

REQUEST UNDER THE FREEDOM OF INFORMATION ACT

July 14, 2014

Fish & Wildlife FOIA Officer
U.S. Fish & Wildlife Service
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

BY ELECTRONIC MAIL: fwhq_foia@fws.gov

RE: FOIA Request – All FWS records re: Polar Bear Specialist Group

Dear FWS Freedom of Information Officer,

On behalf of the Energy and Environment Legal Institute (E&E Legal), and the Free Market Environmental Law Clinic (FME Law) as co-requester, please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* Both entities are non-profit public policy and/or legal institutes organized under section 501(c)3 of the tax code and with research, legal, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws, which dissemination we intend for records responsive to the instant request, as well. E&E Legal also has an investigative journalism function and broadly disseminates information obtained through FOIA in its *Legal Letters* publication.

Please provide us, within twenty working days,¹ copies of all records meeting the following descriptions:

1) Copies of all emails sent or received by Eric Regehr or James Wilder (both wildlife biologists with the U.S. Fish and Wildlife Service in Anchorage, Alaska) which use in either the Subject field or their body,

- a) PBSG or
- b) Polar Bear Specialist Group or
- c) “Fort Collins” (or Ft. Collins) or
- d) intersessional (or inter-sessional) or
- e) members-only or
- f) password-protected.

2) Copies of all emails between Eric Regehr or James Wilder, and one or more of the following individuals: Todd Atwood (USGS Alaska Science Center), George Durner (USGS Alaska Science Center), Elizabeth Peacock (USGS Alaska Science Center), or Karyn Rode (USGS Alaska Science Center).

Responsive records will be dated over the approximately four-month period April 1, 2014 through the date you process this request. Requesters are aware that the Fish & Wildlife Service is highly decentralized and that its website warns FOIA requests covering multiple offices should

¹ See *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion, *infra*.

be sent only to the FWS FOIA officer at fwhq_foia@fws.gov and instructs requesters to make clear that a request seeks records from across multiple officers. Accordingly, please note that **we seek records from across the entire Fish & Wildlife Service, rather than simply those at one particular office or at the headquarters.**

Regarding the definition of emails for these purposes, we note our experience and the experience of others, including as recently determined by a federal court, that agency officials are regularly using non-official email accounts for work-related correspondence, which accounts they then are not searching in response to FOIA requests. As such, we emphasize that a reasonable search *must* also include any non-official email, text message, or instant message account used for FWS-related correspondence as well as all official accounts, and that non-official accounts be searched in a non-conflicted fashion, meaning, at minimum, supervised by someone other than the FWS employee/account holder. We will take any response as an implicit affirmation that, if any of the relevant employees used a non-official account for any FWS-related correspondence, that account(s) has also been searched for potentially responsive correspondence, or (s)he informed FWS those accounts have no responsive records.

FWS Owes E&E Legal and FME Law a Reasonable Search

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994).

It is well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989)

(quoting *Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the “general philosophy of full agency disclosure” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). The act is designed to “pierce the veil of administrative secrecy and to open agency action to the light of scrutiny.” *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with “the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Id.*

A search must be “reasonably calculated to uncover all relevant documents.” *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is “reasonable,” courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) (“reasonableness” is assessed “consistent with congressional intent tilting the scale in favor of disclosure”).

The reasonableness of the search activity is determined ad hoc but there are rules, including that the search must be conducted free from conflict of interest. In searching for relevant documents, agencies have a duty “to ensure that abuse and conflicts of interest do not occur.” *Cuban v. S.E.C.*, 744 F.Supp.2d 60, 72 (D.D.C. 2010). *See also Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999), holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; and faulting the Department of Justice for the fact

that it “was aware that employee had withheld records as ‘personal’ but did not require that ‘he submit those records for review’ by the Department.”

Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies.

We emphasize that FWS must release “factual content.” As the D.C. Court of Appeals noted, an agency must “describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents.” *King v. Department of Justice*, 830 F.2d 210, at 254 n.28 (D.C. Cir. 1987). As an example of how entire records should not be withheld when there is reasonably segregable information, we note that, at bare minimum, basic identifying information (who, what, when, e.g., To, From, Date, and typically Subject) is not “deliberative”. As the courts have emphasized, “the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process.” *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (emphasis added).

Pursuant to high-profile and repeated promises and instructions from the President and Attorney General, we request FWS err on the side of disclosure and not delay production of this

information of great public interest through lengthy review processes to deliberate withholdings. This is particularly true for any recorded information, to which recording the parties must have agreed in advance and therefore about which they have no expectation of privacy.

This applies as well to any information that FWS seeks to claim as reflecting “deliberative process,” in the absence of any actual formal FWS deliberation being underway truly antecedent to the adoption of an agency policy on the relevant matters. *See, e.g., Jordan v. DoJ*, 591 F.2d 753, 774 (D.C. Cir. 1978). It is also true for correspondence that may be embarrassing for the activism, perspectives, opinions or relationships it may reveal but which -- as precedent makes abundantly clear -- do not serve to qualify a record as “personal”.

Therefore, if FWS claims any records or portions thereof are exempt under *any* of FOIA’s discretionary exemptions we request you exercise that discretion and release them consistent with statements by the President and Attorney General, *inter alia*, that **“The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today”** (President Barack Obama, January 21, 2009), and **“Under the Attorney General’s Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged.** Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5.” (Department of Justice, Office of Information Policy, OIP Guidance, “Creating a ‘New Era of Open Government’”).

Nonetheless, if your office takes the position that any portion of the requested records is exempt from disclosure, please inform us of the basis of any partial denials or redactions. In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. See 5 U.S.C. §552(b).

That means, for example, FWS must avoid continuing the government's pattern of over-broad claims of b5 "deliberative process" exemptions to withhold information which is not in fact truly antecedent to the adoption of an agency policy but merely embarrassing or inconvenient to disclose. Given that many of the responsive records are likely to be email to or from an outside party with whom FWS has no shared privilege, there should be few if any b5 deliberative process claims.

If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Dep't of the Air Force*, 455 F.2d at 261.

Further, we request that you provide us with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA" pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and "describ[ing] each document or portion thereof withheld, and for each

withholding it must discuss the consequences of supplying the sought-after information.” *King v. Department of Justice*, 830 F.2d at 223-24.

Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

As authorized under law, we request copies of public records in an electronic format.

Please provide responsive documents in complete form, without any deletions or other edits and with any appendices or attachments and related email, text or Instant message threads as the case may be.

Request for Fee Waiver

This discussion is lengthy due to recent actions taken against requesters, particularly the improper use of denial of fee waivers to impose delay and require further expenditure of resources, representing an economic barrier to access and an improper means of delaying or otherwise denying access to public records, despite our plainly qualifying for fee waiver. We are not alone in this broader experience.²

² See Feb. 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of “exorbitant fees” under FOIA as a barrier to access, available at <http://images.politico.com/global/2012/03/acluefffeewvrfoialtr.pdf>; see also *National Security Counselors v. CIA* (CV: 12-cv-00284, filed D.D.C. Feb. 22, 2012); see also “Groups Protest CIA’s Covert Attack on Public Access,” OpenTheGovernment.org, Feb. 23, 2012, <http://www.openthegovernment.org/node/3372>.

1) Disclosure would substantially contribute to the public-at-large’s understanding of governmental operations or activities, on a matter of demonstrable public interest.

Requesters seek waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge... if 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 government and is not primarily in the commercial interest of the requester”).

Federal agencies regularly waive fees both expressly and constructively for current and other requesters’ FOIA requests using less specific language than the instant request regarding these criteria.

As noted already, requesters intend to broadly disseminate responsive information consistent with their missions and practice. The information sought by E&E Legal and FME Law in this FOIA request will be used to better the public’s understanding of the transparency of certain important agency work, work with outside groups, and scientific integrity.

Given the policy implications and public interest to date,³ information on these issues is plainly of public interest.

Requested records are “agency records” under federal record-keeping and disclosure laws, representing agency officials communicating about a hiring decision that directly affects

³ See e.g., Crockford, S.J., *Polar Bear Specialist Group just had another secret meeting*, POLAR BEAR SCIENCE, Jul. 1, 2014, <http://polarbearscience.com/2014/07/01/polar-bear-specialist-group-just-had-another-secret-meeting/>.

the reliability of the science behind regulations that have a far-reaching impact; as such, these records are of significant public interest for reasons including that the impetus for the hire is not widely known. The release of the requested records will significantly benefit the public by increasing the availability of information, thereby enabling the American people to better understand how the agency functions in its operations in relationship to certain activists or pressure groups, no different than our various requests with, *e.g.*, EPA, and their practice of bringing in employees from and liaising closely with such groups (and, particularly, Sierra Club⁴; *see, e.g.*, revelations about former regional administrators James Martin and Al Armendariz, current RAs Jared Blumenfeld and Judith Enck, and our litigation invoking emails sent to, from or citing Sierra Club, cited in FN 6).

We emphasize that **a requester need not demonstrate that the records would contain any particular evidence, such as of misconduct.** Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or

⁴ *See e.g.*, Michal Conger, [Emails show green group influence on EPA coal rule](#), WASHINGTON EXAMINER, Jan. 9, 2014; C.J. Ciaramella, [Sierra Club Pressed EPA to Create Impossible Coal Standards](#), WASHINGTON FREE BEACON, Jan. 10, 2014; C.J. Ciaramella, [Emails Show Extensive Collaboration Between EPA, Environmentalist Orgs](#), WASHINGTON FREE BEACON, Jan. 15, 2014; John Roberts, [“Secret dealing”? Emails show cozy relationship between EPA, environmental groups](#), FOX NEWS, Jan. 22, 2014; Elana Schor, [Proponents pounce on emails between EPA, enviros on pipeline](#), E&E NEWS, Jan. 23, 2014; Mark Tapscott, [Emails expose close coordination between EPA, Sierra Club and other liberal environmental activist groups](#), WASHINGTON EXAMINER, Jan. 23, 2014; Anthony Watts, [New FOIA emails show EPA in cahoots with enviro groups, giving them special access](#), WATTS UP WITH THAT, Jan. 15, 2014; Editorial, [The EPA: A leftist agenda](#), PITTSBURGH TRIBUNE-REVIEW, Jan. 18, 2014; Lachlan Markay, [McCarthy Dodges Environmentalist Coordination Questions](#), WASHINGTON FREE BEACON, Jan. 16, 2014; Press Release, [McConnell to File Resolution of Disapproval Against EPA War on Coal Regulation](#), Office of U.S. Senator McConnell, Jan. 16, 2014; Michael Bastasch, [Report: EPA coal plant rule tainted by secretiveness, collusion with green groups](#), DAILY CALLER Mar. 10, 2014.

activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir. 2003).

The information sought in this request is not sought for a commercial purpose. Requesters are organized and recognized by the Internal Revenue Service as 501(c)3 educational organizations (not a “Religious...Charitable, Scientific, Literary, Testing for Public Safety, to Foster National or International Amateur Sports Competition, or Prevention of Cruelty to Children or Animals Organization”). Neither group charges for copies of its reports.

Information provided to E&E Legal and FME Law cannot result in any form of commercial gain to E&E Legal or FME Law. With no possible commercial interest in these records, an assessment of that non-existent interest is not required in any balancing test with the public’s interest.

As non-commercial requesters, E&E Legal and FME Law are entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010). Specifically, the public interest fee waiver provision “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. “The legislative history of the fee waiver provision reveals that it was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage

certain types of requesters, and requests,' in particular those from journalists, scholars and nonprofit public interest groups." *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); S. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).⁵

Congress enacted FOIA clearly intending that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." *Ettlinger v. FBI*, citing CONF. COMM. REP., H.R. REP. NO. 1380, 93d Cong., 2d Sess. 8 (1974) at p. 8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI*.

We also note, "insofar as... [agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information." *Better Gov't v. State* (internal citations omitted). The courts therefore will not permit such

⁵ This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that "rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." *Better Gov't v. State*. They therefore, like Requester, "routinely make FOIA requests that potentially would not be made absent a fee waiver provision", requiring the court to consider the "Congressional determination that such constraints should not impede the access to information for appellants such as these." *Id.*

application of FOIA requirements that “‘chill’ the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage.” *Id.* As such, agency implementing regulations may not facially or in practice interpret FOIA’s fee waiver provision in a way creating a fee barrier for requester. “This is in keeping with the statute’s purpose, which is ‘to remove the roadblocks and technicalities which have been used by... agencies to deny waivers.’” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987) (quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

Requesters’ ability to use FOIA -- as well as many nonprofit organizations, educational institutions, and news media, which will benefit from disclosure -- depends on its ability to obtain fee waivers. For this reason, “Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the ‘public benefit’ test for FOIA fee waivers. This waiver provision was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as “‘toll gates” on the public access road to information.’” *Better Gov’t Ass’n v. Department of State.*

As the *Better Government* court also recognized, public interest groups employ FOIA for activities “essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” That is true in the instant matter as well. Indeed, requester is precisely the sort of group the courts have identified in establishing this precedent.

Courts have noted FOIA’s legislative history to find that a fee waiver request is likely to pass muster “if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286. This information request meets that description, for reasons both obvious and specified.

Requesters intend to broadly disseminate responsive information. As demonstrated herein, including in the litany of exemplars of newsworthy FOIA activity that requesters have generated with public information, requesters have both the intent and the ability to convey any information obtained through this request to the public.

The subject matter of the requested records specifically concerns identifiable operations or activities of the government. The requested records, pertaining to FWS’s

working relationship with the Polar Bear Specialist Group would contribute significantly to public understanding of the operations or activities of the government about which information there is no other information in the public domain.

As such, release of these records also directly relates to high-level promises by the President of the United States and the Attorney General to be “the most transparent administration in history.” This transparency promise, in its serial incarnations, demanded and spawned widespread media coverage, and then of the reality of the administration’s transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (see, *e.g.*, an internet search of “study Obama transparency”).

Particularly after requester’s recent discoveries using FOIA, related publicizing of certain agency record-management and electronic communication practices and relationship with Sierra Club, and related other efforts to disseminate the information, the public, media and congressional oversight bodies are very interested in how widespread are the violations of this pledge of unprecedented objectivity, “restoration” of science, and transparency.

This request, when satisfied, will further inform this ongoing public discussion.

Further, E&E Legal and FME Law have conducted several studies on the operation of government, government ethics and the degree to which FWS follows its own rules and laws controlling its administrative activities. In reviewing, *e.g.*, EPA document production under *ATI*

v. *EPA* (seeking correspondence to and from Sierra Club and one other group),⁶ E&E Legal and FME Law are now engaged in an analysis of these relationships and agency transparency when it comes to groups with which agencies have demonstrably close relationships pursuing a shared regulatory agenda. FWS officials' interactions with activists or pressure groups dedicated to influencing and/or generating support for agency policy represents governmental operations or activities. On its face, therefore, information shedding light on this relationship satisfies FOIA's test.

For the aforementioned reasons, potentially responsive records unquestionably reflect “identifiable operations or activities of the government” with a connection that is direct and clear, not remote.

The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case.

Disclosure is “likely to contribute” to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request. The requested records have an informative value and are “likely to contribute to an understanding of Federal government operations or activities” in that they relate to and should shed light on the issue, now the subject of media discourse and congressional oversight, of the intersection between transparency and scientific integrity. This is

⁶ HQ-FOI-0152-12 and HQ-FOI-0158-12, filed as *American Tradition Institute v. EPA*, CV: 13-112 U.S. District Court for the District of Columbia.

precisely the sort of transparency the President promised and in which the public has great interest, and was addressed in various studies of public records reflecting on the Administration's transparency, returned in the above-cited search "study Obama transparency," and the public records themselves that were released to those groups, contributed to public understanding of specific government operations or activities: this issue is of significant and increasing public interest, in large part due to the Administration's own promises and continuing claims, and revelations by outside groups accessing public records.

To deny this and the media and public interest in agency work on polar bear issues, and with outside or special interests, disclosure and larger "transparency" controversy — objectivity, and the relationship with and influence on the government by politically favored non-profits and interest groups and the Administration — would be arbitrary and capricious. However, **the Department of Justice's Freedom of Information Act Guide makes it clear that, in the DoJ's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain.**

Because the requested information is not available in the public domain, the information being held only by FWS, it is therefore clear that the requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons.

E&E Legal and FME Law intend to present these records for public scrutiny and otherwise to broadly disseminate the information it obtains under this request by the means described, herein.

E&E Legal and FME Law counsel have spent a great portion of their respective energies over the past two years promoting the public interest advocating sensible policies to protect human health and the environment, including through obtaining information from federal agencies all implementing the same FOIA standards, routinely receiving fee waivers (until recently, but even then on appeal) for their ability to disseminate public information.

Requesters are cited, for their discussing and dissemination of public records they obtained, in publications to which agencies grant or would grant fee waiver requests (see FN 4, 7). Requesters seek the information in the instant request as part of similar efforts and the same investigative and educational mission. More important, as demonstrated herein and in a litany of exemplars of newsworthy FOIA activity, requesters have an extensive history and practice of utilizing FOIA to educate the public, lawmakers and news media about the government's

operations and, in particular, have brought to light important information about policies grounded in energy and environmental policy.⁷

Requester publishes materials based upon its research via print and electronic media, as well as in newsletters to legislators, education professionals, and other interested parties.⁸ Those activities are in fulfillment of E&E Legal and FME Law's missions. We intend to disseminate the information gathered by this request to the public at large and at no cost through one or more of

⁷ In addition to FN 4, print examples, only, to the exclusion of dozens of national electronic media broadcasts, include, *e.g.*, Conn Carroll, [FOIA reveals NASA's Hansen was a paid witness](#), WASHINGTON EXAMINER, Nov. 7, 2011; [NASA Scientist accused of using celeb status among environmental groups to enrich himself](#), FOX NEWS, Ju. 22, 2011; Suzanne Goldenberg, [Rightwing US thinktank uses FoI laws to pursue climate scientists](#), THE GUARDIAN, Jul. 10, 2012; Risk Policy Report, [EPA Resists Legal Bid To Block Human PM Tests, Citing Regulatory Delays](#), Inside Washington Publishing, Vol. 19, No. 40, Oct. 9, 2012; Dawn Reeves, [EPA Emails Reveal Push To End State Air Group's Contract Over Conflict](#), INSIDE EPA, Aug. 14, 2013; Greg Pollowitz, [ATI Law Center to UVA: Give us the Climategate E-mails](#), NATIONAL REVIEW ONLINE, May 16, 2011; Editorial, [Public interest group sues EPA for FOIA delays, claims agency ordered officials to ignore requests](#), WASHINGTON EXAMINER, Jan. 28, 2013; Jason L. Riley, [From the IRS to the EPA?](#), WALL STREET JOURNAL, May 15, 2013; Anthony Watts, [Richard Windsor seems to be a governmental 'everyman' issue](#), WATTS UP WITH THAT, Jun. 4, 2013; Stephen Dinan, [Obama energy nominee Ron Binz faces rocky confirmation hearing](#), WASHINGTON TIMES, Sept. 17, 2013; Stephen Dinan, [Top Obama energy nominee Ron Binz asked oil company employees for confirmation help](#), WASHINGTON TIMES, Sept. 17, 2013; [Vitter, Issa Investigate EPA's Transparency Problem, More Suspicious E-mail Accounts](#), WATTS UP WITH THAT, Jan. 29, 2013 ("It should also be noted that this has come to light thanks to the work of Chris Horner and ATI, who forced production of these documents by EPA in their FOI litigation."); Stephen Dinan, [Obama energy nominee in danger of defeat](#), WASHINGTON TIMES, Sept. 18, 2013; Stephen Dinan, [Greens, lobbyists and partisans helping Ron Binz, Obama's FERC pick, move through Senate](#), WASHINGTON TIMES, Sept. 12, 2013; Michal Conger, [Ethics issues shadow Obama's anti-coal FERC nominee](#), WASHINGTON EXAMINER, Jul. 31, 2013; Stephen Dinan, [Energy nominee Ron Binz Loses voltage with contradictions, Obama coal rules](#), WASHINGTON TIMES, Sept. 22, 2013; [Public interest group sues EPA for FOIA delays, claims agency ordered officials to ignore requests](#), WASHINGTON EXAMINER, Jan. 28, 2013; Patrick McNamara, [Environmental group sues to get UA records](#), ARIZONA DAILY STAR, Oct. 5, 2013; Dawn Reeves, [EPA Emails Reveal Push To End State Air Group's Contract Over Conflict](#), INSIDE EPA, Aug. 14, 2013.

⁸ See *EPIC v. DOD*, 241 F.Supp.2d 5 (D.D.C. 2003) (court ruled that the publisher of a bi-weekly electronic newsletter qualified as the media, entitling it to a waiver of fees on its FOIA request); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that "aims to place the information on the Internet"; "Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities").

the following: (a) newsletters; (b) opinion pieces in newspapers or magazines; (c) E&E Legal and FME Law websites; (d) in-house publications for public dissemination; (e) other electronic journals, including blogs to which our professionals contribute; (f) local and syndicated radio programs dedicated to discussing public policy; (g) to the extent that Congress or states engaged in relevant oversight or related legislative or judicial activities find that which is received noteworthy, it will become part of the public record on deliberations of the legislative branches of the federal and state governments on the relevant issues. Requester also intends to disseminate the information gathered by this request via media appearances.

With foundational, institutional interests in and reputations for playing leading roles in the relevant policy debates and expertise in the subject of transparency, energy- and environment-related regulatory policies, the undersigned requesting organizations unquestionably have the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public-at-large.”

The disclosure will contribute “significantly” to public understanding of government operations or activities. *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is “likely to contribute” to an understanding of specific government operations or activities.*

As previously explained, the public has no source of information on the relationship between or influence by the Polar Bear Specialist Group and the FWS; the same is true regarding

FWS's scientific integrity. The E&E Legal-FME Law inquiry will provide further information on this unstudied area of government operations. Because there is no such analysis currently existent, any increase in public understanding of this issue is a significant contribution to this highly visible and politically important issue as regards the operation and function of government.

Because E&E Legal and FME Law have no commercial interests of any kind, disclosure can only result in serving the needs of the public interest.

As such, requesters have stated, “with reasonable specificity that their request pertains to operations of the government,” that they intend to broadly disseminate responsive records. “[T]he informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

2) **Alternately, E&E Legal and FME Law qualify as media organizations for purposes of fee waiver**

The provisions for determining whether a requesting party is a representative of the news media, and the “significant public interest” provision, are not mutually exclusive. Again, as E&E Legal and FME Law are non-commercial requesters, and are entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event FWS deviates from prior practice on similar

requests and refuses to waive our fees under the “significant public interest” test, which we will then appeal while requesting FWS proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) (“fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media...”). However, we note that as documents are requested and likely are available electronically, there should be no copying costs.

Requesters repeat by reference the discussion as to their publishing practices, reach and intentions to broadly disseminate, all in fulfillment of E&E Legal and FME Law’s missions as set forth, *supra*.

Government information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with agency activities in this controversial area or, as the Supreme Court once noted, what their government is up to. For these reasons, requesters qualify as “representatives of the news media” under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news

media outlets can qualify as representatives of the new media for purposes of the FOIA, including after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format; as such, there are no duplication costs other than the cost of a compact disc(s).

CONCLUSION

As required by law, we expect the agency to release within the statutory period of time all segregable portions of responsive records containing properly exempt information, and to provide information that may be withheld under FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears.").

We expect all aspects of this request be processed free from conflict of interest.

We request the agency provide particularized assurance that, only if necessary, it release some quantity of records on a rolling basis and with an eye toward production on a specified schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). FWS must at least gather, review, and inform a requesting party of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188 (D.C. Cir. 2013). FOIA specifically requires FWS to immediately notify FME Law and E&E Legal with a particularized and substantive determination, and of its determination and its reasoning, as well as our right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Id.*, at 186 (D.C. Cir. 2013). *See also, Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records, such that the agency furnishes records to our attention as soon as they are identified, preferably electronically, but as needed, at the address below. We inform FWS of our intention to protect our appellate rights on this matter at the earliest date should FWS not comply with FOIA per, *e.g.*, *CREW v. FEC*.

If you have any questions please do not hesitate to contact the undersigned.

Respectfully submitted,



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