



February 17, 2017

VIA ELECTRONIC MAIL

Clarice Julka, FOIA Officer
U.S. Department of Interior
MS-7328, MIB
1849 C Street, NW
Washington, DC 20240
os_foia@ios.doi.gov

Re: Freedom of Information Act Request: External Communication Order

Dear Ms. Julka,

The Center for Biological Diversity (Center) submits the following request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”). The Center is 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 the following records from the U.S. Department of Interior (“DOI”):

All records that reference and/or communicate to DOI employees an order or directive to halt external communications of any kind, including but not limited to any such order(s) referenced in media reports,¹ and including any records that reference and/or communicate any reversal(s) of any such order(s), where applicable.

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

¹ See e.g., <https://www.nytimes.com/2017/01/25/us/politics/some-agencies-told-to-halt-communications-as-trump-administration-moves-in.html>

it is in the DOI's possession and control. If such records are no longer under the control of DOI but were at any time, please refer this request to the relevant federal agency or agencies. This request is being sent to DOI's Office of the Secretary with the understanding that it will be forwarded to any other agency offices where responsive records may be located.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

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).

If you decide to 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 that 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.

In addition, if you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

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). 3

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 “profiles” or “embedded files.” Profiles 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.

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); 5 C.F.R. § 1303.10(c). 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:

Amy Atwood
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374

If you find that this request is unclear, or if the responsive records are voluminous, please call me at (971) 717-6401 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). 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 fee waiver amendments of 1986 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). DOI's regulations at 43 C.F.R. § 2.45(a) establish the same standard.

Thus, DOI should 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. 43 C.F.R. § 2.48(a)(1) – (4). 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 DOI. This request asks for the following: All records that reference and/or communicate to DOI employees an order or directive to halt external communications of any kind, including but not limited to any such order(s) referenced in media reports,² and including any records that reference and/or communicate any reversal(s) of any such order(s), where applicable.

These requested records relate to DOI’s communications with the public, legislature, government agencies, and others about its policies and practices. These policies and practices govern DOI’s oversight and management activities for public lands and public trust resources, and the responsive records will give the Center and the public insight into the ways DOI is and is not conveying its decisions, policies, actions, and other activities to people and entities outside the agency. These external communications are an identifiable activity of the government, which in this case is DOI, an executive branch agency. *See 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 increase the public’s understanding of those operations and activities.

Disclosure of the requested records will allow the Center to inform our membership and general public about whether and how DOI is and is not communicating information to people and entities outside the agency. The requested records will help the Center and public better understand the reasons and circumstances for any communication-related directive(s), the scope of any such directive(s), and the reason(s) for the reversal of such order(s), if any. These records would show the extent and duration to which external communications will be removed, disallowed, and/or restricted, thereby informing the public about a matter that is critical to our democracy: government transparency. DOI’s communications are important because DOI’s actions and activities affect public land and public trust resources, and the Center and public rely

² See e.g., <https://www.nytimes.com/2017/01/25/us/politics/some-agencies-told-to-halt-communications-as-trump-administration-moves-in.html>

on accurate, timely information from DOI regarding its decisions, actions, policies, and activities.

When available, the Center will analyze the requested information and make it accessible to our 1.2 million members and online activists and the general public. This will enhance the public's understanding of DOI's external communications regarding its decisions, actions, policies, and other activities that affect public land and public trust resources. Thus, the requested records are likely to contribute to an understanding of DOI's operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Broad Audience's Understanding of DOI's Communication Policies and Decisions.

The requested records will contribute to the public's understanding of DOI's policies and decisions regarding how its employees communicate to others outside the agency. As explained above, the records will contribute to the public's understanding of the extent and duration to which external communications will be removed, disallowed, and/or restricted, thereby shedding light on the level of governmental transparency within DOI.

News coverage shows the public has a strong interest in orders and directives given to federal employees regarding their external communications. *See e.g.*, Hannah Devlin, 'Draconian' Trump gag on scientists could affect legislation, experts warn. THE GUARDIAN, Feb. 16, 2017 (*available at*: <https://www.theguardian.com/us-news/2017/feb/16/science-advisers-climate-change-trump-gag-rule-john-holdren>). The Center will use information in the requested records to inform the public at large about any such order or directive given to DOI.

Through the Center's synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained in and gleaned from the requested records will contribute to 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").

Indeed, the public does not currently have an ability to easily evaluate the requested records because they concern information that is not currently in the public domain. *See Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records "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 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"

It is immaterial whether any portion of the Center's request may currently be in the public domain because the information we have requested is considerably greater than any piece of

information that may currently be available publicly. *See Judicial Watch*, 326 F.3d at 1315. Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of DOI’s external communications regarding its decisions, actions, policies, and activities. The public is always well served when it knows how the government conducts its activities, particularly matters touching on use of taxpayer funds and government transparency. Hence, there can be no dispute that disclosure of the requested records will educate the public.

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 enhance the public’s understanding of how DOI communicates information outside the agency regarding its activities affecting public land and public trust resources. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal the level of transparency within DOI, an executive branch agency. Public oversight of agency actions is vital to our 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. The Center has been substantially involved in the activities of numerous government agencies for more than 25 years, and we have consistently displayed our ability to disseminate information granted 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; (5) and 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 television each month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, and *Los Angeles Times*. 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 180,000 people “like” the Center on Facebook. The Center also regularly tweets to

approximately 50,000 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 DOI's communications is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is 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 does not need to show how it intends to distribute the information, 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 to show how requestors distribute information to the public generally. *Id.*

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

Access to government records, disclosure forms, and similar materials 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, this request qualifies for a full fee-waiver. We hope that DOI 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) 717-6401 or atwood@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,

Amy R. Atwood
Senior Attorney
Endangered Species Legal Director
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
(971) 717-6401
atwood@biologicaldiversity.org