



REQUEST UNDER THE FREEDOM OF INFORMATION ACT

November 12, 2012

National Freedom of Information Officer
U.S. EPA, Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
BY ELECTRONIC MAIL

By E-mail: hq.foia@epa.gov

RE: FOIA Request – Certain agency records to, from or citing Richard Windsor

Dear EPA FOIA Officer,

On behalf of the Competitive Enterprise Institute (“CEI”, or “Requester”), and pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the agency’s own implementing regulations, please provide us within twenty (20) days copies of any and all email sent to or from an EPA employee in the Office of the Administrator (OA) from or to an email account in the name of, or email alias,¹ “Richard Windsor”, **from December 15, 2008 to the date you process this request, inclusive.**

Scope of Request, Background Explaining the Requested Records

Covered offices include the Office of the Administrator, meaning in total and not just Lisa Jackson’s immediate office.

We request a rolling production, with responsive records being processed and produced independent of any others, as no such production is dependent upon other records being released.

¹ By this term we mean the arbitrary -- that is, assigned -- term associated with an address to describe it by, e.g., an address book or an email account holder).

This request contemplates copies of documents in electronic format if you possess them as such, otherwise photocopies are acceptable; as the records we seek are email, all should be held electronically.

We do not seek duplicates; as such, if the Agency identifies an alias account showing the name of Richard Windsor, then all email sent to or from that account is sufficient to satisfy this request.

This contemplates searching include Agency email addresses, and other on-line storage like BOX or Google Docs/Drive used for work-related purposes by OA employees.

We understand from prior research and EPA responses to FOIA requests that Administrator Lisa Jackson used one or more “alias” email accounts in the conduct of her public service with EPA. We also understand that one such alias is “Richard Windsor”.

The described records are Agency email correspondence on Agency computers or servers, that were sent or received by Agency personnel to or from that Jackson email address, from that date the selection was announced (Monday, December 15, 2008) through the date you process this request.

It is not material to state that at some point (prior to January 24, 2009) Ms. Jackson was not yet an EPA employee, or that in any particular case she was corresponding with Agency personnel from a private account: we seek emails on Agency accounts or otherwise addressing work-related matters all of which are “agency records”.

We note that this request is sufficiently specific and narrow, requires no forwarding to other offices for processing, and is a “simple” Request.

Withholding and Redaction

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

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

Specifically, if your office takes the position that any portion of the requested records is exempt from disclosure, we request that you provide us with an index of those documents

as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA” pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and “describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information.” *King v. Department of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

EPA thus cannot withhold entire documents rather than producing their “factual content” and redacting the confidential advice and opinions. As the D.C. 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.” *Id.* at 254 n.28.

As an example of how entire records should not be withheld when there is reasonably segregable information, we note that basic identifying information (who, what, when) is not “deliberative”. As the courts have emphasized, “the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process.” *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (emphasis added).

If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Department of the Air Force*, 455 F.2d at 261.

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

Satisfying this Request contemplates providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable. By this we mean that no delay should be incurred on the basis that the records are held in a particular format and must be transferred as we seek them as held in whatever medium or bearing whatever physical characteristics may be the case.

Please provide responsive documents in complete form, with any appendices or attachments as the case may be.

Request for Fee Waiver

This discussion is detailed as a result of our recent experience of agencies (particularly EPA) improperly using denial of fee waivers as an improper means of delaying or otherwise denying access to records, despite our history of regularly obtaining fee waivers. We are not alone in this experience.²

The information sought in this request is not sought for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization (not a “Religious...Charitable, Scientific, Literary, Testing for Public Safety, to Foster National or International Amateur Sports Competition, or Prevention of Cruelty to Children or Animals Organization[.]”). As such, we also have 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, CEI 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).

REQUEST FOR REDUCTION OF PROCESSING FEES -- 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...”) and 40 C.F.R. § 2.107(d)(1) (“No search or review fees will be charged for requests by educational institutions...or representatives of the news media.”); see also 2.107(b)(6).

We qualify and request these records in our capacity as a representative of the news media.

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

Requester publishes materials based upon its research via print and electronic media, as well as in newsletters to legislators, education professionals, and other interested parties.³ Those activities are in fulfillment of CEI's mission. We intend to disseminate the information gathered by this request to the public at large and at no cost through one or more of the following: (a) newsletters; (b) opinion pieces in newspapers or magazines; (c) CEI's websites, which receive approximately 150,000 monthly visitors (appx. 125,000 unique);⁴ (d) in-house publications for public dissemination; (e) other electronic journals, including blogs to which our professionals contribute; (f) local and syndicated radio programs dedicated to discussing public policy; (g) to the extent that Congress or states engaged in relevant oversight or related legislative or judicial activities find that which is received noteworthy, it will become part of the public record on deliberations of the legislative branches of the federal and state governments on the relevant issues.

Requester may also specifically compile a report specifically on recent revelations about Agency email practices, use of personal accounts and related record management practices at issue in this request, and other requests currently pending before EPA or already in court (see, e.g., HQ-FOI-01268-12, 08-FOI-00203-12, 06-FOI-00361-12). The information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with Agency activities in this controversial area, or as the Supreme Court once noted, what their government is up to.

For a list of exemplar publications, please see <http://cei.org/publications>.

We also intend to disseminate the information gathered by this request via media appearances (the undersigned appears regularly, to discuss his work, on national television and national and local radio shows, and weekly on the radio shows "Garrison" on WIBC Indianapolis and the nationally syndicated "Battle Line with Alan Nathan").

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

⁴ See, e.g., www.openmarket.org (one of several blogs operated by CEI providing daily coverage of legal and regulatory issues); www.globalwarming.org (another CEI blog).

CEI also is regularly cited in newspapers,⁵ law reviews,⁶ and legal and scholarly publications.⁷

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 editorial skills to turn it into distinct work, and distributes that work to the public. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new

⁵ *See, e.g.*, Al Neuharth, “Why Bail Out Bosses Who Messed It Up,” *USA Today*, Nov. 21, 2008, at 23A (quotation from Competitive Enterprise Institute) (available at 2008 WLNR 22235170); Bill Shea, “Agency Looks Beyond Criticism of Ads of GM Boasting About Repaid Loan,” *Crain’s Detroit Business*, May 17, 2010, at 3 (available at 2010 WLNR 10415253); Mona Charen, Creators Syndicate, “You Might Suppose That President Obama Has His Hands ...,” *Bismarck Tribune*, June 10, 2009, at A8 (syndicated columnist quoted CEI’s OpenMarket blog); Hal Davis, “Earth’s Temperature Is Rising and So Is Debate About It,” *Dayton Daily News*, April 22, 2006, at A6 (citing CEI’s GlobalWarming.Org); *Washington Examiner*, August 14, 2008, pg. 24, “Think-Tanking” (reprinting relevant commentary from OpenMarket); Mark Landsbaum, “Blogwatch: Biofuel Follies,” *Orange County Register*, Nov. 13, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 23059349); *Pittsburgh Tribune-Review*, “Best of the Blogs,” Oct. 7, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 19666326).

⁶ *See, e.g.*, Robert Hardaway, “The Great American Housing Bubble,” 35 *University of Dayton Law Review* 33, 34 (2009) (quoting Hans Bader of CEI regarding origins of the financial crisis that precipitated the TARP bailout program).

⁷ *See, e.g.*, Bruce Yandle, “Bootleggers, Baptists, and the Global Warming Battle,” 26 *Harvard Environmental Law Review* 177, 221 & fn. 272 (citing CEI’s GlobalWarming.Org); Deepa Badrinarayana, “The Emerging Constitutional Challenge of Climate Change: India in Perspective,” 19 *Fordham Environmental Law Review* 1, 22 & fn. 119 (2009) (same); Kim Diana Connolly, “Bridging the Divide: Examining the Role of the Public Trust in Protecting Coastal and Wetland Resources,” 15 *Southeastern Environmental Law Journal* 1, 15 & fn. 127 (2006) (same); David Vanderzwaag, *et al.*, “The Arctic Environmental Protection Strategy, Arctic Council, and Multilateral Environmental Initiatives,” 30 *Denver Journal of International Law and Policy* 131, 141 & fn. 79 (2002) (same); Bradley K. Krehely, “Government-Sponsored Enterprise: A Discussion of the Federal Subsidy of Fannie Mae and Freddie Mac,” 6 *North Carolina Banking Institute* 519, 527 (2002) (quoting Competitive Enterprise Institute about potential bailouts in the future).

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

Accordingly, fees assessed, if any (see below), must be limited to duplication costs.

We request records in electronic format as available, in text-searchable, static image format (PDF), also reducing possible duplication costs. *See* 5 U.S.C. § 552(a)(3)(B).

WAIVER OR REDUCTION OF ALL COSTS

We request a waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester”); see also 40 C.F.R. §2.107(l), and (c).

As a non-commercial requester, CEI is entitled to liberal construction of FOIA’s fee waiver standard for considering whether disclosure would inform the public. 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 provisions for determining whether a requesting party is a representative of the news media, and the public interest provision, are not mutually exclusive. 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); SEN. COMM. ON THE

JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).⁸

“This is in keeping with the statute's purpose, which is ‘to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.’” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987)(quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy)).

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

As the *Better Government* court also recognized, public interest groups employ FOIA for activities “essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.”

⁸ 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.*

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

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.

This information request meets that description, for reasons both obvious and specified.

The subject matter of the requested records specifically concerns identifiable operations or activities of the government. The requested records presumptively were produced on Agency resources because their author determined them to be related to Agency business. This presumption is strengthened by the fact that the records were sent to or from an Agency “alias” account, known to very few and almost certainly in each case because the alias account holder informed them of this non-public account, instructing them to use them for particular purposes. The correspondence are unquestionably “identifiable operations or activities of the government.” The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by federal agency will meet this threshold” of identifiable operations or activities of the government. There can be no question that this is such a case.

Disclosure is “likely to contribute” to an understanding of specific government operations or activities because the releasable material must be meaningfully informative in relation to the subject matter of the request. The disclosure of the requested documents have an informative value and are “likely to contribute to an

understanding of Federal government operations or activities”. Specifically, these are expressions of priorities and aspirations of, or to, a senior political appointee on an “alias” account whose specifics were not public and which according to EPA documents were known by very few within the Agency; whomever knew of the account(s) received the information from the senior employee (we understand that this alias account was provided to the EPA Administrator) who presumptively provided this address(es) for the purpose of obtaining certain correspondence she determined were work-related.

Emails on “alias” accounts reflect discussions that the, e.g., Administrator (or the sender if other than the Administrator), not only determined were work-related but, by definition, were those she preferred to keep from those who might oppose her initiatives.

However unpleasant this may be to those who prefer bureaucratic secrecy, in truth once these alias accounts are discovered their contents must be disclosed as inherently being of interest to the public for the same reasons the account holder or other user sought to keep the work-related correspondence secret: they reveal things the Administrator determined would not be helpful if made publicly available.

Keeping such discussions is a luxury of the private citizen, and the Administrator, in using their private email accounts. It is not available in the conduct of public service, when using taxpayer-funded accounts, particularly those created with the objective of shielding particular work-related discussions. **FOIA prescribed the exemptions from its coverage: seeking to shield certain discussions, or an account being presumed secret are simply not among them.**

Further, the DoJ Freedom of Information Act Guide makes it clear that, **in the Department of Justice'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.** There is no reasonable claim that the requested information, of candid assertions intentionally moved to presumably secret accounts, as opposed to press-officer cleared messaging, is already in the public domain.

The requested records are “likely to contribute” to an understanding of your agency's decisions because they are not otherwise in the public domain, were intended to be secret and free from FOIA, and are not accessible other than through a FOIA request.

Given the economic and social impact of EPA's policies and activities, it is important for information relating to discussions the Administrator determined to be work-related but not helpful if publicly revealed be made available to the public.

These are work-related records, records the Administrator at a unique level preferred to keep secret from the public, which is not an exemption under FOIA; by disclosure and

dissemination this information will facilitate meaningful public participation in the decision-making process, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of your agency's decision-making process with regard to the high hazard sites.

The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons. Requester has an established practice of utilizing FOIA to educate the public, lawmakers and news media about the government’s operations and, in particular, have brought to light important information about policies grounded in energy and environmental policy, like EPA’s.⁹

CEI has spent years promoting the public interest advocating sensible policies to protect human health and the environment, routinely receiving fee waivers under FOIA. As demonstrated herein and in the above litany of exemplars of newsworthy FOIA activity, the Requester has both the intent and the ability to convey any information obtained through this request to the public.

More importantly, with a longstanding interest, reputation for a leading role in the relevant policy debates and expertise in the subject of energy- and environment-related regulatory policies CEI 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.”

⁹ This involves EPA (see, e.g., <http://washingtonexaminer.com/epa-refuses-to-talk-about-think-tank-suit-demanding-docs-on-officials-using-secret-emails/article/2509608#.UH7MRo50Ha4>, referencing revelations in a memo obtained under FOIA; *Horner et al. (CEI) v. EPA* (CV-00-535 D.D.C., settled 2004)), Treasury (see, e.g., http://www.cbsnews.com/8301-504383_162-5314040-504383.html, http://www.cbsnews.com/8301-504383_162-5322108-504383.html), Energy (see, e.g., <http://www.foxnews.com/scitech/2011/12/16/complicit-in-climategate-doe-under-fire/>, <http://news.investors.com/ibd-editorials/031210-527214-the-big-wind-power-cover-up.htm?p=2>), NOAA (see, e.g., <http://wattsupwiththat.com/2012/10/04/the-secret-ipcc-stocker-wg1-memo-found/>, <http://wattsupwiththat.com/2012/08/21/noaa-releases-tranche-of-foia-documents-2-years-later/>), NASA (See, e.g., <http://legaltimes.typepad.com/blt/2010/11/global-warming-foia-suit-against-nasa-heats-up-again.html>, which FOIA request and suit produced thousands of pages of emails reflecting agency resources used to run a third-party activist website, and revealing its data management practices; see also <http://wattsupwiththat.com/2012/10/04/the-cyber-bonfire-of-gisss-vanities/>), among others. Many more examples are available on CEI’s website, <http://cei.org/search/node/FOIA>.

The disclosure will contribute “significantly” to public understanding of government operations or activities. We repeat by reference the discussion, *supra*, of the records contributing to the public’s understanding of operations or activities of government. The specifically requested information, which are discussions, that EPA sought to minimize the chances that the public would see, is not publicly available nor is anything reasonably approximating the requested discussions; claiming that EPA put out many statements on various topics covered in these discussions its senior officer(s) determined should be kept from the taxpayer or regulated parties who might challenge the Agency’s activities, on its website or otherwise, does not alter or respond to that.

Absent disclosure of the records requested, the public’s understanding will be shaped only by what is disclosed by any Agency or private interests involved.

After disclosure of these records, the public's understanding of these discussions, about which there is no information publicly available, will be significantly enhanced. The requirement that disclosure must contribute “significantly” to the public understanding is therefore met.

As such, the Requester has stated “with reasonable specificity that its request pertains to operations of the government,” and “the 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).

In the event a waiver or reduction of costs is denied, please notify the undersigned in advance if the anticipated costs exceed \$150.00 so that we may determine whether to instruct the Agency to proceed pending resolution of our appeal.

CONCLUSION

We expect the agency to release all segregable portions of records with 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.

In its substantive response **we request the agency provide an assessment 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. § 552(a)(7)(B). *See Muttitt v. U.S. Cent. 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”). *Also see generally, Citizens for Responsibility & Ethics in Washington v. Federal Election Commission*, 839 F. Supp. 2d 17, 25 (D.D.C. 2011).

We repeat our request for a rolling production of records, such that the agency furnishes records as soon as they are identified to my attention at:

Competitive Enterprise Institute
1899 L Street N.W.
12th Floor
Washington, DC 20036

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

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Horner', with a long horizontal flourish extending to the right.

Christopher C. Horner, Esq.
CHorner@cei.org

1899 L Street NW, Suite 1200
Washington, DC 20036
202.331.2260 (O)