



March 14, 2017

FOIA/PA Branch

Civil Rights Division

BICN, Room 3234

950 Pennsylvania Ave, N.W.

Washington, DC 20530

(202) 514-4209

CRT.FOIArequests@usdoj.gov

Re: Freedom of Information Act Request; Fee Waiver Requested

Dear Sir/Madam:

Pursuant to the Freedom of Information Act (5 U.S.C. § 552, *et seq.*), and the regulations thereunder, I am writing on behalf of the Competitive Enterprise Institute (CEI), a non-profit 501(c)(3) public-interest group, to request access to and copies of the following documents:

1. Any inquiries, findings and conclusions, based on investigations under Title II or Title III of the Americans with Disabilities Act of any college, university, media entity,¹ or non-profit entity regarding accessibility of free online audio or video content made available to the public by such entities or their employees, agents or students.
2. Any inquiries, findings and conclusions, based on investigations under Title II or Title III of the Americans with Disabilities Act, of any individual regarding accessibility of free online audio or video content made available to the public by such individual.
3. Any records related to *The United States' Findings and Conclusions Based on its Investigation Under Title II of the Americans with Disabilities Act of the University of California at Berkeley*, DJ No. 204-11-309.

¹ For purposes of this FOIA request, “media entity” does not include a video programming distributor covered by the captioning requirements of the Telecommunications Act of 1996 (requirements that typically apply to cable operators, satellite distributors, and broadcasters). This FOIA request’s reference to “content” includes, but is not limited to, content made available on YouTube, iTunes U, the college or university’s own web site or domain on the internet, and the web pages of its faculty, staff, and students. “College or university” includes a consortium consisting largely or entirely of colleges or universities. “Entities” include colleges, universities, media entities, and non-profit entities.

Please provide the documents in electronic form (except for documents that do not exist in electronic form), unless it would be cheaper to obtain paper copies. If the volume of records responsive to one item of records above is far greater than those responsive to other item(s), and takes more time to gather, please send the records responsive to the other item(s) as soon as they become available (for example, by making rolling productions), rather than waiting until all remaining records have been collected.

We request that your office waive charges pursuant to 5 U.S.C. § 552(a)(4)(iii) & 28 C.F.R. 16.11(d)(1) &(k)(2), since, as is explained below, disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requestor.

Even if you do not waive all the charges, as those provisions mandate, we request in the alternative that your office waive charges for the first 100 pages and first two hours of search time, pursuant to 28 C.F.R. 16.11(d)(3)&(k)(2).

We request this on the basis that CEI is a nonprofit, tax-exempt, public-interest organization, with formal research, educational, and publication functions as part of its mission, and because release of these records will serve the public interest by contributing significantly to the public's understanding of government operations, the shaping of public policy, and how taxpayer money is spent. This FOIA request is not for commercial use.² In the past, CEI FOIA requests have generated data and other useful information that was of interest to the public, information

² Nor would it primarily further or advance any commercial interest. Also, CEI is not a trade association.

featured in news articles and commentary.³ The Berkeley investigation that is the subject of this FOIA request is a matter of public interest, as is reflected in recent press coverage.⁴

If our fee waiver is denied, we are willing to pay up to \$100.00, and in the event of any appeal as appropriate and regardless of that outcome or your response to this fee waiver request, we request the search and document production proceed in the interim. (If there are any such charges, please provide an invoice for the time incurred and cost for each document for which more than \$15.00 is sought).

CEI's interest in the documents springs from its efforts to educate the public, scholars, and state and federal regulators on matters of government operations,⁵ including federal civil-rights laws

³ See, e.g., Stephen Dinan, *Do Text Messages from Feds Belong on Record? EPA's Chief's Case Opens Legal Battle*, Washington Times, April 30, 2011, at A1 (news coverage based on documents obtained by CEI's Christopher Horner); Stephen Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, Washington Times, April 9, 2013, at A4 (EPA stepped up records-management training based on "admission" that some staff had "fallen short" on complying with EPA rules, a practice uncovered by CEI); Stephen Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, Washington Times, April 2, 2013, at A1 (CEI's Horner "uncovered that" regional official was "using private email addresses to conduct official business").

Information obtained by CEI through FOIA requests ends up in editorials, news coverage, and Congressional testimony. See, e.g., Trey Kovacs & Alex Habighorst, *Time for an Official End to Federal Employee Union Subsidies*, Washington Examiner, June 5, 2013, <http://washingtonexaminer.com/op-ed-time-for-an-official-end-to-federal-employee-union-subsidies/article/2531217> (Op-ed by CEI staff citing documents obtained in CEI FOIA requests); *Written Statement of Hans Bader, Senior Attorney, Competitive Enterprise Institute, U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on Regulatory Affairs, Hearing Entitled Lasting Implications of the General Motors Bailout*, June 22, 2011, <http://www.scribd.com/doc/58462911/Hans-Bader-Statement-for-Regulatory-Affairs-Subcommittee>.

⁴ See, e.g., Carl Straumsheim, *Berkeley Will Delete Online Content*, Inside Higher Ed, March 6, 2017, <https://www.insidehighered.com/news/2017/03/06/u-california-berkeley-delete-publicly-available-educational-content>; Andrew Ferguson, *Berkeley Goes Offline*, Weekly Standard, March 20, 2017: <http://www.weeklystandard.com/berkeley-goes-offline/article/2007153>; Scott H. Greenfield, *UC Berkeley and the 20,000 Broken Promises*, Simple Justice, March 8, 2017, <http://blog.simplejustice.us/2017/03/08/uc-berkeley-and-the-20000-broken-promises/>; Robby Soave, *Department of Justice: If Disabled People Can't Use Berkeley's Free Online Courses, No One Can*, Reason, Sept. 19, 2016, <http://reason.com/blog/2016/09/19/departement-of-justice-if-disabled-people>.

⁵ CEI is widely quoted by the press and legal commentators, including about the very subject of this FOIA request. See, e.g., JulieAnn McKellogg, *US Supreme Court Hears Massive Wal-Mart Discrimination Case*, Voice of America, March 29, 2011 (quoting CEI's Hans Bader about *Wal-Mart v. Dukes*, a Supreme Court discrimination case) (available at 2011 WLNR 6155680); Scott H. Greenfield, *UC Berkeley and the 20,000 Broken Promises*, Simple Justice, March 8, 2017, <http://blog.simplejustice.us/2017/03/08/uc-berkeley-and-the-20000-broken-promises/> (legal commentator quotes CEI's Hans Bader about DOJ's Berkeley investigation, one of the subjects of this FOIA request); Walter Olson, *The ADA takes Berkeley courses offline*, March 12, 2017,

such as the Americans with Disabilities Act,⁶ First Amendment and discrimination issues.⁷ CEI has previously written public commentary about one of the investigations covered by this FOIA request,⁸ which has been cited in other publications.⁹ The general and policy-oriented public will

<https://www.overlawyered.com/2017/03/ada-takes-berkeley-courses-offline/> (legal commentator quoting CEI's Hans Bader about the Berkeley investigation covered by this FOIA request); Al Neuharth, *Why Bail Out Bosses Who Messed It Up*, USA Today, Nov. 21, 2008, at 23A (quoting CEI) (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) (citing CEI); William P. Hoar, *Bailing Out Scam Artists*, New American, October 13, 2008, at pg. 42 (quoting CEI's Bader); Mark Tapscott, *GM Named in Deceptive Advertising Complaint Filed With FTC*, Washington Examiner, May 4, 2010 (www.washingtonexaminer.com/opinion/blogs/beltway-confidential/GM-named-in-deceptive-advertising-complaint-filed-with-FTC-92788939.html) (same).

⁶ See, e.g., Hans Bader, *Federal Disability Order Limits Public Access to Educational Content*, CEI Blog, March 6, 2017, <https://cei.org/blog/federal-disability-order-limits-public-access-educational-content> (discussing the Berkeley investigation at issue in this FOIA request); Bader, *Obama Justice Department's disability order blocks public access to college lectures*, Liberty Unyielding, March 6, 2017, <http://libertyunyielding.com/2017/03/06/obama-justice-departments-disability-order-blocks-public-access-college-lectures/> (same).

⁷ See, e.g., Hans Bader, *Federal Workplace Officials Using Un-'Reasonable' Legal Standard on Harassment*, CEI Blog, Feb. 28, 2017, <https://cei.org/blog/federal-workplace-officials-using-un-reasonable-legal-standard-harassment> (CEI blog post discussing EEOC ruling on Title VII claim and how its ruling contrasted with the federal courts' handling of similar claims); JulieAnn McKellogg, *US Supreme Court Hears Massive Wal Mart Discrimination Case*, Voice of America, March 29, 2011 (quoting CEI's Hans Bader about Supreme Court discrimination case) (available at 2011 WLNR 6155680); Carrie Lynn Flores, *Translation Services Not Required: The Civil Rights Act of 1964 Does Not Require Special Accommodations for Limited English Proficiency Individuals*, 15 Harvard Latino Law Review 193, 198 fn. 24 (2011) (citing CEI's Bader about Title VI of the Civil Rights Act); Carter T. Coker, *Hope-Fulfilling or Effectively Chilling? Reconciling the Hate Crimes Prevention Act With the First Amendment*, 64 Vanderbilt Law Review 271, 283 fn. 73, 289 fn.103 & 106, 209 fn. 106 (2011) (citing Bader about interplay between civil rights laws and First Amendment).

⁸ See, e.g., Hans Bader, *Federal Disability Order Limits Public Access to Educational Content*, CEI Blog, March 6, 2017, <https://cei.org/blog/federal-disability-order-limits-public-access-educational-content> (discussing the Berkeley investigation at issue in this FOIA request); Bader, *Obama Justice Department's disability order blocks public access to college lectures*, Liberty Unyielding, March 6, 2017, <http://libertyunyielding.com/2017/03/06/obama-justice-departments-disability-order-blocks-public-access-college-lectures/> (same).

⁹ Scott H. Greenfield, *UC Berkeley and the 20,000 Broken Promises*, Simple Justice, March 8, 2017, <http://blog.simplejustice.us/2017/03/08/uc-berkeley-and-the-20000-broken-promises/> (legal commentator quotes CEI's Hans Bader about DOJ's Berkeley investigation, one of the subjects of this FOIA request); Walter Olson, *The ADA takes Berkeley courses offline*, March 12, 2017, <https://www.overlawyered.com/2017/03/ada-takes-berkeley-courses-offline/> (same).

benefit from the dissemination of the information requested, since CEI's professionals are widely-published about these subjects.¹⁰

CEI publishes about these and other issues in print and electronic media, as well as newsletters to legislators, education professionals, and other interested parties,¹¹ and thus qualifies as a press entity for purposes of FOIA.¹² Those activities are in fulfillment of CEI's mission. The information received will be disseminated through one or more of the following: a) newsletters, (b) opinion pieces in newspapers or magazines, (c) CEI's web sites and blogs which receive approximately 80,000 monthly visitors (approximately 40,000 unique) and are published on most

¹⁰ For example, the author of this letter, a CEI employee, routinely writes about civil-rights issues and discrimination cases. *See, e.g.,* Hans Bader, *Time to End Obama-Era Fed Micromanagement of Colleges Under Title IX*, CNS News, Feb. 22, 2017 (www.cnsnews.com/commentary/hans-bader/time-end-obama-era-fed-micromanagement-colleges-under-title-ix); *Not All Court Rulings Consistent With 'Dear Colleague Letter'*, Chronicle of Higher Education, Feb. 15, 2017 (www.chronicle.com/blogs/letters/not-all-court-rulings-consistent-with-dear-colleague-letter); *Proof and Campus Rape*, Letter, New York Times, July 8, 2014 (www.nytimes.com/2014/07/08/opinion/proof-and-campus-rape.html); *Tenure Also Protects Good Teachers*, Wall Street Journal, June 19, 2014, at A14; *On Colleges and Evidence Standards*, Letter, Wall Street Journal, May 20, 2014, at A12; *Disparity Reflects a Sad Reality*, Richmond Times-Dispatch, April 23, 2014, at A10; *EEOC Demands Imperil the Public*, Washington Times, Jan. 12, 2012, at B2 (discussing disparate-impact claims brought under federal civil-rights law); Bader, *Arne Duncan vs. Fairness and the Rights of the Accused*, Letter, Wall Street Journal, Sept. 25, 2014, at A20 (<http://online.wsj.com/articles/arne-duncan-vs-fairness-and-the-rights-of-the-accused-letters-to-the-editor-1411582510>); *How Eric Holder's Disparate Impact Crusade Leads To Quotas*, Daily Caller, June 5, 2014 (<http://dailycaller.com/2014/06/05/how-eric-holders-disparate-impact-crusade-leads-to-quotas/>); *Denied Due Process*, Boston Herald, June 20, 2014, at 18; *Regulating Sex on Campus*, Los Angeles Times, June 1, 2014, at 19; *Punishment Without Trial: The Department of Education Attacks Students' Due Process Rights*, Daily Caller, May 23, 2014 (<http://dailycaller.com/2014/05/23/punishment-without-trial-the-department-of-education-attacks-students-due-process-rights/>); *Unlawful to Favor Women-Owned Businesses*, Washington Times, Aug. 5, 2011, at B; *Day Cares Can't Mandate Diversity*, Washington Times, July 19, 2011 at B2; Letter, *Murphy Twists Facts in Title IX Column*, Quincy Patriot-Ledger, April 15, 2011, at pg. 6 (discussing civil-rights claims in educational context); Letter, *Mr. Franken's Arbitration Amendment*, Washington Post, Oct. 29, 2009, at A18 (discussing arbitration of federal civil-rights claims); Letter, *The Case Against Racial Balancing Schemes*, Washington Post, Dec. 8, 2006, at A38 (discussing civil-rights lawsuit in Supreme Court); Letter, *Fair Means Fair; Evidence Must Count for Something*, Wall Street Journal, July 21, 2011, at A16 (discussing Title IX civil-rights claims) (available at <http://online.wsj.com/article/SB10001424052702303795304576454032171232042.html>).

¹¹ *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").

¹² See the attachment to this letter, a letter from EPA granting CEI a waiver of fees under FOIA.

days,¹³ (d) in-house publications for public dissemination, (e) other electronic journals including daily blogs and newspaper blogs to which our professionals contribute,¹⁴ (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. CEI is regularly cited in newspapers,¹⁵ law reviews,¹⁶ and legal and scholarly publications.¹⁷

¹³ See, e.g., <https://cei.org/blog> (one of several blogs operated by CEI providing daily coverage of legal and regulatory issues); www.globalwarming.org (another CEI blog).

¹⁴ See, e.g., <http://www.cnsnews.com/author/hans-bader> (roughly 150 articles by CEI's Bader from 2013 through this month); <http://washingtonexaminer.com/author/hans-bader> (web page showing dozens of commentaries by CEI's Bader in the *Washington Examiner*); <http://libertyunyielding.com/author/hanbcompent/> (hundreds of Bader blog posts).

¹⁵ See, e.g., George Will, *Obama's Speech Police*, *Washington Post*, May 26, 2013, at A17 (quoting CEI's Hans Bader about civil-rights issues); Cathy Young, *Yet Another Governmental Overreach*, *Newsday*, May 28, 2013 (same); Ramesh Ponnuru, *Colleges: New Sexual Harassment Rules Defy Reason*, *St. Paul Pioneer-Press*, July 24, 2013, at A14 (same); *Yet Another Federal Attack on Civil Liberties*, *Cincinnati Enquirer*, May 26, 2013, at F5 (same); Greg Victor, *Subsidizing Madness*, *Pittsburgh Post-Gazette*, March 27, 2011, at E4 (citing Hans Bader of CEI about reach of federal discrimination laws); 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 CEI's 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 CEI's OpenMarket) (available in Westlaw news database at 2007 WLNR 19666326).

¹⁶ See, e.g., Audrey Wolfson Latourette, *Title IX Office of Civil Rights Directives*, 23 *Journal of Law, Business & Ethics* 1, 15 (2017) (citing Hans Bader about civil-rights issues); Stephen S. Worthington, *Gaps in the Armor: Predictors of Civil Rights Complaints in Pennsylvania's Elementary and Secondary Schools*, 46 *Journal of Law & Education* 57 (2017) (citing Bader about Title VI of the Civil Rights Act); Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure*, 8 *Journal of Legal Analysis* 47, 78 (2016) (citing Bader in discussion of federal civil-rights guidance documents); Carrie Lynn Flores, *Translation Services Not Required: The Civil Rights Act of 1964 Does Not Require Special Accommodations for Limited English Proficiency Individuals*, 15 *Harvard Latino Law Review* 193, 198 fn. 24 (2011) (citing Hans Bader about Title VI of the Civil Rights Act); Carter T. Coker, *Hope-Fulfilling or Effectively Chilling? Reconciling the Hate Crimes Prevention Act With the First Amendment*, 64 *Vanderbilt Law Review* 271, 283 fn. 73, 289 fn.103 & 106, 209 fn. 106 (2011) (citing Bader about interplay between civil rights laws and First Amendment); Robert Hardaway, *The Great American Housing Bubble*, 35 *University of Dayton Law Review* 33, 34 (2009) (quoting Bader about the origins of the financial crisis).

¹⁷ 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

As provided by FOIA, I look forward to hearing from you within twenty (20) days.¹⁸ If you deny this request, please provide a written explanation for the denial including a reference to the specific statutory exemption on which you are relying, and provide the name and address of the person or body to whom an appeal should be directed. Also, please provide all segregable or non-exempt portions of otherwise exempt material.

The undersigned declares under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on March 14, 2017.

Sincerely,



Hans Bader
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hans.bader@cei.org

Badrinarayana, *The Emerging Constitutional Challenge of Climate Change: India in Perspective*, 19 Forham 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 CEI).

¹⁸ See 5 U.S.C. § 552(a)(6)(A)(i).



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

May 10, 2010

OFFICE OF
ENVIRONMENTAL INFORMATION

Mr. Hans Bader
Competitive Enterprise Institute
1899 L Street, NW, 12th Floor
Washington, DC 20036

RE: Request Number HQ-FOI-01223-10

Dear Mr. Bader:

This is in response to your request for a waiver of fees in connection with your Freedom of Information Act (FOIA), 5 U.S.C. 552 request. Your FOIA request is seeking a copy of records referred to as the Kerry-Graham-Lieberman climate bill and any attachments or exhibits.

We have reviewed your submission and based on the information you provided, we are granting your fee waiver request. The US Environmental Protection Agency (EPA) Office of Congressional and Intergovernmental Relations, within the Office of the Administrator, will be responding to your information request for the Agency.

If you have any questions concerning this determination, please contact me at (202) 566-1667.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry F. Gottesman".

Larry F. Gottesman
National FOIA Officer