

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

COMPETITIVE ENTERPRISE INSTITUTE )

v. )

Case No. 14-765-GK )

OFFICE OF SCIENCE AND TECHNOLOGY POLICY )

**DECLARATION OF CHRISTOPHER C. HORNER  
IN OPPOSITION TO DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT**

I, Christopher C. Horner, am one of plaintiff’s attorneys.

Attached as Exhibit 1 is a letter dated August 17, 2012 that I received from U.S. Department of Commerce Assistant General Counsel for Administration Barbara Fredericks in response to my Freedom of Information Act request to the National Oceanic and Atmospheric Administration, NOAA FOIA#2010-00199 (not including the enclosures to that letter).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on January 6, 2017.



\_\_\_\_\_  
Christopher C. Horner

# EXHIBIT 1



AUG 17 2012

Christopher C. Horner  
 1489 Kinross Lane  
 Keswick, VA 22947

Dear Mr. Horner:

This responds to your Freedom of Information Act (FOIA) (5 U.S.C. § 552) appeal of the constructive denial of your February 19, 2010 FOIA request to the National Oceanic and Atmospheric Administration (NOAA) (FOIA #2010-00199) for copies of all documents, memoranda, electronic mail and other communications produced, held, sent or received by Dr. Solomon of the Earth System Research Laboratory that involve the following subjects, persons and/or dates:

- Citing or otherwise relating to Dr. Solomon's participation or role in, association with or contribution to the:
  - "IPCC" and "AR4" from January 1, 2006 through December 31, 2009.
  - "IPCC" and "TAR" from January 1, 2000 through December 31, 2005.
- Thomas Wigley, Benjamin Santer, or Michael Mann from January 1, 2000 through January 31, 2010.
- NOAA participation in the "Fifth Assessment Report" or "AR5" from January 1, 2007 through February 19, 2010.
- The Climatic Research Unit (CRU) at the University of East Anglia, Phil Jones, Steven McIntyre (or MM as in "McIntyre and McKittrick"), Ross McKittrick, Douglas Keenan, Wei-Chyung Wang (or otherwise the State University of New York at Albany), Chris de Freitas (or otherwise the journal "Climate Science"), Gavin Schmidt, James Hansen, or Gerald or Jerry North from January 1, 2001 through February 19, 2010.
- Wegman Committee or Report from January 1, 2006 through February 19, 2010.
- The "Hockey Stick" from January 1, 2001 through January 31, 2010.
- The September 2007 Government Accountability Office Report titled, "Climate Change Research: Agencies have data-sharing policies but could do more to enhance the availability of data from federally funded research" from September 1, 2007 through January 31 2010.
- The 2003 article by S. McIntyre and R. McKittrick titled, "Corrections to the Mann et. al. (1998) Proxy Data Base and Northern Hemisphere Average Temperature Series" from October 1, 2003 through December 31, 2006.
- The 2003 article by W. Soon and S. Baliunas titled, "Proxy climatic and environmental changes of the past 1000 years" from January 1, 2003 through December 31, 2006.
- Claims or attributions of the "Dr.", "PhD", or "Ph.D." for Thomas R. Karl from April 1, 2008 through February 19, 2010.

Your request also sought copies of all documents produced, held, sent or received by Dr. Solomon, Andrea Bair, and Thomas Peterson of the National Climatic Data Center that involve the following subjects and dates:

- “Watts up With That”, “[Surface Stations.org](http://SurfaceStations.org)”, Anthony Watts, “Watts”, and/or “Is the U.S. Surface Temperature Record Reliable” from January 1, 2008 through February 19, 2010.
- A paper by Menne et al., “On the reliability of the U.S. Surface Temperature Record” or the BAMS July 2009 paper, “THE U.S. HISTORICAL CLIMATOLOGY NETWORK MONTHLY TEMPERATURE DATA, VERSION 2” from January 1, 2009 through December 31, 2009.

NOAA did not issue a formal response to your FOIA request. You appealed this constructive denial on October 27, 2010. For the reasons discussed below, your appeal is granted in part.

## DISCUSSION

### *I. Partial Determinations*

Two separate partial determinations were already made on the documents at issue in this appeal. On March 4, 2011 and January 9, 2012, three boxes (comprising approximately 4,000 pages) of National Environmental Satellite, Data, and Information Service (NESDIS) materials and 825 Office of Oceanic and Atmospheric Research (OAR) documents, respectively, were released to you. This letter transmits the Department of Commerce’s final determinations on the remainder of the responsive documents, all from OAR.

### *II. Adequacy of Search*

NOAA searched the email and offices of all individuals in NESDIS and OAR that were reasonably calculated to have materials responsive to your request. This included searching the home office and personal email account of Dr. Solomon. All responsive records are included herein, subject to applicable FOIA exemptions.

### *III. Fifty-Three Documents Referred in Full or in Part to Other Agencies*

In the responsive materials, fifty-three documents were the primary interest of another agency. Thirty-two documents were drafted solely by another agency and were referred to those agencies in full.<sup>1</sup> The remaining twenty-one documents consist of email strings where those portions of the communication that were drafted by an employee of another agency were referred to that other agency. The referred portions are redacted and contain a note indicating which agency received the referral. The remainder of each of these twenty-one documents are released to you, except for eight records where personal email addresses have been redacted pursuant to exemption (b)(6).<sup>2</sup> The number of documents referred to each agency is as follows:

- Two documents referred to the Environmental Protection Agency in full
- Twenty-seven documents referred to the Department of Energy, eighteen in full and nine in part

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<sup>1</sup> One document consisted entirely materials of interest to both the Department of State (DoS) and the U.S. Global Change Research Program (USGCRP), a group that is overseen by the Office of Science and Technology Policy (OSTP) within the Executive Office of the President. The document was jointly referred in full to DoS and OSTP.

<sup>2</sup> These exemption (b)(6) redactions are discussed *infra*.

- Ten documents referred to DoS, nine in full and one in part
- Three documents referred to OSTP, one in full and two in part
- One document referred in full, half to DoS and half to OSTP
- Nine documents referred to the National Aeronautics and Space Administration (NASA) in part
- One document referred to the U.S. Geological Survey in full.

#### IV. One Hundred Twenty-Six Documents Withheld in Full Pursuant to FOIA Exemption (b)(4)

One hundred twenty-six documents are withheld in full pursuant to exemption (b)(4), which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The one hundred twenty-six documents are all published scientific papers that are all either explicitly marked as costing a specific amount of money to purchase from a particular scientific journal or are available only through pay subscription services. This information is "commercial or financial" information because it relates to the respective journal or subscription service's business or commercial activities. *Am. Airlines v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2nd Cir. 1978). The information was obtained "from a person" because Dr. Solomon obtained these scientific papers directly from the journals, subscription services or authors, and the term "person" under exemption (b)(4) encompasses a wide range of entities, including corporations like those owning the journals or subscription services. *See e.g., FlightSafety Servs. V. Dept. of Labor*, 326 F.3d 607,611 (5th Cir. 2003).

The one hundred twenty-six published papers are also "confidential" under the third prong of *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C.Cir. 1974). In *9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*, the First Circuit held that the pertinent inquiry under the third prong is whether public disclosure of the information will harm an "identifiable private or governmental interest which the Congress sought to protect by enacting Exemption 4 of the FOIA." 721 F.2d 1, 10 (1st Cir. 1983); *see also Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C.Cir. 1992).

In cases involving the third prong of *National Parks*, the inquiry focuses on whether individuals could use FOIA to obtain records rather than purchasing the records directly from the selling company. Where release of a record could cause individuals to use the FOIA to circumvent purchasing the record from a business, courts have found that application of exemption (b)(4) is appropriate. *See Gilmore v. DOE*, 4 F. Supp. 2d 912, 922-23 (N.D. Cal. 1998); *see also FOIA Update*, Vol. VI, No. 1, at 3-4 ("OIP Guidance: Protecting Intrinsic Commercial Value"); *FOIA Update*, Vol. IV, No. 4 at 3-5 (setting forth similar basis for protecting copyrighted materials against substantial adverse market effect caused by FOIA disclosure). In the instant case, release of the copyrighted scientific papers could undermine the commercial structure of the journals or subscription services that make money by distributing specific pieces of scientific literature. In those instances where a scientific paper was clearly marked as costing a particular amount or was only available through a fee-based subscription service, the document was withheld in full under exemption (b)(4). Attached to this letter, however, is an addendum that identifies the specific papers where exemption (b)(4) was asserted. The addendum provides the name of the journal, the title of the article and the author(s). In those instances where scientific papers, though copyrighted, were freely available on the internet or on a journal's website, the documents are released to you in full. *9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 10 (1st Cir. 1983).

*V. Three Documents Withheld in Full Pursuant to FOIA Exemption (b)(5)*

Three documents are withheld in full pursuant to exemption (b)(5)'s deliberative process privilege. 5 U.S.C. § 552(b)(5). All three documents are part of a DoS initiated process whereby the U.S. Government collectively develops a recommendation to the IPCC on the appropriate scoping of IPCC's Fifth Assessment Report (AR5). Exemption (b)(5) exempts from disclosure inter- or intra-agency documents which would not be available by law to a party in litigation with the agency. 5 U.S.C. § 552(b)(5). The exemption incorporates numerous statutory and common law privileges, including the deliberative process privilege. *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 149, 154 (1975). As a threshold matter, the documents must be inter- or intra-agency communications. *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001). In the instant case, all three documents clearly constitute inter-agency communications because they are examples of NOAA employees communicating in email with individuals elsewhere within NOAA and in other agencies to help formulate an official U.S. Government position on what issues the IPCC's AR5 should address.

The deliberative process privilege is intended to prevent injury to the quality of agency decisions by ensuring that open, frank discussion of legal or policy matters will not be inhibited by fears of public disclosure. *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. at 150-151. In order to qualify for protection under the privilege, documents must be both pre-decisional and deliberative. *See Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (citation omitted). First, a document is considered pre-decisional, if it is "antecedent to the adoption of an agency policy." *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc). In ascertaining whether a document is pre-decisional, an agency is not required to identify a particular decision. Rather, it must identify the deliberative process involved and the document's role in that process. *See Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980). In the instant case, all three documents are part of a pre-decisional DoS initiated process whereby U.S. Government agencies collectively develop a recommendation to the IPCC on the appropriate scope of AR5. While the U.S. Government's final official position is publicly available, the final product represents an amalgamation of the various recommendations made by individual government employees.

Second, a document is considered deliberative if it is "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). In the instant case, all three documents express opinions of individual NOAA scientists on what the U.S. should recommend to the IPCC as the appropriate scope of AR5. DoS took opinions from throughout the government on this matter and used the recommendations to formulate the final U.S. Government position that was transmitted to the IPCC. Therefore, since all three documents are intra-governmental deliberations on what the official U.S. Government position on scoping of AR5 should be and these deliberations were antecedent to adoption of that official position, all three documents are withheld in full under exemption (b)(5)'s deliberative process privilege.

*VI. One Hundred Eighteen Documents Withheld in Part and Four Documents Withheld in Full Pursuant to FOIA Exemption (b)(6)*

One hundred twenty-two documents, one hundred eighteen in part and four in full, are withheld pursuant to exemption (b)(6). 5 U.S.C. § 552(b)(6). Eighty documents are withheld in part because they contain personal cell phone numbers or email addresses of private citizens; four documents are withheld in full because they are unpublished draft scientific papers; twenty-five

documents are withheld in part because they contain passwords provided by the IPCC that permit access to an online comment matrix; and thirteen documents are withheld in part because they contain Dr. Solomon's personal email address and cell phone number.

Under exemption (b)(6), all documents must satisfy a two-part test before the exemption can be applied: (1) the responsive material must constitute personnel, medical or similar files, and (2) the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6). The Supreme Court has explained that exemption (b)(6) was intended to be interpreted broadly and has found the threshold requirement is met if a Government record contains information that "applies to a particular individual." *Department of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). As discussed in more detail *infra*, all one hundred twenty-two documents contain information that directly pertains to a particular individual or individuals.

Once this threshold requirement is satisfied, the Supreme Court has developed a balancing test under which the competing interests of the public and the individual are weighed to determine whether the material in question should be disclosed. See *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). Under the balancing test, the Government may withhold responsive records only if the privacy interest in the records outweighs the public interest. See *National Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989).

One hundred five documents are withheld in part and four withheld in full pursuant to exemption (b)(6) to protect the personal privacy of non-Federal individuals. Under exemption (b)(6), individuals who are not Federal employees generally have a privacy interest in their personal information, including contact information. See, e.g., *Alliance for the Wild Rockies v. DOI*, 53 F. Supp. 2d 32, 36 (D.D.C. 1999). Eighty documents withheld in part contain personal cell phone numbers or email addresses of private citizens. The email addresses and phone numbers were included in a couple of different types of documents, including lists of participants in various conferences of IPCC functions, and emails where various individuals are communicating, including with Federal employees in some cases.<sup>3</sup> An individual's privacy interest in their personal cell phone number or email address clearly outweighs the negligible public interest of seeing with whom Federal employees may be communicating. That public interest is already satisfied to the extent that the person's name and the content of the email are otherwise released to the requestor.

Four documents are withheld in full under exemption (b)(6) to protect draft scientific papers that are as yet unpublished. These four documents meet the threshold requirement for withholding under exemption (b)(6) because they are clearly identifiable as relating to particular non-Federal individuals because they are identified as the authors. These individuals have a protectable privacy interest in the documents because they are academics and depend on publication of unique scientific papers in order to get hired, gain tenure, and receive promotions and bonuses.<sup>4</sup> See, e.g., *Core v. United States Postal Serv.*, 730 F.2d 946, 948-49 (4th Cir. 1984); *Barvick v. Cisneros*, 941 F.Supp. 1015, 1021-22 (D. Kan. 1996); *Ripskis v. HUD*, 746 F.2d 1, 3

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<sup>3</sup> Eight of these documents were also referred in part to other agencies, one to OSTP and seven to NASA.

<sup>4</sup> NOAA was also in possession of numerous draft papers that have been subsequently published. All such drafts are being released to you save for a few drafts that are protected under exemption (b)(4) because they are virtually indistinguishable from the final version of the paper that is subject to copyright and only available for a fee or through a subscription service. The attached addendum identifies these documents in relation the journal, title and author(s).

(D.C. Cir. 1984); *FLRA v. U.S. Dep't of Commerce*, 962 F.2d 1055, 1060 (D.C. Cir. 1992). This privacy interest based on career advancement outweighs any public interest in having these papers released in draft form.

Likewise, twenty-five documents are withheld in part under exemption (b)(6) because they contain passwords provided by the IPCC that permit access to an online comment matrix.<sup>5</sup> The passwords are provided to individuals that the IPCC is specifically requesting participate in the comment process on IPCC draft products. The passwords are withheld under exemption (b)(6) because a person who has access to past or future passwords can enter the IPCC's online comment matrix and see what individual's around the world are providing as comments. Not only would this violate the privacy of the private individuals who are providing the comments, but such access could possibly allow the person gaining unauthorized access to impersonate one of these individuals. To the extent that these comments are publicly made available by the IPCC at a later time, they are generally presented anonymously. Providing access to the comments through the IPCC's online system by providing a password would merely subject other individuals, including numerous non-Federal individuals, to having their private comments made public and possibly subjecting them to harassment.

Dr. Solomon's personal email address and cell phone number are withheld in the thirteen documents in which they appear.<sup>6</sup> While Federal employees generally have a decreased expectation of privacy, they do have a protectable privacy interest in purely personal details that do not shed light on agency functions, such as cell phone numbers. See, e.g., *DOD v. FLRA*, 510 U.S. 487, 500 (1994) (federal employees' home addresses); *Kidd v. DOJ*, 362 F. Supp. 2d 291, 296-97 (D.D.C. 2005) (home telephone number); *Barvick v. Cisneros*, 941 F. Supp. at 1020-21 (personal information such as home addresses and telephone numbers, social security numbers, dates of birth, insurance and retirement information, reasons for leaving prior employment, and performance appraisals). Courts are likely to protect such personal details of a Federal employee, even one who conducts official business occasionally from his or her personal email address, if disclosure is likely to subject the individual to personal distress or embarrassment. See, e.g., *Barvick v. Cisneros*, 941 F. Supp. at 1020. In the instance case, Dr. Solomon is likely subject to harassment through her personal email if her personal email address is made public.

#### IX. All Remaining Documents Released in Full

All remaining documents are released in full either in hard copy (365) or electronic (1,978) format.<sup>7,8</sup> Among these documents are two records that had pre-existing redactions. The pre-

<sup>5</sup> While several of these documents appear to be repeats, NOAA was in possession of multiple electronic copies of the documents and saved them using different file names. As a result, each document is a separate record for purposes of FOIA.

<sup>6</sup> Two of these documents also contain personal information of private parties withheld under rationale for exemption (b)(6) discussed *supra*. One document contains personal contact information for a private individual, while the other identifies an individual by name that is grievously ill. In the latter document, the identity of the sick individual is withheld.

<sup>7</sup> For one hard-copy email, the Department was only able to locate the first page of the email. The email is clearly marked as such. The one page that was located is provided to you in full.

<sup>8</sup> The DVD containing electronic copies of 1,976 of the documents contains several empty folders and small .gif/.jpg files. These are artifacts of how the IPCC saved websites onto CDs.



existing redactions are clearly marked on the two records in question. Two additional documents are non-responsive in part because they contain tangential discussions of NOAA employees that are unrelated to Dr. Solomon's role with the IPCC.<sup>9</sup>

Some documents available from this release may be protected by copyright owned by private individuals or organizations, and may be subject to restrictions on use. You may want to obtain legal advice prior to further dissemination.

This is the final decision of the Department of Commerce. You have the right to obtain judicial review of this partial denial of your FOIA appeal as provided in 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in blue ink, appearing to read 'Barbara S. Fredericks', with a long horizontal line extending to the right.

Barbara S. Fredericks  
Assistant General Counsel for Administration

Enclosures:

Addendum 1: FOIA Exemption (b)(4) Documents  
One DVD containing 1,978 documents  
Seven DVDs each containing a movie  
365 hardcopy documents

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<sup>9</sup> The non-responsive portions of the emails in question are clearly marked as non-responsive.