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REQUEST UNDER THE FREEDOM OF INFORMATION ACT

October 26, 2018

Freedom of Information Request
DO, Assistant Director
Disclosure Services
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

VIA FACSIMILE: 202.622.3895

RE: FOIA Request – Russian funding of environmental pressure groups

Dear FOIA Officer,

On behalf of the Institute for Energy Research (IER), and pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*., and considering **IER's requests in the alternative for fee waiver,** *infra*, we request, within twenty working days,[1] certain *information* described, below. IER is a non-profit public policy institute organized under section 501(c)3 of the tax code and with research, publication and other media 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.

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

As background to assist in satisfying the following record requests, IER seeks certain correspondence and related records discussing Russian funding of environmental pressure groups' advocacy in the United States. This is a subject which is inarguably the subject of widespread media and public interest as well as congressional and intelligence investigations.

Therefore, please provide us copies of all correspondence **and its accompanying information[2], including also any attachments,** which were sent (to, from, or as cc: or bcc:):

1) Treasury Department employee **Peter Wisner, Director, Office of Environment and Energy, which use or mention, anywhere in the record** (whether in the Subject field, body of the email or any attachment)[3], any of the following phrases:

a) "House report"
b) "Committee report"
c) "Science Committee"
d) "Smith letter"
e) "Lamar Smith"
f) Weber, *and/or*
g) "Russian Attempts to Influence U.S. Domestic Energy Markets by Exploiting Social Media".

(*records responsive to this request will be dated from* ***April 30, 2018 through the date you process this request****, inclusive*);

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[2] This includes public records, and associated public information, see discussion of Data Delivery Standards, *infra*.

[3] See, e.g., "Russian Attempts to Influence U.S. Domestic Energy Markets by Exploiting Social Media", United States House of Representatives Committee on Science, Space, and Technology Majority Staff Report, March 1, 2018, https://science.house.gov/sites/republicans.science.house.gov/files/documents/SST Staff Report - Russian Attempts to Influence U.S. Domestic Energy Markets by Exploiting Social Media 03.01.18.pdf, 2) House Committee on Science, Space, and Technology letter to Secretary Mnuchin, June 19, 2017, https://science.house.gov/sites/republicans.science.house.gov/files/documents/06_29_2017 CLS & Weber - Mnuchin.pdf, 3) "Assessing Russian Activities and Intentions in Recent US Elections", January 6, 2017, https://www.dni.gov/files/documents/ICA_2017_01.pdf.

2) sent to or from (also including as cc: or bcc:) **Peter Wisner, at any time during the period December 1, 2016 through the date you process this request, which use** "Assessing Russian Activities and Intentions in Recent US Elections"; and also please provide those

3) sent to or from (also including as cc: or bcc:) Treasury Department employees **Elizabeth Urbanas and/or Peter Wisner, and/or any individual assigned the title of Acting Director, Office of Environment and Energy (within Treasury's International Affairs Office) at any time during the period July 1, 2014 through the date you process this request, which use at least one** of the following terms from *both* (a) *and* (b):

(a)(i) **environment** (which also includes e.g., environmental or environmentalist), ii) **gas**, iii) **green**, iv) **fracturing**, *and/or* v) **fracking** (including also in, e.g., anti-fracking), *and*

b) i) **Russia** (including also in, e.g., Russian), ii) **Putin** *and/or* iii) **foreign**.

So for example, a responsive record would use "environmentalist" and "foreign", "anti-fracking" and "Russian", etc.

Records responsive to this request will be dated from ***July 1, 2014 through the date you process this request****, inclusive*.

We request productions for all three requests begin with the <u>oldest</u> records first.

To further help narrow the population of potentially responsive records and reduce the review required in order to complete processing of this request, **requester does not seek correspondence that merely forwards press clippings, such as news accounts or opinion pieces, if that correspondence has no comment or no substantive comment added by an party** in the thread (an electronic mail message that includes any expression of opinion or viewpoint would be considered as including substantive comment; examples of non-responsive emails would be those forwarding a news report or opinion piece with no comment or only "fyi", or "interesting").

These search parameters are sufficiently narrow and precise in their clear delineation for described correspondence over specific dates sent to or from specified Treasury Department employees.

Our request for fee waiver is in the alternative, first for reasons of public interest, and second, on the basis of IER's status as a media outlet.[4] We do not seek the information for a commercial purpose. IER is organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization. It conducts investigative research and has a publishing function as well as a major effort in broadly disseminating public information obtained under FOIA, particularly as involves the "climate" agenda, energy and environment policy, and the intersection of these matters with activist lobbies. As such, the requester has no commercial interest possible in these records.

This request is made to inform the public about an issue of great public interest, particularly relating to Russian funding of environmental groups which was the focus of other recent oversight and as discussed in House and Senate committee reports. which is inarguably the subject of widespread media and public interest.[5] **IER first seeks waiver of any fees** under FOIA on that basis. Disclosure of records responsive to this request will contribute "significantly" to public understanding of government operations or activities. 5 U.S.C. §

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[4] See IER's webpage at https://instituteforenergyresearch.org to view its studies, analysis, YouTube publications and other information relevant to this determination.

[5] See, e.g., Austin Ramzy, "Does Praise for China Make Group a 'Foreign Agent'? Republicans Say It Might", New York Times, June 7, 2018, https://www.nytimes.com/2018/06/07/world/asia/natural-resources-defense-council-china.html; Steven Mufson and Chris Mooney, "House Republicans attack environmental group over its climate work in China", Washington Post, June 5, 2018, https://www.washingtonpost.com/news/energy-environment/wp/2018/06/05/house-republicans-attack-environmental-group-for-its-climate-work-in-china/?noredirect=on&utm_term=.3db40796f74a; Evan Halper, "Is that environmental group a pawn of Beijing? Nonprofits wary of being branded 'foreign agents'", Los Angeles Times, June 14, 2018, http://www.latimes.com/politics/la-na-pol-foreign-agents-20180614-story.html.

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"); see also *inter alia* 31 C.F.R. Part 1, § 1.7(d)(1).

In the alternative, IER requests waiver of its fees on the basis it is a media outlet.

The Treasury Department must address both of these requests for fee waiver in the event it denies one; failure to do so is *prima facie* arbitrary and capricious.

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 IER is a non-commercial requester, it is 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 the Treasury Department refuses to waive our fees under the "significant public interest" test, which we would then appeal while requesting the Treasury Department 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…").

Definition of Information Sought/Delivery Standards

Noting also FN 4, *supra*, **please consider as responsive entire email "threads"** containing any information responsive to this request, regardless whether any part of that thread falls outside the cited time parameters.

As this matter involves a significant issue of public interest, please produce responsive information as it becomes available on a rolling basis but consistent with the Act's prescribed timelines.

In the interests of expediting the search and processing of this Request, IER is willing to pay fees up to $200. Please provide an estimate of anticipated costs in the event that fees for processing this Request will exceed $200. To keep costs and copying to a minimum **please provide copies of all productions to the email used to send this request.** Given the nature of the records responsive to this request, all should be in electronic format, and therefore there should be no photocopying costs (see discussion, *infra*).

We request records on your system, e.g., its backend logs, and do *not* seek only those records which survive on an employee's particular machine or account.

We do not demand your Office produce requested information in any particular form, instead **we request records in their native form, with specific reference to the U.S. Securities and Exchange Commission Data Delivery Standards.**[6] The covered information we seek is electronic information, this includes electronic *records*, and other public *information*.

To quote the SEC Data Delivery Standards, "Electronic files must be produced in their native format, i.e. the format in which they are ordinarily used and maintained during the normal course of business. For example, an MS Excel file must be produced as an MS Excel file rather than an image of a spreadsheet. ***(Note: An Adobe PDF file is not considered a native file unless the document was initially created as a PDF.)***" (emphases in original).

In many native-format productions, certain public information remains contained in the record (e.g., metadata). Under the same standards, to ensure production of all information requested, if your production will be de-duplicated it is vital that you 1) preserve any unique metadata associated with the duplicate files, for example, custodian name, and, 2) make that unique metadata part of your production.

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[6] https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf.

Native file productions may be produced without load files. However, native file productions must maintain the integrity of the original meta data, and must be produced as they are maintained in the normal course of business and organized by custodian-named file folders. A separate folder should be provided for each custodian.

In the event that necessity requires your Office to produce a PDF file, due to your normal program for redacting certain information and such that native files cannot be produced as they are maintained in the normal course of business, in order to provide all requested information each PDF file should be produced in separate folders named by the custodian, *and* accompanied by a load file to ensure the requested information appropriate for that discrete record is associated with that record. The required fields and format of the data to be provided within the load file can be found in Addendum A of the above-cited SEC Data Standards. All produced PDFs must be text searchable.

In the context of the Treasury Department's demonstrated practice of taking the effort to physically print, then poorly scan *electronic* mail into low-resolution, non-searchable PDF files, we note that production of electronic records necessitates no such additional time, effort or other resources, and no photocopying expense. Any such effort as described is most reasonably viewed as an effort to frustrate the requester's use of the public information.

FOIA requests require no demonstration of wrongdoing, and the public interest prong of a FOIA response is the only aspect to which these factors are relevant; we address the public interest in the issue as relates to IER's **requests for fee waiver in the alternative** in detail, *infra*, and respectfully remind the Treasury Department that IER is a media outlet such that, at most, IER can be charged the costs of copying these records (for electronic records, those costs should be *de minimis*).

The public currently has no other source of information on the subject matter at the center of records responsive to this request, beyond generalized media reports and speculation. The IER inquiry into this question will provide an important window into this unstudied area of government operations. Simply put, the public has no up-to-date information about how the Treasury Department carried out its work or how the Department handled input from the public and outside groups demanding aggressive action against climate change. Because there is no such information is currently available to the public, 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.

This request, when satisfied, will help to inform the public on these matters.

The Treasury Department Owes Requester 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). In this situation, there should be no difficulty in finding these documents. While the exact location the documents are held is unknown to requester, the Department doubtless knows where to find correspondence of one specific, identified Department employee (Day Mount) and is in a position to ascertain whether its employees sent or received correspondence on a particular day.

The Treasury Department Must Err on the Side of Disclosure

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)). Accordingly, when an agency withholds requested documents, the burden of proof is placed squarely on the

agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996). 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*

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. Pursuant to high-profile and repeated promises and instructions from the previous President and Attorney General we request the Treasury Department err on the side of disclosure and not delay production of this information of great public interest through lengthy review processes over which withholdings they may be able to justify. In the unlikely event that the Treasury Department 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 immediate-past 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." (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 record(s) may be exempt from disclosure, please inform us of the basis of any partial denials or redactions, and provide the rest of the record, all reasonably segregable, non-exempt information, withholding only that information that is properly exempt under one of FOIA's nine exemptions. *See* 5 U.S.C. §552(b). We remind the Treasury Department that it cannot withhold entire documents rather than producing their "factual content" and redacting any information that is legally withheld under FOIA exemptions. As the D.C. Circuit Court of Appeals noted, the 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 (that is "who, what, when" information, e.g., To, From, Date, and typically Subject) is not "deliberative"**.

If it is your position that a document contains non-exempt segments and that those nonexempt 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. Department of the Air Force*, 455 F. 2d 242, 261. Further, we request that you provide us with an index all such withheld 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 record is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Please provide responsive documents in complete form. Any burden on the Department will be lessened if it produces responsive records without redactions and in complete form.

Requests for Fee Waiver in the Alternative

This extended fee waiver discussion is detailed as a result of our experience of agencies improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records to groups whose requests are, apparently, unwelcome, including and particularly IER. *It is only relevant if Treasury Department considers denying our fee waiver request*.

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

IER's principal request for waiver or reduction of all costs is 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").

IER does not seek these records for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as 501(c)3 educational organization. As such, requester also has no commercial interest possible in these records. If no commercial interest exists, an assessment of that non-existent interest is not required in any balancing test with the public's interest.

As a non-commercial requester, IER is 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). 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). The 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 activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir 2003).

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)).[7] "This is in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities which have been used by…

[7] 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*.

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).

Requester's ability — as well as many nonprofit organizations, educational institutions and news media that will benefit from disclosure — to utilize FOIA 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", a waiver provision added to FOIA in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests including, most importantly for our purposes, nonprofit public interest groups. *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986). 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. *Id.*

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." *Id.* 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. F.B.I.*, 596 F. Supp. 867, 872 (D. Mass. 1984), citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8

(1974) at 8. Refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Id.* at 874.

Therefore, "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 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.

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 (9th Cir. 1987).

This information request meets that description, for reasons both obvious and specified. As previously discussed, the information sought will provide important insights into the role of outside groups in lobbying for or otherwise influencing Treasury Department participation in climate change discussions. The requested records will provide the public with original source knowledge concerning matters of possible change in Treasury Department policy and the Department's interactions with this lobby. The requested records thus clearly concern the operations and activities of government.

1) **The subject matter of the requested records specifically concerns identifiable operations or activities of the government**. Potentially responsive records will provide important insights into the role of outside groups in lobbying for or otherwise influence Treasury Department participation in climate change discussions. The requested records will provide the public with original source knowledge concerning matters of public change in Treasury Department policy and the Department's interactions with this lobby. The requested records thus clearly concern the operations and activities of government.

The Department of Justice Freedom of Information Act Guide concedes that this threshold is easily met. There can be no question that it is met here and, for that potentially responsive records unquestionably reflect "identifiable operations or activities of the government" with a connection that is direct and clear, not remote.

2) **Requester intends to broadly disseminate responsive information**. As demonstrated herein requester has both the intent and the ability to convey any information obtained through this request to the public. IER regularly publishes works and it and its experts are regularly cited in newspapers and trade and political publications, and appear on radio and television to discuss their work, and Requester intends to broadly disseminate public information obtained under this FOIA as it has other information relevant to its mission and work.

3) **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.** Requester intends to broadly disseminate responsive information. The requested records have an informative value and are "likely to contribute to an understanding of Federal government operations or activities," and as noted above this issue is of significant and increasing public interest.

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**. It cannot be denied that, to the extent the requested information is available to any parties, it appears likely that this is information held only by Treasury, 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.

Thus, disclosure and dissemination of this information will facilitate meaningful public participation in the policy debate, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of your agency's dealings with interested parties outside the agency and interested -- but not formally involved -- employees who may nonetheless be having an impact on the federal permitting process, state and local processes and/or activism on the issue.

4) **The disclosure will contribute to the understanding of the public at large, as opposed to merely that of he requester or a narrow segment of interested persons.** The media coverage of the issue relevant to the instant request, cited above, demonstrate that this is an issue of interest to the general public and not some small subset.

IER is dedicated to and has a documented record of promoting the public interest, advocating sensible policies to protect human health and the environment, broadly disseminating information relevant to the policy issues on which its experts work.

With a demonstrated interest and record in the relevant policy debates and expertise in the subject of energy- and environment-related regulatory policies, IER unquestionably has 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."

5) **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*.

Only by the Treasury Department releasing this information will public interest groups such as Requester, other media, and the public at large see these terms first hand and draw their own conclusions concerning Treasury's relationship with outside green groups. The significance of this to the public understanding is vast, as it will allow the public to examine the details of these interactions to ascertain the degree of control outside actors might have over U.S. government employees engaged in diplomatic work. Because IER has no commercial interests of any kind, disclosure can only result in serving the needs of the public interest.

As such, requester has stated "with reasonable specificity that its request pertains to operations of the government," and that it intends 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). We note that federal agencies regularly waive fees for substantial productions arising from requests expressing the same intention using the same language as used in the instant request.[8]

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[8] *See, e.g.*, no fees required by other agencies for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language include: **DoI** OS-2012-00113, OS-2012-00124, OS-2012-00172, FWS-2012-00380, BLM-2014-00004,

The key to "media" fee waiver is whether a group publishes, as IER most surely does. *See supra*. In *National Security Archive v. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the D.C. Circuit wrote:

> The relevant legislative history is simple to state: because one of the purposes of FIRA is to encourage the dissemination of information in Government files, as Senator Leahy (a sponsor) said: "It is critical that the phrase `representative of the news media' be broadly interpreted if the act is to work as expected.... If fact, *any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a `representative of the news media.'"*

Id. at 1385-86 (emphasis in original).

As the court in *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) noted, this test is met not only by outlets in the business of publishing such as newspapers; instead, citing to the *National Security Archives* court, it noted one key fact is determinative, the "*plan to act, in essence, as a publisher*, both in print and other media." *EPIC v. DOD,* 241 F.Supp.2d at 10 (*emphases* added). "In short, the court of appeals in National Security Archive held that '[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.'" *Id*. at 11. *See also, Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989).

For these reasons, requester qualifies as a "representative[] of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses

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BLM-2012-016, BLM: EFTS 2012-00264, CASO 2012-00278, NVSO 2012-00277; **NOAA** 2013-001089, 2013-000297, 2013-000298, 2010-0199, and "Peterson-Stocker letter" FOIA (August 6, 2012 request, no tracking number assigned, records produced); **DoL** (689053, 689056, 691856 (all from 2012)); **FERC** 14-10; **DoE** HQ-2010-01442-F, 2010-00825-F, HQ-2011-01846, HQ-2012-00351-F, HQ-2014-00161-F, HQ-2010-0096-F, GO-09-060, GO-12-185, HQ-2012-00707-F; **NSF** (10-141); **OSTP** 12-21, 12-43, 12-45, 14-02.; **EPA** HQ-2013-000606, HQ-FOI-01087-12, HQ-2013-001343, R6-2013-00361, R6-2013-00362, R6-2013-00363, HQ-FOI-01312-10, R9-2013-007631, HQ-FOI-01268-12, HQ-FOI-01269, HQ-FOI-01270-12, HQ-2014-006434. These latter examples involve EPA either waiving fees, not addressing the fee issue, or denying fee waiver but dropping that posture when requester sued.

editorial skills to turn it into distinct work, and distributes that work to the public. *See EPIC v. Dep't 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, particularly 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, so there should be no costs.

Conclusion

We expect the Treasury Department to release within the statutory period of time all responsive records, withholding only segregable portions of any that might contain 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 including the search for responsive records be processed free from conflict of interest.

We request the Treasury Department to provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i); see also *CREW v. FEC*. The Treasury Department must at least inform us 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; FOIA specifically requires The Treasury Department to immediately notify IER with a particularized and substantive determination, and of its determination and its reasoning, as well as IER's 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 Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 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 my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform the Treasury Department of our intention to protect our appellate rights on this matter at the earliest date should the Treasury Department not comply with FOIA per, *e.g.*, *CREW v. Fed. Election Comm'n*, 711 F.3d 180 (D.C. Cir. 2013).

If you have any questions please do not hesitate to contact me. I look forward to your timely response.

Sincerely,

Thomas J. Pyle
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