

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE )  
1899 L Street, N.W. )  
12th Floor )  
Washington, D.C. 20036 )

Plaintiff, )

v. )

C.A. No. 12-1617

UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY )  
1200 Pennsylvania Avenue, N.W. )  
Ariel Rios Building )  
Washington, D.C. 20460 )

Defendant. )

**COMPLAINT FOR DECLARATORY RELIEF AND  
RELIEF IN THE FORM OF MANDAMUS**

Plaintiff COMPETITIVE ENTERPRISE INSTITUTE (“CEI”) for its complaint against Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (“EPA” or “the Agency”), alleges as follows:

- 1) This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production under three separate FOIA requests dated May 8, 2012, seeking certain records pertaining to “secondary”, non-public email accounts for EPA administrators, the existence of which accounts Plaintiff discovered in an Agency document obtained under a previous FOIA request.
- 2) That Agency memo about these accounts states, “Few EPA staff members, usually only high-level senior staff, even know that these accounts exist.”

- 3) The records relate to senior agency employee performance of official functions, and compliance with disclosure and other obligations.
- 4) These records are of significant public interest for reasons including that the secondary accounts were initiated for and at the direction of former EPA administrator Carol Browner who publicly stated she did not use her EPA computer for email, in explaining her directive to erase her EPA computer hard drive and backup tapes<sup>1</sup> in violation of an order by the U.S. District Court for the District of Columbia.<sup>2</sup>
- 5) This is according to an April 11, 2008 Agency memo to the National ARchives and Records Administration that Plaintiff obtained, which acknowledges that Ms. Browner had such an account, the account was initiated for the first time under her for the reason that it was impractical for her to effectively correspond with an account whose address was public, that she assisted in creating the account, and that upon its creation the account was set on “auto-delete”.

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<sup>1</sup> Plaintiff refers to the case *Landmark Legal Foundation v. Environmental Protection Agency* (CV: 00-2338 (RCL)). See, e.g., “‘She needed her files deleted; she wanted her files deleted,’ [computer technician contractor Kevin] Bailey testified in the Landmark lawsuit. ‘I would like my files deleted. I want you to delete my files.’ Something like that.’...Browner said she doesn’t think her request affected the case because she seldom used her computer - except for occasional word processing or travel reservations.” John Solomon, “EPA Head Browner Asked for Computer Files to Be Deleted”, Associated Press, June 29, 2001, <http://www.mail-archive.com/ctrl@listserv.aol.com/msg70823.html>.

<sup>2</sup> At an April 2001 hearing in the *Landmark Legal* case EPA, represented by the United States Attorney’s Office, revealed that on the same day Judge Royce Lamberth issued a preliminary injunction at Landmark’s request to preserve all responsive records (January 19, 2001), then-administrator Carol Browner ordered the hard drive in her computer and that of her assistant to be erased. “Despite the Court’s order, the hard drives of several EPA officials were reformatted, email backup tapes were erased and reused, and individuals deleted emails received after that date.” See Memorandum Opinion holding EPA in contempt, July 24, 2003.

- 6) Defendant EPA sided with Plaintiff on Plaintiff's administrative appeal of EPA's failure to produce responsive records under all three requests, stating in pertinent part "Your appeals are granted", yet continues to provide no substantive response to Plaintiff's requests.
- 7) For nearly five months Defendant EPA has produced no records responsive to any of these requests.
- 8) Defendant EPA denied Plaintiff's requests for fee waivers, one of which it continues to deny upon administrative appeal, despite routinely providing waivers to Plaintiff for requests that are of far less public interest.
- 9) Defendant continues to refuse to waive fees for one of the requests, but also refuses to provide estimated fees necessary to proceed or to appeal.
- 10) As such, and in the face of revelations about organized and systemic abuses by senior federal employees to hide from the public their activities, particularly their email, EPA has constructively denied CEI's requests and its appeal, leaving Plaintiff no recourse but this lawsuit asking this Court to compel EPA to comply with the law.

### **PARTIES**

- 11) Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. CEI's programs include research, investigative journalism and publication, as well as a transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.
- 12) Defendant EPA is a federal agency headquartered in Washington, DC whose stated mission is to "protect human health and the environment."

**JURISDICTION AND VENUE**

- 13) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) because this action is brought in the District of Columbia and 28 U.S.C. § 1331 because the resolution of disputes under FOIA presents a federal question.
- 14) Venue is proper in this Court under 28 U.S.C. § 1391(b) because Plaintiff's and Defendant EPA's principal place of business is in the District of Columbia.

**FACTUAL BACKGROUND**

- 15) This lawsuit seeks to compel EPA to respond fully and completely to three separate FOIA requests dated May 8, 2012, which EPA has chosen to treat collectively (Exs. 1, 2 and 3, attached). The requests sought certain described records relating to a dual Email account structure instituted by EPA, by which, according to the above-cited EPA memo, "the Agency's Office of Environmental Information (OEI)(and its predecessor organization) assigned Administrators and Acting Administrators two e-mail accounts".
- 16) Plaintiff sought records relating to the creation, assignment and use of these accounts, and specific described records from the non-public account of current Administrator Lisa Jackson (citing "coal", "climate", "endangerment" and/or "MACT").
- 17) EPA acknowledged all three requests by separate form letters dated May 10, 2012, each framing the respective request and stating that another office within the Agency was assigned the responsibility of processing Plaintiff's requests. ("Your request has been forwarded to the Administrator's Office (AO) for processing" [HQ-FOI-01268-12], and "Your request has been forwarded to the Office of Environmental Information (OEI) for processing" [HQ-FOI-01269-12; HQ-FOI-01270-12]).

- 18) Thereafter, by one letter from EPA's Office of Environmental Information dated May 18, 2012, EPA asserted expressly in regard to all three requests that a different office was now tasked with handling next steps for the three requests. "EPA's Office of the Administrator (AO) will be responding to your information requests...AO will contact you regarding the cost of processing your requests and seek an assurance of payment. They will be unable to process your requests until they receive your assurance of payment."
- 19) Defendant thereby also acknowledged that the requests were not being processed, but only promised they would be processed, by other offices sometime later upon Plaintiff satisfying a condition of accepting EPA's cost estimate(s).
- 20) For Plaintiff to accept such an estimate Defendant must offer an estimate.
- 21) EPA has never provided Plaintiff a cost estimate of the fee it refused to waive.
- 22) EPA has otherwise since chosen to treat these distinct requests together.<sup>3</sup>
- 23) Recent revelations confirm that it is a widespread practice among federal employees to hide the record of agency activity.<sup>4</sup>

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<sup>3</sup> By letter dated June 1, 2012, EPA's Office of General Counsel denied CEI's requests to have its fees waived or reduced for each of the three requests. Having heard no fee estimates as previously promised and owed from AO, CEI appealed these fee waiver denials to OGC. EPA's decision on that Appeal was due by June 29, 2012. On June 28, OGC informed CEI that it would provide decisions on or before July 10, 2012. None came and, after CEI prompted EPA on July 30, 2012, by letter dated July 31, 2012, OGC informed CEI that CEI had prevailed on fee waivers for two of the three Requests [HQ-FOI-01269-12 and HQ-FOI-01270-12]. EPA still refuses to waive or significantly reduce Plaintiff's fees for request HQ-FOI-01268-12 seeking certain emails of administrator Lisa Jackson, on the grounds that information regarding Plaintiff's keywords is already in the public domain including on EPA's website. But whether information regarding these keywords is in the public domain is completely irrelevant, and is just a red herring. What matters is that there is no information in the public domain specifically about what Plaintiff sought, nor are the actual records, which are discussions of the Agency's controversial campaign against coal-fired power on the non-public email account, which account was not public knowledge or even known within the Agency.

24) Transparency in government is the subject of high-profile promises from the president and attorney general of the United States, both arguing forcefully that “that FOIA ‘should be administered with a clear presumption: In the face of doubt, openness prevails’” (See, e.g., Attorney General Eric Holder, OIP Guidance, “President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA

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<sup>4</sup> See, e.g., “at least fourteen DOE officials used non-government accounts to communicate about the loan guarantee program and other public business.” August 14, 2012 Letter from U.S. House Committee on Oversight and Government Reform Chairman Darrell Issa (R-Calif.) and subcommittee Chairman Jim Jordan (R-Ohio) and Trey Gowdy (R-S.C.) to Energy Secretary Steven Chu, <http://oversight.house.gov/wp-content/uploads/2012/08/2012-08-14-DEI-Gowdy-Jordan-to-Chu-re-loan-program-emails.pdf>. See also Jim Snyder, “Brightsource Warned Of Embarrassment To Obama In Loan Delay”, Bloomberg, June 6, 2012, <http://www.bloomberg.com/news/2012-06-06/brightsource-warned-of-embarrassment-to-obama-from-loan-delays.html>.

And see Eric Lichtblau, “Across From White House, Coffee With Lobbyists,” *New York Times*, June 24, 2010, <http://www.nytimes.com/2010/06/25/us/politics/25caribou.html?pagewanted=all> (lobbyists “routinely get e-mail messages from White House staff members’ personal accounts rather than from their official White House accounts, [the latter] which can become subject to public review”); and see Nick Bauman, “Starbucksgate: Obama’s Lobbyist/Email Scandal,” *Mother Jones*, June 28, 2010, <http://motherjones.com/mojo/2010/06/starbucksgate-crew-calls-investigation-white-house> (White House aides “using private email accounts to schedule coffee shop meetings with lobbyists (an apparent attempt to prevent these sessions from appearing in White House visitor logs)”).

Plaintiff also notes the revelation that then-White House Deputy Chief of Staff Jim Messina used his AOL account to orchestrate a deal to obtain lobbying support of the drug industry for “Obamacare.” See “Promises Made, Promises Broken: The Obama Administration’s Disappointing Transparency Track Record,” report by the U.S. House of Representatives Committee on Energy and Commerce, Vol. 1, Issue 3, July 31, 2012, <http://republicans.energycommerce.house.gov/Media/file/PDFs/20120731WHTransparencyStaffReport.pdf>, and supporting documents at <http://republicans.energycommerce.house.gov/Media/file/PDFs/20120731WHTransparencyStaffReportSupportingDocs.pdf>.

Plaintiff CEI also was rebuffed and sued Defendant EPA under FOIA for refusing to search for or provide email representing a senior official’s conduct of his public business on a private email account, despite a demonstrated history of the employee performing public duties on private accounts created for that specific purpose, and despite federal law and regulation requiring all such mail be copied to the employee’s account or otherwise to his agency. (See *Competitive Enterprise Institute v. EPA*, CV: 12-1497, filed 9/11/2012).

Guidelines, Creating a ‘New Era of Open Government,’”

<http://www.justice.gov/oip/foiapost/2009foiapost8.htm>. This and a related guidance elaborate on President Obama’s memorandum for the heads of executive departments and agencies, January 20, 2009,

[http://www.whitehouse.gov/the\\_press\\_office/Freedom\\_of\\_Information\\_Act.](http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act.))

**Plaintiff's FOIA Request HQ-FOI-01268-12 Seeking Certain Specified Emails of Administrator Lisa Jackson**

25) On May 8, 2012, Plaintiff requested (emphases in original):

**copies of all emails sent from or to (including as “cc:” or “bcc:”) the secondary email account(s) assigned to Administrator Lisa Jackson during the period January 20, 2009 to the date EPA processes this Request, which include the words “climate”, “endanger” (which includes in e.g., “endangerment”), “coal”, or “MACT” in the body, “Subject”, “To”, “From”, “cc:” or “bcc:” fields.**

26) Plaintiff titled this Word document “EPA FOIA re Jackson Secondary Account Mail”. EPA assigned this request identification number HQ-FOI-01268-12.

**Plaintiff's FOIA Request HQ-FOI-01269-12 Seeking Certain Specified Records Re: Creating and Assigning Secondary Email Accounts**

27) On May 8, 2012, by a separate document Plaintiff requested (emphases in original):

**copies of all records relating to the assignment of an e-mail address(es) to or acknowledgement of the creation of an e-mail address(es) for now-Administrator Lisa Jackson during the period December 14, 2008 to the date EPA processes this Request, including the address(es) assigned.**

28) Plaintiff titled this Word document “EPA OEI FOIA re Jackson Secondary Account Addresses”. EPA assigned this request identification number HQ-FOI-01269-12.

**Plaintiff's FOIA Request HQ-FOI-01270-12 Seeking Certain Specified Emails of Administrator Lisa Jackson**

29) On May 8, 2012, by a separate document Plaintiff requested (emphases in original):

**copies of all records relating to the creation and assignment of a secondary e-mail address(es) for the EPA Administrator and Acting Administrator, produced,**

**sent or received by EPA's Office of Environmental Information (OEI) during the period December 1, 1992 through January 20, 2001, inclusive.**

30) Plaintiff titled this Word document "EPA OEI FOIA re Creating Secondary Email Accounts". EPA assigned this request identification number HQ-FOI-01270-12.

31) As part of all three requests, CEI wrote, in pertinent part:

We specifically seek emails sent to or from the email account(s) described as follows in an April 11, 2008 note from John B. Ellis, Agency Records Officer in EPA's Office of Environmental Information, to Mr. Paul Wester of the National Archives and Records Administration:

[I]n the 1990's, the Agency's Office of Environmental Information(OEI)(and its predecessor organization) assigned Administrators and Acting Administrators two e-mail accounts. The primary account uses the Agency's standard naming convention ([lastname.firstname@epa.gov](mailto:lastname.firstname@epa.gov)). The address for the secondary account generally uses a standard prefix (the word "to") with a name or word supplied by the Administrator or Acting Administrator. ...

This dual-account structure was first implemented during former Administrator Carol Browner's tenure (January 12, 1993 - January 19, 2001) and it has been used by every Administrator or long-term Acting Administrator since that time...

Few EPA staff members, usually only high-level senior staff, even know that these accounts exist.

Therefore, responsibility for identifying, printing and submitting records for filing in accordance with EPA records schedules falls to the Administrator, or Acting Administrator, and, if directed by the Administrator or Acting Administrator, to the executive assistant.

#### **Defendant's Response to Plaintiff's FOIA Requests**

32) EPA acknowledged all three requests by individual form letters dated May 10, 2012, each framing the respective request and stating "Your request has been forwarded to the Administrator's Office (AO) for processing" [HQ-FOI-01268-12], or "Your request has been forwarded to the Office of Environmental Information (OEI) for processing" [HQ-FOI-01269-12; HQ-FOI-01270-12].

- 33) Thereafter, by one letter dated May 18, 2012, EPA asserted a different approach, reassigning the requests and treating them collectively, stating expressly in regard to all three requests, “EPA’s Office of the Administrator (AO) will be responding to your information requests...AO will contact you regarding the cost of processing your requests and seek an assurance of payment. They will be unable to process your requests until they receive your assurance of payment.”
- 34) To date, neither AO nor any other office within Defendant EPA has provided Plaintiff a substantive response indicating they were processing the requests at issue.
- 35) To date EPA has still not provided a cost estimate for request HQ-FOI-01268-12.

**Plaintiff’s Administrative Appeal**

- 36) In one document sent by electronic mail on August 9, 2012, Plaintiff CEI filed its administrative appeal of EPA’s denial of CEI’s requests for fee waivers, and its constructive denial of these requests.

**Defendant’s Response to Plaintiff’s Administrative Appeal**

**A. Defendant’s Response Denying Plaintiff’s Request for Fee Waiver**

- 37) EPA replied to this appeal by letter dated July 31, 2012, granting Plaintiff’s appeal of the Agency’s denial of two of three requests for fee waiver or reduction.
- 38) FOIA provides for fee waiver or reduction when “disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii).
- 39) EPA denied Plaintiff’s request to have its fees waived or reduced for request HQ-FOI-01268-12, seeking certain emails sent from or to Administrator Lisa Jackson

which include the words “climate”, “endanger” (including “endangerment”, “coal”, or “MACT”.

40) Defendant asserted that disclosure of the requested records would not satisfy FOIA’s public interest requirement because the information Plaintiff sought in the administrator’s non-public email account that CEI recently uncovered is already in the public domain, that “there is an overwhelming amount of informative material on EPA’s website concerning the topics your request relates to”, and therefore would have no informative value.

41) Defendant did not state that there are any records or any information actually sought by Plaintiff’s request in the public domain.

42) Plaintiff routinely receives fee waivers under FOIA, including from EPA, and for requests for information of far less demonstrable interest to the public than, as here, an Administrator’s discussions of the Agency’s most controversial effort on an email account unknown to the public. (An effort described as another “way” to skin “the cat” after the failure of politically-charged “cap-and-trade” legislation.<sup>5</sup>).

43) Defendant’s denial of this request for fee waiver also remains incomplete in that the Agency has to date continued its refusal to provide any estimate of fees to appeal, despite stating in its denial of Plaintiff’s appeal that “EPA will provide you with a

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<sup>5</sup> “At a somber post-election press conference, President Barack Obama, ever the pragmatic, conceded that one of his major policy goals, implementing a comprehensive cap-and-trade system, was dead. ‘Cap-and-trade was just one way of skinning the cat; it was not the only way,’ Obama said on Wednesday, a day after the Republican take-over of the House of Representatives. ‘It’s doubtful that you could get the votes to pass that through the House this year or next year or the year after,’ he added.” See “The Week in Green Energy: The Many Ways to Skin a Cat,” *IBTimes* (UK), November 8, 2010, <http://www.ibtimes.co.uk/articles/20101108/week-green-energy-many-ways-skincat.htm>.

cost estimate to process your request, and will require an assurance of payment before proceeding if the amount is expected to exceed \$25.00. 40 C.F.R. 2.107(e)".

- 44) Defendant thereby reiterated a condition precedent to processing Plaintiff's requests of Plaintiff accepting EPA's cost estimates, which Defendant has failed to provide.
- 45) As such, Defendant continues to not responsively reply to Plaintiff's request for fee waiver or reduction, and to improperly deny it.

**B. Defendant's Response to Plaintiff's Appeal for Failure to Produce Records**

- 46) By its letter dated August 29, 2012, EPA granted Plaintiff's appeal of EPA's failure to provide responsive records under each of the three requests at issue in this matter.
- 47) EPA stated "Within the next twenty working days from the date of this letter, the appropriate officer within the EPA's Office of the Administrator will communicate with you concerning the completion of your request."
- 48) The Agency did not order its program offices to produce the withheld information, or state that EPA would produce the requested information.
- 49) EPA has not contacted CEI concerning the completion of its requests.

**LEGAL ARGUMENTS**

**Defendant EPA Owed and Has Failed to Provide Plaintiff a Meaningful, Productive Response to its Requests, and to its Appeal**

- 50) EPA regulations state, in pertinent part, "(k) ...A decision affirming an adverse determination in whole or in part will contain a statement of the reason(s) for the decision, including any FOIA exemption(s) applied, and inform you of the FOIA provisions for judicial review of the decision. If the adverse determination is reversed or modified on appeal, you will be notified in a written decision. This written decision will either have the requested information that has been determined on appeal to be

releasable attached to it, or your request will be returned to the appropriate office so that it may be reprocessed in accordance with the appeal decision.” 40 C.F.R. § 2.104.

- 51) FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days, affirming the agency is processing the request and intends to comply. It must rise to the level of indicating “that the agency is exercising due diligence in responding to the request...Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request.” (5 U.S.C. § 552(a)(6)(C)(i)) Alternately, the agency must cite “exceptional circumstances” and request, and make the case for, an extension that is necessary and proper to the specific request. See also *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).
- 52) The courts have deemed a substantive agency response to mean the agency must begin to process the request. See, e.g., *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57. Examples include informing a requester that it assigned the request(s) to the simple, normal or complex processing tracks and giving notice that it is reviewing some quantity of records with an eye toward production on some estimated schedule. See generally, *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 839 F. Supp. 2d 17, 25 (D.D.C. 2011). Alternately, a complying agency will obtain an appropriate extension in the event of unusual circumstances.
- 53) No office within Defendant EPA has provided any indication that it is in fact processing Plaintiff’s requests, or sought and made its case for an extension of time to respond to CEI’s requests as required when “exceptional circumstances” exist.

- 54) EPA chose to merely assign tracking numbers and claim that certain offices would handle the requests.
- 55) After siding with Plaintiff on CEI's appeal of the Agency's failure to respond to Plaintiff's requests for records, stating in pertinent part "Your appeals are granted", Defendant did not produce or order production of responsive records subject to legitimate withholdings, or even indicate that the requests were in the queue for processing and that a certain quantity of records was being reviewed with an eye toward production on some estimated schedule.
- 56) Nearly five months after Plaintiff's request, and four more weeks after agreeing with Plaintiff on appeal, EPA still owes Plaintiff the responsive records, but continues to handle Plaintiff's requests by failing to provide even promised updates and estimates.
- 57) By not substantively responding to CEI's request Nos. HQ-FOI-01268-12, HQ-FOI-01269-12, and HQ-FOI-01270-12, EPA has constructively denied all three requests for records, and in its ruling on Plaintiff's appeal acknowledges Plaintiff has exhausted its administrative remedies.
- 58) To allow agencies to rule on appeal by merely providing indeterminate, non-substantive responses would make a mockery of FOIA. It would provide the taxpayer a right to see records without an actual remedy when those records are not produced as required. Plaintiff has no recourse but to file this lawsuit.
- 59) Defendant has wrongly denied Plaintiff's requests to have its fees waived or substantially reduced for request HQ-FOI-01268-12, as "disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government."

60) Defendant's denial is also incomplete because, instead of granting Plaintiff's requests as is proper, or providing Plaintiff the necessary fee estimates and information about Plaintiff's appellate rights, as required, Defendant has merely stated that it will not proceed with its search until Plaintiff agrees to the fee estimates which the Agency continues to refuse to put forth.

**Having Failed to Properly Respond to Plaintiff's Requests and Appeal, Defendant EPA Owes Plaintiff Responsive Records Subject to Legitimate Withholdings**

61) EPA is now legally required to provide Plaintiff records responsive to its requests.

**Defendant EPA Owes Plaintiff a Waiver or Substantial Reduction of its Fees**

62) FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. *See Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986)(fee waiver intended to benefit public interest watchdogs)

63) The language of the FOIA makes clear that Congress intended that the assessment of fees not be a bar to private individuals or public interest groups seeking access to government documents. FOIA specifically and the legislative history of the relevant FOIA provision calls for a liberal interpretation of the fee waiver standard. ("A requester is likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government." 132 Cong. Rec. H9464 (Reps. English and Kindness)).

64) Courts have noted this 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 1282, 1284-1286 (9th. Cir. 1987).

- 65) The information requested in HQ-FOI-01268-12 meets that description, for reasons both obvious and specified in Plaintiff’s request and appeal.
- 66) This suggests that all fees should be waived whenever a requester is seeking information on a subject relating to the manner in which a government agency is carrying out its operations or the manner in which an agency program affects the public. The requested information also meets this description.
- 67) The release of the requested information would benefit the public because for the first time the public would see the extent, if any, of high-level discussions involving EPA’s most politically and economically controversial programs on this account, which programs already have resulted in announced coal mine closures, layoffs, and projected electricity generating unit closures with accompanying reliability concerns.
- 68) EPA offers no evidence to rebut this reality inherent in Plaintiff’s request that disclosure of the requested information would contribute significantly to public understanding of the operations or activities of the government when there is no other means of obtaining the information requested: internal discussions by the administrator on a non-public email account established for more candid discussions but which is nonetheless still subject to FOIA.
- 69) Further, CEI has proven its ability to disseminate the information to a broad audience, through means explained in our original request and for the reasons for which CEI is regularly granted fee waiver requests by EPA and other agencies.

- 70) Defendant EPA could obviate FOIA's requirements if it were allowed to refuse fee waivers for requests for information relating to Agency activities on the basis that there is much material on its website "concerning topics that [any given request] relates to."
- 71) As such, this is not a permissible standard for denying fee waivers otherwise consistent with FOIA's requirements and precedent urging waivers for public interest groups.
- 72) Finally, since this request is for material which is clearly of benefit to the public, other persons will undoubtedly also request these records. It would be inequitable if the first requester were to bear the full material cost of the initial search.

**FIRST CLAIM FOR RELIEF**

**Duty to Release Records Relating to Creation, Assignment and Use of Secondary Email Accounts, and Certain Described Records on Administrator Jackson's Non-Public Account -- Declaratory Judgment**

- 73) Plaintiff re-alleges paragraphs 1-72 as if fully set out herein.
- 74) FOIA requires all doubts to be resolved in favor of disclosure. It allows the citizenry to learn "what their government is up to." *NRA v. Favish* 541 U.S. 157, 171 (quoting *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989)). 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." *Ibid.*
- 75) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.
- 76) Plaintiff has a statutory right to the information it seeks.

- 77) Defendant failed to provide Plaintiff responsive records.
- 78) Defendant refused to provide records despite agreeing with Plaintiff's administrative appeal of this failure.
- 79) Plaintiff has exhausted its administrative remedies.
- 80) Plaintiff asks this Court to enter a judgment declaring that
- i. EPA records relating to the creation, assignment and use of secondary Email accounts and other records specifically described in Plaintiff's requests HQ-FOI-01268-12, HQ-FOI-01269-12 and HQ-FOI-01270-12, and all attachments thereto are public records subject to release under FOIA unless subject to one of that Act's mandatory exclusions;
  - ii. EPA must release those requested records;
  - iii. EPA's denial of Plaintiff's FOIA requests seeking the described records is not reasonable, and does not satisfy EPA's obligations under FOIA; and
  - iv. EPA's refusal to produce the requested records is unlawful.

**SECOND CLAIM FOR RELIEF**

**Release of Records Relating to Creation, Assignment and Use of Secondary Email Accounts, and Certain Described Records on Administrator Jackson's Non-Public Account -- Injunctive Relief**

- 81) Plaintiff re-alleges paragraphs 1-80 as if fully set out herein.
- 82) Plaintiff is entitled to injunctive relief compelling Defendant to produce all records in its possession responsive to Plaintiff's requests described, *supra*.
- 83) This Court should enter an injunction ordering the Defendant to produce to Plaintiff within 10 business days of the date of the order, the described, requested records pertaining to the creation, assignment and use of secondary Email accounts and other specifically described records, and a detailed *Vaughn* index claiming FOIA exemptions applicable to withheld information.

**THIRD CLAIM FOR RELIEF**

**Request for Fee Waiver for HQ-FOI-01268-12 -- Declaratory Judgment**

- 84) Plaintiff re-alleges paragraphs 1-83 as if fully set out herein.

- 85) Plaintiff has sought and been denied a waiver or reduction of its fees for one request under the Freedom of Information Act, HQ-FOI-01268-12.
- 86) FOIA provides for fee waiver or reduction when “disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”
- 87) The information Plaintiff seeks in HQ-FOI-01268-12 meets this description.
- 88) Plaintiff has a statutory right to have its fees waived or substantially reduced.
- 89) Defendant refuses to waive or substantially reduce Plaintiff’s fees.
- 90) Defendant has not provided an estimate of the fees it demands.
- 91) Plaintiff has exhausted its administrative remedies.
- 92) Plaintiff asks this Court to enter a judgment declaring that:
  - i. Disclosure of Agency records as described in Plaintiff’s request HQ-FOI-01268-12 is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government;
  - iii. EPA's denial of Plaintiff's fee waiver request is not reasonable, and does not satisfy EPA’s obligations under FOIA;
  - iv. EPA’s refusal to grant Plaintiff’s request for fee waiver is unlawful; and
  - v. EPA must grant Plaintiff’s request to have its fees waived or substantially reduced associated with producing the requested records.

**FOURTH CLAIM FOR RELIEF**

**Request for Fee Waiver for HQ-FOI-01268-12 -- Injunctive Relief**

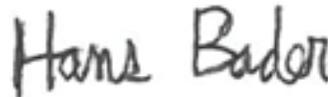
- 93) Plaintiff re-alleges paragraphs 1-92 as if fully set out herein.
- 94) Plaintiff is entitled to injunctive relief compelling Defendant to grant Plaintiff’s request to have its fees waived or substantially reduced for HQ-FOI-01268-12.
- 95) We ask this Court to enter an injunction ordering the Defendant to grant Plaintiff’s request to have its fees waived or substantially reduced within 10 business days of the date of the order.

**FIFTH CLAIM FOR RELIEF**  
**Costs And Fees – Injunctive Relief**

- 96) Plaintiff re-alleges paragraphs 1-95 as if fully set out herein.
- 97) Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- 98) This Court should enter an injunction ordering the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.
- 99) Plaintiff has a statutory right to the records that it seeks, Defendant has not fulfilled its statutory obligations to provide the records or a substantive response, and there is no legal basis for withholding the records.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for its attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 28th day of September, 2012,



Hans Bader  
D.C. Bar No. 466545



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September 28, 2012