July 5, 2017

VIA ELECTRONIC MAIL

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

Re: FREEDOM OF INFORMATION ACT APPEAL: EPA-HQ-2017-007766 (Sue and Settle)

Dear FOIA Officer:

On behalf of the Center for Biological Diversity (“Center”), I appeal the U.S. Environmental Protection Agency’s (“EPA”) final determination response to the Center’s referenced request for records pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as amended (“FOIA”), assigned FOIA Request No. EPA-HQ-2017-007766 (“FOIA Request”). For the reasons set forth below, EPA’s “no records” response in its final determination letter is improper and in violation of FOIA because EPA failed to conduct an adequate search for responsive records and failed to disclose records that are responsive to the Center’s FOIA Request.

You have 20 working days to respond to this appeal. You are advised that the Center intends to pursue legal action if EPA does not search for and disclose all responsive records immediately, in accordance with FOIA’s disclosure mandate and federal policies.

FACTUAL BACKGROUND ABOUT THE CENTER’S FOIA REQUEST

On May 25, 2017, the Center submitted its FOIA Request to the EPA via the online portal at foiaonline.regulations.gov. Attachment A (The Center’s May 25, 2017 FOIA Request). In that request, the Center requested: (1) [t]he directive signed by EPA Administrator Scott Pruitt (“Mr. Pruitt”) curtailing so-called “sue and settle” tactics, as reported by media outlets. See generally David LaRoss & Doug Obey, Pruitt Moves to Curtail EPA Use of ‘Sue and Settle’ As GOP Pushes Bills (2017), https://insideepa.com/daily-news/pruitt-moves-curtail-epa-use-sue-and-settle-gop-pushesbills, (last visited May 25, 2017); and (2) all records mentioning, including, and/or referencing the directive signed by Mr. Pruitt curtailing so-called “sue and settle” tactics. Id. That same day, EPA sent an automated email acknowledging the submission and assigning the FOIA Request tracking number: EPA-HQ-2017-007766. Attachment B (EPA’s May 25, 2017 Acknowledgement Email).
On May 31, 2017 EPA sent an email and automated FOIAOnline notice granting the Center’s fee waiver request. Attachment C (EPA’s May 31, 2017 Fee Waiver Grant Email).

On June 26, 2017, because 21 workdays had passed without any determination or response by EPA, the Center sent a letter notifying the agency that it had violated FOIA’s statutory determination deadline, requesting an estimated date of completion of a determination on the FOIA Request, and offering to assist the agency in its response. Attachment D (The Center’s June 26, 2017 Notice of Deadline Violation Offer to Assist Letter).

On June 28, 2017, EPA provided a final determination to the Center, in which the agency said that it “conducted a search and concluded this was an oral directive; no responsive records were located.” Attachment E (EPA’s June 28, 2017 Final Determination Letter).

The Center challenges EPA’s “no records” response, its failure to conduct an adequate search for responsive records, and failure to provide the Center with responsive records for which there are no applicable FOIA exemptions.

THE FREEDOM OF INFORMATION ACT

The purpose of FOIA is to “open agency action to the light of public scrutiny.” Dep’t of the Air Force v. Rose, 425 U.S. 352, 372 (1976). Former President Obama reinforced FOIA’s strong presumption of disclosure with regard to all FOIA decisions. See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (directing agencies to administer FOIA under a presumption that “[i]n the face of doubt, openness prevails”). Former Attorney General Eric Holder issued FOIA guidelines that reinforce a commitment to open government, encouraging federal agencies to both “make discretionary releases of information” and to “make partial disclosures” when an agency determines full disclosure is not possible. Former Attorney General Eric Holder’s Memorandum for Heads of Executive Departments and Agencies (Mar. 19, 2009). In his memo, the Former Attorney General also announced a “foreseeable harm” standard for defending agency decisions to withhold information under FOIA. Thus, the DOJ will defend an agency’s denial of a FOIA request “only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” See id. These authorities remain in effect.

FOIA “mandates a policy of broad disclosure of government documents” and carries a strict disclosure mandate that requires federal agencies to expeditiously disclose requested records to requesters. See 5 U.S.C. § 552; Church of Scientology v. Dep’t of the Army, 611 F.2d 738, 741 (9th Cir. 1980). Consequently, any inquiry under FOIA brings with it a “strong presumption in favor of disclosure.” U.S. Dep’t of State v. Ray, 502 U.S. 164, 173 (1991).

To that end, nothing in FOIA should be read to “authorize withholding of information or limit the availability of records to the public, except as specifically stated.” 5 U.S.C. § 552(c). Congress recognized that in certain limited instances, records may be exempt from FOIA’s broad disclosure mandate, and thus created nine categories of exemptions. Id. § 552(b). These exemptions, however, “must be narrowly construed in light of FOIA’s dominant objective of
disclosure, not secrecy.” Maricopa Audubon Soc’y v. U.S. Forest Serv., 108 F.3d 1082, 1085 (9th Cir. 1996). Accordingly, because FOIA carries a presumption in favor of disclosure, and indeed, because “FOIA requesters face an information asymmetry given that the agency possesses the requested information and decides whether it should be withheld or disclosed,” COMPTEL v. U.S. Federal Comm’n Comm., 910 F. Supp. 2d 100, 111 (D.D.C. 2012) (internal citations omitted), agencies bear the burden of justifying the withholding of any records that are responsive to a FOIA request. 5 U.S.C. § 552(a)(4).

An agency must provide “a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” See King v. Dept. of Justice, 830 F.2d 210, 219 (D.C. Cir. 1987) (agency must provide); see also Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 861 (D.C. Cir. 1980) (holding an agency’s disclosure of “who wrote the [document], to whom it was addressed, its date, and a brief description” was “patently inadequate” to establish exemption under FOIA).

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).

**DISCUSSION**

I. EPA DID NOT CONDUCT AN ADEQUATE SEARCH FOR RECORDS.

EPA’s final determination response of “no records” that are responsive to the Center’s FOIA Request is improper because EPA apparently failed to conduct an adequate search for responsive records. To achieve FOIA’s core purpose of disclosure, an agency must perform an adequate search for responsive records. Founding Church of Scientology v. NSA, 610 F.2d 824, 837 (D.C. Cir. 1979). An agency “must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” Oglesby v. Dep’t of the Army, 920 F.2d 57, 68 (D.C. Cir.1990). A court will apply “a ‘reasonableness’ test to assess whether an agency’s search for responsive records was adequate. Campbell v. U.S. Dep’t of Justice, 164 F.3d 20, 27 (D.C. Cir. 1998). This reasonableness test is “consistent with congressional intent tilting the scale in favor of disclosure.” Id.

Here, the evidence suggests that EPA failed to conduct an adequate search for responsive records. In its FOIA Request, the Center sought two categories of records, the first being Mr. Pruitt’s directive curtailing so-called “sue and settle” tactics, reported by media outlets, and the second category being all records mentioning, including, and/or referencing the directive signed by Mr. Pruitt curtailing so-called “sue and settle” tactics.¹

In its June 28, 2017 Final Determination Letter, EPA said that there were no responsive records because the “sue and settle” directive was “an oral directive.” Attachment E. However, the Center did not only request the directive itself, but all records that mention, include, or reference the directive that Mr. Pruitt authorized. Attachment A. It is highly unlikely that there are no records that mention or reference Mr. Pruitt’s oral directive. Therefore, it is unlikely that EPA conducted any searched for responsive records that would mention, include, and/or reference Mr. Pruitt’s directive curtailing so-called “sue and settle” tactics, as the Center requested.

Furthermore, that EPA has no responsive records is particularly difficult to believe in light of the recent Congressional investigation into EPA and the Department of Justice’s “process for negotiating and concluding settlements of litigation that may lead to new rulemaking by the agency.” Attachment F (Letter from Congressional Committee on Energy & Commerce to Scott Pruitt, EPA Administrator, and Jeff Sessions, U.S. Attorney General (June 29, 2017)). The Congressional Committee has requested a briefing and written guidelines from EPA and the Department of Justice regarding Mr. Pruitt’s “reported repudiation of the Obama administration’s favored practice of ‘sue and settle’ agreements, which committed the agency to undertake new rulemakings,” following reports of a recent EPA reform directive. Given the investigation, is it unlikely that there are truly “no records” that are responsive.

Hence, it is simply not reasonable to conclude that EPA conducted an adequate search that was reasonably calculated to locate all records that are responsive to the Center’s FOIA Request – including emails, attachments, memoranda, correspondence, meeting notes, draft documents, etc. Thus, based on available information, EPA failed to conduct a search that is reasonably expected to produce all of the requested responsive records.

Additionally, because the Center believes there may be further evidence of EPA’s inadequate search, the Center reserves its right to pursue further challenges once it receives additional records from EPA and has an opportunity to review them.

II. EPA FAILED TO PROVIDE THE CENTER WITH RESPONSIVE AGENCY RECORDS, TO WHICH THERE ARE NO APPLICABLE EXEMPTIONS.

EPA failed to provide any agency records responsive to the Center’s FOIA Request. Even if EPA had established that it conducted an adequate search for all items of the Center’s FOIA Request and located responsive records, it would still be unable to show that any FOIA exemptions apply to the records.

Furthermore, it would be difficult for EPA to show that there are no reasonably segregable, non-exempt information, such as purely factual information, such that it may withhold any record in entirety. This issue was not even mentioned at all in the final determination letter. FOIA

“requires partial disclosure of records reflecting deliberative or policy making processes on the one hand, and purely factual, investigative matters on the other,” and, therefore, EPA “has the burden of showing that no segregable information exists.” *Ethyl Corp. v. U.S. EPA*, 25 F.3d 1241, 1250 (4th Cir. 1994) (internal citations omitted); 5 U.S.C. § 552(b) (”[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record.”).

Thus, EPA must disclose all responsive agency records and all reasonably segregable, non-privileged, and/or factual portions of responsive records without further delay.

### III. CONCLUSION

As described above, EPA violated FOIA by failing to conduct an adequate search for responsive records and failing to disclose records that are responsive to the Center’s FOIA Request. Accordingly, EPA must produce all of the withheld records immediately. In so doing, EPA must also provide an estimated date of completion of its release of the records. 5 U.S.C. § 552(a)(7)(B).

We expect your timely resolution of this matter. Do not hesitate to contact me with any questions regarding this appeal. 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,

Margaret E. Townsend
Open Government Staff Attorney
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
(971) 717-6409
foia@biologicaldiversity.org

**Attachments:**
- Attachment A (The Center’s May 25, 2017 FOIA Request)
- Attachment B (EPA’s May 25, 2017 Acknowledgement Email)
- Attachment C (EPA’s May 31, 2017 Fee Waiver Grant Email)
- Attachment D (The Center’s June 26, 2017 Notice of Deadline Violation Offer to Assist).
- Attachment E (EPA’s June 28, 2017 Final Determination Letter)
- Attachment F (Letter from Congressional Committee on Energy & Commerce to Scott Pruitt, EPA Administrator, and Jeff Sessions, U.S. Attorney General (June 29, 2017))
Attachment A
May 25, 2017

VIA FOIAONLINE.REGULATIONS.GOV
U.S. Environmental Protection Agency

Re: Freedom of Information Act Request: Sue and Settle Directive

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 the following records from the U.S. Environmental Protection Agency (“EPA”) Headquarters:

1. The directive signed by EPA Administrator Scott Pruitt (“Mr. Pruitt”) curtailing so-called “sue and settle” tactics, as reported by media outlets. See generally David LaRoss & Doug Obey, Pruitt Moves To Curtail EPA Use Of 'Sue And Settle' As GOP Pushes Bills (2017), https://insideepa.com/daily-news/pruitt-moves-curtail-epa-use-sue-and-settle-gop-pushes-bills, (last visited May 25, 2017); and

2. All records mentioning, including, and/or referencing the directive signed by Mr. Pruitt curtailing so-called “sue and settle” tactics.

For this request, the term “all records” refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, letters, notes, telephone records, telephone notes, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, telephone logs, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

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 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 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.

Finally, FOIA’s “frequently requested record” provision was enacted as part of the 1996 Electronic Freedom of Information Act Amendments, and requires all federal agencies to give “reading room” treatment to any FOIA-processed records that, “because of the nature of their subject matter, the agency determines have become the subject of subsequent requests for substantially the same records.” See 5 U.S.C. § 552(a)(2)(D)(ii)(I). Also, enacted as part of the 2016 FOIA Improvement Act, FOIA’s Rule of 3 requires all federal agencies to proactively “make available for public inspection in an electronic format” “copies of records, regardless of form or format … that have been released to any person … and … that have been requested 3 or more times.” 5 U.S.C. § 552(a)(2)(D)(ii)(II). Therefore, we respectfully request that you make available online any records that the agency determines will become the subject of subsequent requests for substantially the same records, and records that have been requested three or more times.

**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). We ask that you please provide all records in an electronic format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or Excel spreadsheet, or; (2) for files that are 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.
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 E. 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.” Ettinger 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). The EPA’s regulations at 40 C.F.R. § 2.107(l)(1)-(3) establish the same standard.

Thus, the EPA 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. 40 C.F.R. § 2.107(1)(2). 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 the EPA. This request asks for: (1) the directive signed by EPA Administrator Scott Pruitt (“Mr. Pruitt”) curtailing so-called “sue and settle” tactics, as reported by media outlets. See generally David LaRoss & Doug Obey, Pruitt Moves To Curtail EPA Use Of ’Sue And Settle' As GOP Pushes Bills (2017), https://insideepa.com/daily-news/pruitt-moves-curtail-epa-use-sue-and-settle-gop-pushes-bills, (last visited May 25, 2017); and (2) all records mentioning, including, and/or referencing the directive signed by Mr. Pruitt curtailing so-called “sue and settle” tactics.

This FOIA will provide the Center and the public with crucial insight into the EPA Administrator’s directive to curtail the “sue and settle” litigation approach. It is clear that a federal agency administrator’s attempt to change an established practice and regulation is a specific and identifiable activity of the government, in this case the executive branch agency, the EPA. 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 to the public information about the Mr. Pruitt and his allies’ efforts to curtail the so-called “sue and settle” process for their own deregulatory advancement. Once the information is made available, the Center will analyze it and present it to its 1.3 million members and online activists and the general public in a manner that will meaningfully enhance the public’s understanding of this topic.

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

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons’ Understanding of Mr. Pruitt’s Sue and Settle Directive

The requested records will contribute to public understanding of how Mr. Pruitt’s directive is consistent with the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (“APA”), and the EPA’s mission to “protect human health and the environment.”1 As explained above, the records will contribute to public understanding of this topic.

Federal agency regulations generally, and specifically the EPA Administrator’s attempt to curb regulations that are in his own disinterest 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 Mr. Pruitt’s “sue and settle” directive. 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), 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, which concern Mr. Pruitt’s “sue and settle” directive that are 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….”

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of how Mr. Pruitt’s directive will impact the EPA and future litigation. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about how Mr. Pruitt and current administration are attempting to repeal regulations that are in their own disinterest.

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 significantly enhance the public’s understanding of Mr. Pruitt’s “sue and settle” directive as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be significantly increased as a result of disclosure

2 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.
because the requested records will help reveal more about what Mr. Pruitt’s directive means for the future of the EPA and environmental health.

The records are also certain to shed light on EPA’s compliance with the APA and its own mission. Such public oversight of agency action 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 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; (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 TV per month, including regular reporting in such important outlets as The New York Times, Washington Post, and Los Angeles Times. Many media outlets have reported on Mr. Pruitt’s priorities as the EPA Administrator utilizing information obtained by the Center from federal agencies, including the EPA. 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 1.3 million members and supporters. Three times a year, the Center sends printed newsletters to more than 58,016 members. More than 233,000 people have “liked” the Center on Facebook, and there are regular postings regarding the future of the EPA under Mr. Pruitt’s leadership. The Center also regularly tweets to more than 52,200 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 the EPA’s duties 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 need not show how it intends to distribute the information, because “[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless

---

3 See supra note 1.
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, 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 1.3 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 the EPA 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,

Margaret E. Townsend  
Open Government Staff Attorney  
CENTER FOR BIOLOGICAL DIVERSITY  
P.O. Box 11374  
Portland, OR 97211-0374  
foia@biologicaldiversity.org
Attachment B
This message is to confirm your request submission to the FOIAonline application: View Request. Request information is as follows:

- Tracking Number: EPA-HQ-2017-007766
- Requester Name: Margaret Townsend
- Date Submitted: 05/25/2017
- Request Status: Submitted
- Description: The Center requests the following records from the U.S. Environmental Protection Agency (“EPA”) Headquarters: 1. The directive signed by EPA Administrator Scott Pruitt (“Mr. Pruitt”) curtailing so-called “sue and settle” tactics, as reported by media outlets. See generally David LaRoss & Doug Obey, Pruitt Moves To Curtail EPA Use Of 'Sue And Settle' As GOP Pushes Bills (2017), https://insideepa.com/daily-news/pruitt-moves-curtail-epa-use-sue-and-settle-gop-pushes-bills, (last visited May 25, 2017); and 2. All records mentioning, including, and/or referencing the directive signed by Mr. Pruitt curtailing so-called “sue and settle” tactics.
Attachment C
Your request for Fee Waiver for the FOIA request EPA-HQ-2017-007766 has been fully granted. Additional details for this request are as follows:

- Request Created on: 05/25/2017
- Fee Waiver Disposition Reason: N/A
- Request Long Description: The Center requests the following records from the U.S. Environmental Protection Agency (“EPA”) Headquarters: 1. The directive signed by EPA Administrator Scott Pruitt (“Mr. Pruitt”) curtailing so-called “sue and settle” tactics, as reported by media outlets. See generally David LaRoss & Doug Obey, Pruitt Moves To Curtail EPA Use Of ‘Sue And Settle’ As GOP Pushes Bills (2017), https://insideepa.com/daily-news/pruitt-moves-curtail-epa-use-sue-and-settle-gop-pushes-bills, (last visited May 25, 2017); and 2. All records mentioning, including, and/or referencing the directive signed by Mr. Pruitt curtailing so-called “sue and settle” tactics.
MAY 31 2017

Ms. Margaret Townsend  
Center for biological Diversity  
P.O. Box 11374  
Portland, OR 97211-0374


Dear Ms. Townsend:

This is in response to your request for a fee waiver in connection with your Freedom of Information Act (FOIA) request to the U.S. Environmental Protection Agency (EPA), requesting the directive signed by EPA Administrator Scott Pruitt ("Mr. Pruitt") curtailing so-called "sue and settle" tactics, as reported by media outlets.

We have reviewed your submission and based on the information provided, we are granting your request for a fee waiver. However, this fee waiver does not include a waiver of fees for records that are publicly available. The EPA Office of the Administrator (AO) will respond to your information request for the Agency.

If you have any questions concerning this correspondence, please contact me at (202) 566-1667.

Sincerely,

Larry F. Gottesman  
Agency FOIA Officer
June 26, 2017

VIA ELECTRONIC MAIL

U.S. Environmental Protection Agency
EPA’s FOIA Public Liaison
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
hq.foia@epa.gov

RE: Notice of Deadline Violation and Request for Estimated Date of Completion for EPA FOIA Request EPA-HQ-2017-007766 /Offer to Assist.

Dear FOIA Liaison:

I am writing regarding the above-referenced request by the Center for Biological Diversity (“Center”) pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as amended (“FOIA”).

On May 25, 2017, the Center sent via FOIAOnline a request pursuant to FOIA, to the U.S. Environmental Protection Agency (“EPA”). In that request, the Center requested: (1) [t]he directive signed by EPA Administrator Scott Pruitt (“Mr. Pruitt”) curtailing so-called “sue and settle” tactics, as reported by media outlets. See generally David LaRoss & Doug Obey, Pruitt Moves To Curtail EPA Use Of ‘Sue And Settle’ As GOP Pushes Bills (2017), https://insideepa.com/daily-news/pruitt-moves-curtail-epa-use-sue-and-settle-gop-pushesbills, (last visited May 25, 2017); and (2) all records mentioning, including, and/or referencing the directive signed by Mr. Pruitt curtailing so-called “sue and settle” tactics.

On the same day, EPA sent an automated email acknowledging the submission and assigning the request tracking number: EPA-HQ-2017-007766.

On May 31, 2017 EPA sent an email and automated FOIAOnline notice granting the Center’s fee waiver request.

Since the date EPA acknowledged the Center’s FOIA request, 21 workdays have passed with no determination from EPA.

Pursuant to FOIA, 5 U.S.C. § 552(a)(6)(A)(i), a determination on this request was due 20 business days after your receipt of the request, or June 23, 2017. Furthermore, FOIA allows an agency to extend the decision deadline beyond the 20 workdays only with “written notice to the person making such request setting forth unusual circumstances for the requested extension and
the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days . . . .” 5 U.S.C. § 552(a)(6)(B)(i). As described above, EPA did not provide specific assertion of an “unusual circumstance” that would delay a decision on this request, nor did it include an estimated date of completion.

At this time, the Center is not exercising our legal option under FOIA to file suit to compel the EPA’s compliance with FOIA’s time limits. 5 U.S.C. § 552(a)(6)(C). However, be informed that time is of the essence in this matter and our patience is not without limits. As the Center informed you in its request letter, the requested information is for the Center and the public at large to understand Mr. Pruitt and his allies’ efforts to curtail the so-called “sue and settle” process for their own deregulatory advancement. The rationale driving this request is to inform the public about these present issues and the Center’s need to access the requested records is therefore very time sensitive.

Nevertheless, the Center does not wish to initiate litigation at this time because it believes that a cooperative approach is a more productive way to manage and resolve EPA’s delay. Therefore, I am offering to assist your office in any way that I can in order to facilitate EPA’s prompt release of the requested records.

Additionally, beyond the estimated decision date mandate that 5 U.S.C. § 522(a)(6)(B)(i) imposes, as noted above, for any response taking longer than ten days, EPA must inform the requester “(i) the date on which the agency originally received the request; and (ii) an estimated date on which the agency will complete action on the request.” Id. at § 552(a)(7)(B). Therefore, as required by 5 U.S.C. § 552(a)(7)(B)(ii), we request that EPA immediately provide an estimated date by which we can expect completion of the agency’s unlawfully delayed response to our FOIA request. The Center is mindful that we have legal options available if EPA fails to respond. See, e.g., Muttitt v. U.S. Central Command, 813 F.Supp.2d 221 (D.D.C. 2011) (requester permitted to bring free-standing FOIA claim for agency’s failure to provide ECD).

As we evaluate the need to seek judicial review of this matter, it would be useful if you could let us know whether you have implemented a “first-in/first-out” system for processing a backlog of FOIA requests and, if so, the number of requests in line ahead of this one.

Although the Center is not pursuing litigation at this time, because of the time-sensitive nature of the requested data, legal action will be required if EPA fails to make a prompt determination.

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. We look forward to your timely response.
Sincerely,

Margaret E. Townsend
Open Government Staff Attorney
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
foia@biologicaldiversity.org
Attachment E
June 28, 2017

Margaret Townsend  
Center for Biological Diversity  
P.O. Box 11374  
Portland, Oregon 97211

Dear Margaret Townsend:

This responds to your FOIA request dated May 25, 2017, which seeks, “the directive signed by EPA Administrator Scott Pruitt curtailing so-called “sue and settle” tactics.” Your request was designated EPA-HQ-2017-007766 and assigned to the Office of the Administrator for response. The EPA conducted a search and concluded this was an oral directive; no responsive records were located.

If you have any concerns, 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.”

You may also seek dispute-resolution services from the EPA’s FOIA public liaison at hq.foia@epa.gov or (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
Sincerely,

Jonathan V. Newton
Jonathan V. Newton
Attorney-Advisor
Attachment F
The Honorable Scott Pruitt  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

The Honorable Jeff Sessions  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Dear Administrator Pruitt and Attorney General Sessions:

Pursuant to Rules X and XI of the U.S. House of Representatives, the Committees on Energy and Commerce and the Judiciary are continuing their oversight of the Environmental Protection Agency (EPA) and the Department of Justice’s process for negotiating and concluding settlements of litigation that may lead to new rulemaking by the agency.¹ During the previous administration, EPA entered numerous settlements or consent decrees, a practice known as “sue and settle,” committing the agency to undertake significant new rulemakings subject to timelines or schedules. This process too often circumvents legitimate oversight by Congress and the Office of Management and Budget’s Office of Information and Regulatory Affairs. It also frequently prevents affected stakeholders and the public from participating as fully in the rule-making process as otherwise would be possible.

According to media reports, Administrator Pruitt recently announced at an environmental policy conference that he “sent out a directive across the agency” to curtail EPA’s “sue and

settle” policy.² Pruitt further stated that “the consent decree should not be used to engage in rulemaking. Because that subverts the process that Congress has set up.”³ We appreciate this change in policy, hope that Attorney General Sessions shares Administrator Pruitt’s views, and urge EPA and the Justice Department to develop conforming written guidelines as soon as possible.

To assist us in understanding the scope of the recent directive, we request that EPA and DOJ staff provide Committee staff with a briefing on the matter. Please make arrangements to schedule this briefing no later than July 11, 2017.

Your assistance is greatly appreciated. If you have any questions, please contact Lamar Echols of the Energy and Commerce Committee’s staff at 202-225-6371 and Dan Huff of the Judiciary Committee’s staff at 202-226-7680. Thank you for your attention to this matter.

Sincerely,

Greg Walden
Chairman
Committee on Energy and Commerce

Bob Goodlatte
Chairman
Committee on the Judiciary

John Shimkus
Chairman
Committee on Energy and Commerce
Subcommittee on Environment

Tom Marino
Chairman
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Tim Murphy
Chairman
Committee on Energy and Commerce
Subcommittee on Oversight
and Investigations

cc: The Honorable Frank Pallone, Jr., Ranking Member
Committee on Energy and Commerce

The Honorable Diana DeGette, Ranking Member
Energy and Commerce Subcommittee on Oversight and Investigations

The Honorable John Conyers, Jr., Ranking Member
Committee on the Judiciary