more than 5.2 million pages. The Center sends out more than 277 email newsletters and action alerts per year to more than 1.2 million members and supporters. Three times a year, the Center sends printed newsletters to more than 52,343 members. More than 255,100 people have "liked" the Center on Facebook, and there are regular postings regarding transparency within federal agencies. The Center also regularly tweets to more than 51,400 followers on Twitter. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Public oversight and enhanced understanding of censorship within federal agencies is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, courts will examine whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). The Center need not show how it intends to distribute the information requested here, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. *Id.*

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

Access to government records through FOIA requests is essential to the Center's role of educating the general public. Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than 1.2 million members and online activists dedicated to the protection of endangered and threatened species and wild places. The Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

IV. Conclusion

For all of the foregoing reasons, the Center qualifies for a full fee-waiver. We hope that OMB will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

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

Sincerely,

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

Margaret E. Townsend
Open Government Staff Attorney
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
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Attachment A