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REQUEST UNDER THE FREEDOM OF INFORMATION ACT

December 12, 2017

Office of Information Programs and Services
A/GIS/IPS/RL
U. S. Department of State
Washington, D. C. 20522-8100

VIA FACSIMILE: (202) 261-8579

RE: FOIA Request – Certain Agency records related to Paris Agreement "Validators"

Dear State FOIA Officer,

On behalf of the Competitive Enterprise Institute (CEI) please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*. CEI is a non-profit public policy organized under section 501(c)3 of the tax code and with research, legal, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us, within twenty working days,[1] copies of *all emails or text messages, and any attachments,* that were (a) sent to or from (whether as to, from, cc: or bcc:) (i) David Vance Wagner, (ii) Clare Sierawski, (iii) Kevin Welsh, (iv) Reed Schuler, and/or (v) Todd Stern,

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

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(b) in which the word validator (including also in “validators”) appears anywhere in the text or email, whether in the body and/or the To:, From:, cc:, bcc: or Subject field.

Records responsive to this request will be dated over the following brief time periods:

August 26-30, 2014

September 23-25, 2015

November 1, 2015 – December 31, 2015

We request entire threads of which any responsive correspondence is a part, mindful also of the DC Circuit's ruling in *American Immigration Lawyers Association v. Executive Office for Immigration Review* (D.C. Cir. July 29, 2016).[2]

To properly narrow the population of potentially responsive records and reduce the review required in order to complete processing of this request, r**equesters do not seek correspondence that merely forwards media items (including but not limited to any daily press clippings), such as news accounts or opinion pieces, *if that correspondence has no comment or no substantive comment added by any party*** in the thread (an electronic mail message that includes any expression of opinion or viewpoint would be considered as including

[2] https://www.cadc.uscourts.gov/internet/opinions.nsf/BCEF1EB7B6536FD285257FFF0054F06F/$file/15-5201-1627649.pdf, “we find no statutory basis for redacting ostensibly non-responsive information from a record deemed responsive. Under the statutory framework, once the government concludes that a particular record is responsive to a disclosure request, the sole basis on which it may withhold particular information within that record is if the information falls within one of the statutory exemptions from FOIA’s disclosure mandate”.

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substantive comment; examples of non-responsive emails would be those forwarding a news report or opinion piece with no comment or only “fyi”, or “interesting”).

These search parameters are sufficiently narrow and precise in their clear delineation for described correspondence sent to or from certain State Department employees.

We agree to pay up to $150.00 for responsive records in the event State denies our fee waiver requests in the alternative, both of which it must address, detailed, *infra*. We note, for purposes of our requests in the alternative for fee waiver that CEI is a media entity for FOIA’s purposes as declared already by federal agencies (see discussion, *infra*).

As you are aware, President Trump has announced, and then requested the State Department follow up on his announcement, to withdraw from the December 2015 Paris climate agreement.[3] A leaked (including to requesters) State Department advisory memo, although in draft form, reveals materially, indeed severely misleading advice, by commission but particularly by omission of the considerations that would be found in records responsive to this request. Further, State Department public records produced under Freedom of Information Act litigation confirms that a lawyer for the Republican Chairman of the Senate Committee on Foreign Relations, Bob Corker, noted the “disturbing contempt” showed by the Obama administration

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[3] Timothy Cama, "Trump to decide by late May whether to stay in Paris climate pact”, The Hill, April 30, 2017, http://thehill.com/policy/energy-environment/326561-trump-to-decide-whether-to-stay-paris-climate-pact-by-late-may.

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circumventing the Senate's constitutional treaty role on Paris when that strategy was first reported in August, 2014.[4]

But for release of the requested information now it appears that the public, and even the President, will be asked to make a decision on the Paris climate treaty without the most relevant factors being anywhere part of the discussion.

We remain mindful of the D.C. Circuit's ruling in *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013) and so also note to State our intention to promptly protect our rights in any event the Department fails to provide the required, timely response.

We have properly narrowed the scope of this request for prompt satisfaction.

Relevant Background to this Request and the Public Interest

"The Circular 175 procedure refers to regulations developed by the State Department to ensure the proper exercise of the treaty-making power. Its principal objective is to make sure that the making of treaties and other international agreements for the United States is carried out within constitutional and other appropriate limits, and with appropriate involvement by the State Department."[5] State Department Foreign Affairs Manual 11 FAM 721, "is a codification of the substance of Department Circular No. 175, December 13, 1955, as amended, on the negotiation

[4] See, Christopher Horner, "Paris climate deal under Obama was a scheme", July 25, 2017, Washington Times, http://amp.washingtontimes.com/news/2017/jul/25/Paris-climate-deal-under-Obama-was-a-scheme/.

[5] See generally https://www.state.gov/s/l/treaty/c175/

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and conclusion of treaties and other international agreements."[6] It states that, "The C-175 procedure facilitates the application of orderly and uniform measures to the negotiation, conclusion, reporting, publication, and registration of U.S. treaties and international agreements, and facilitates the maintenance of complete and accurate records on such agreements". Id.

President Obama purported to commit the United States to the December 2015 Paris climate agreement as an agreement among executives requiring no legislative approval. Regardless most countries — including those whose diplomats made clear an overriding need to avoid Paris "going to Congress", because "we know the politics in the U.S. Whether we like it or not, if it comes to the Congress, they will refuse"[7] — somehow managed to involve their own elected parliamentary bodies in approving the agreement, and apparently as a treaty if their submissions to the United Nations depository offer any guide.[8] Clearly, these "validators" were involved from outside the government in the administration's campaign to avoid opposition to U.S. participation in the Paris treaty including by avoiding Senate "advice and consent", avoidance of which was critical to the Obama administration's plans to claim to have ratified the pact.

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[6] https://fam.state.gov/searchapps/viewer?format=html&query=circular%20175&links=CIRCULAR,175&url=/FAM/11FAM/11FAM0720.html#M721

[7] "Climate Deal Must Avoid US Congress Approval, French Minister Says," *The Guardian*, June 1, 2015, http://www.theguardian.com/world/2015/jun/01/un-climate-talks-deal-us-congress. Parties with similar systems if generally even less stringent requirements for legislative approval of international commitments which have included parliamentary body approval include Germany, Japan, Australia, Canada, Mexico, even China's Peoples National Congress and the European Parliament and, of course, France.

[8] UNFCCC—Paris Agreement, Status of Ratification, http://unfccc.int/paris_agreement/items/9444.php.

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For the public to understand the announced, still-pending upcoming presidential action regarding the move to withdraw from Paris, announced in a June 1 Rose Garden speech about the Paris climate agreement, these records are of great public importance.

The public currently has no source of information on the subject matter at the center of this request. State's response to this request will provide an important window into how the State Department carried and is carrying out its obligation to properly consider and accurately advise the executive branch on international obligations. This will provide information on what State did and did not inform the executive of in its assessment of the Paris climate agreement.

Because there is no such information is currently available to the public, any increase in public understanding of this issue is a significant contribution to this highly visible and politically important issue as regards the operation and function of government.

All of the above notwithstanding, FOIA requires no motive, or demonstration of wrongdoing, and the public interest prong, for fee waiver, is the only aspect to which these factors are relevant; we address the public interest in the issue in detail, *infra*, and respectfully remind State that federal agencies acknowledge CEI is a representative of the news media and that CEI can be charged, at most, the costs of copying these records (for electronic records, those costs should be *de minimis*).

State Must Err on the Side of Disclosure

It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989)

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(*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). Accordingly, when an agency withholds requested documents, the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of an earlier, if extant Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, "a democracy requires accountability, and accountability requires transparency," and "the Freedom of Information Act… is the most prominent expression of a profound national commitment to ensuring open Government." Accordingly, the President has directed that FOIA "be administered with a clear presumption: In the face of doubt, openness prevails" and that a "presumption of disclosure should be applied to all decisions involving FOIA."

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The State Department Owes CEI a Reasonable Search

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994). In this situation, there should be no difficulty in finding these documents. While the exact location the documents are held is unknown to requesters, the Department doubtless knows the exact email addresses of its own employees and is in a position to ascertain whether its employees have corresponded with any of the outside individuals named above, using officials accounts, and must ask as a result of this request whether they corresponded on relevant topics on any unofficial accounts.

It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). The act is designed to "pierce the veil of administrative secrecy and to open agency action to the light of scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id*.

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Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies. Pursuant to high-profile and repeated promises and instructions from the President and Attorney General we request the State Department err on the side of disclosure and not delay production of this information of great public interest through lengthy review processes over which withholdings they may be able to justify. In the unlikely event that the State Department claims any records or portions thereof are exempt under any of FOIA's discretionary exemptions, we request you exercise that discretion and release them consistent with statements by the former President and Attorney General, *inter alia*, that **"The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today" (President Barack Obama, January 21, 2009), and "Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged."** (Department of Justice, Office of Information Policy, OIP Guidance, "Creating a 'New Era of Open Government'").

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"Validator" as used in State's (and, according to other FOIA productions, other agencies') discussions, refers to unpaid outside voices which "provide an onslaught of positive ads"[9] to support agency initiatives, and "write 'good news' op-eds" on request — and also "assist with the inside game". They are "folks who will be supportive", who will repeat talking points ("TPs") (as in, "we need the very best TPs for the heads up calls we will make", "help…develop statements" in support, and "do events".[10]

State Department use of the term "validators" in the context of the prior administration's stance on the Paris climate treaty referred to parties who write about arranging for (these are State Department descriptions) Green Groups, "China hands/national security luminaries", Business, Diplomatic, Islands, "Climate Policy/commentators" to promote the administration stance on Paris, for "the rollout/outreach plan"; parties to produce "pretty good stories" by pushing said talking points, as they are the "experts media may call on for stories", "post" on issue-specific blogs, issue "statements", not just statements but "pretty awesome" statements, and "write a "good news op-ed to follow up on his gloomy one in the WSJ from [August 2015]".

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[9] As in, "There's going to sic] an onslaught of positive ads coming from a variety of NGOs this week. Let me know if there is anything we can do to assist with the inside game". December 4, 2011 email from Clean Energy Group (CEG) lobbyist Michael J. Bradley to EPA associate administrator for the U.S. Environmental Protection Agency's Office of Policy Michael Goo. Request No. EPA-HQ-2015-008156. Then-Administrator Lisa Jackson suggested CEG as EPA's "industry validator" for its New Source Performance Rules for greenhouse gases, March 21, 2012, email from Ms. Jackson using the pseudonym "Richard Windsor" to Goo and other EPA colleagues, Subject, "A Few Updates Needed". Request No. HQ-FOI-01268-12. "Validators'" identities are routinely released by agencies, including in these examples from EPA.

[10] Requester merely cites those exemplars with which he has personal familiarity, in EPA request nos., HQ-FOI-01268-12, HQ-FOI-01052-12, HQ-FOI-01058-12, HQ-2014-007293, EPA-HQ-2015-008156.

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Exemption 5 protects documents shielded by the deliberative process privilege. *N.L.R.B. V. Sears, Roebuck & Co*., 421 U.S. 132, 149-50 (1975). To justify exemption under the deliberative process privilege, "the government must show that, in the context in which the materials [were] used, the documents [were] both predecisional and deliberative." *City of Virginia Beach*, 995 F.2d at 1253 (internal quotation marks and citation omitted). Further, In *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 598 (S.Ct. 1957), the Supreme Court noted that Exemption 6 "[was] intended to cover detailed Government records on an individual which can be identified as applying to that individual." 456 U.S. 595 at 602.

Under the "working law" doctrine, names which were ultimately included in a final list of climate validators reflect the agency's "effective law and policy," to which Exemption 5 does not apply. State Department productions of public records affirm that these discussions of Paris "validators" do not offer hypothetical lists, but that these were in fact parties contacted by the State Department as validators, many of whose public "validation" efforts State congratulates itself over about in subsequent correspondence.

Although Exemption 6 has been held to apply to "the names of Government employees," no judicial precedent extends its protections to the names of private individuals. Rather, Exemption 6 was written to protect "confidential personal data usually included in a personnel file;" the language "similar files" was included to ensure that confidential personal data stored elsewhere would not be improperly disclosed. *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976). Such individuals as those who enlisted to serve as "validators" for an administration's

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political position on a matter of key importance are neither "detailed Government records" nor "confidential personal data usually included in a personnel file," Exemption 6 does not apply.

All of which is to say that although the identities of industry and advocacy voices teaming up with an administration to promote an aligned agenda may be embarrassing, there is no reason that they are inherently privileged, nor are they typically treated as such.

We note that even in the event such correspondence includes information properly subject to e.g., deliberative process exemption, the public interests involved informs a conclusion that State should exercise its discretion under FOIA exemption "b(5)" and release information that is not subject to mandatory withholding and belongs to the public, consistent with President Obama's and former Attorney General Eric Holder's numerous instructions to do so (see *infra*).

Nonetheless, if your office takes the position that any portion of the requested records is exempt from disclosure, please inform us of the basis of any partial denials or redactions, and provide the rest of the record, all reasonably segregable, non-exempt information, withholding only that information that is properly exempt under one of FOIA's nine exemptions. *See* 5 U.S.C. §552(b). We remind the State Department that it cannot withhold entire documents rather than producing their "factual content" and redacting any information that is legally withheld under FOIA exemptions. As the D.C. Circuit Court of Appeals noted, the agency must "describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents." *King v. Department of Justice*, 830 F.2d 210, at 254 n.28 (D.C. Cir. 1987).

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If it is your position that a document contains non-exempt segments and that those nonexempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Department of the Air Force*, 455 F. 2d 242, 261. Further, we request that you provide us with an index all such withheld documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA" pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959(D.C. Cir. 1979), and "describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information." *King v. Department of Justice*, 830 F.2d at 223-24.

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

Satisfying this request contemplates providing copies of documents, in electronic format if you possess them as such; as the requested records are electronic mail, this should be all responsive records.

Please provide responsive documents in complete form. Requesters have narrowed their request to documents relating to specific items of heightened public interest, excluded a category of potentially responsive records ("press clippings") likely to be, relatively, voluminous, and note

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that State's administrative burden in producing records will be minimized if the Department produces these documents without unnecessary delay.

Requests in the Alternative for Fee Waiver

This discussion is detailed as a result of requesters' experience (and that of others[11]) with agencies improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records. Both requesters regularly obtain fee waivers. **The following discussion, to the conclusion of this document, is only relevant if the State Department questions our fee waiver; in the event the State Department agrees to our fee waiver it may ignore this discussion**.

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

CEI's principal request for waiver or reduction of all costs is pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester").

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[11] *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. *See also* William D. Cohan, Stonewalled by the S.E.C., May 13, 2010, http://opinionator.blogs.nytimes.com/2010/05/13/stonewalled-by-the-s-e-c/?_r=0.

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Neither requester seeks these records for a commercial purpose. Requesters are organized and recognized by the Internal Revenue Service as 501(c)3 educational organizations. As such, requesters 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 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).

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)

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(fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); S. COMM. ON THE JUDICIARY, AMENDING the FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).[12]

"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).

Requesters' ability — as well as many nonprofit organizations, educational institutions and news media that 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

[12] 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*.

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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 Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986).

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

Congress enacted FOIA clearly intending that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." *Ettlinger v. F.B.I.*, 596 F. Supp. 867, 872 (D. Mass. 1984), citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Id.* at 874.

Therefore, "insofar as… [agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information." *Better Gov't v.*

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State (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that "'chill' the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage." *Id*. As such, agency implementing regulations may not facially or in practice interpret FOIA's fee waiver provision in a way creating a fee barrier for Requester.

Courts have noted FOIA's legislative history to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286 (9th Cir. 1987).

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

1) **The subject matter of the requested records specifically concerns identifiable operations or activities of the government**.This is inescapable as per the above representations and well-understood facts about the relevant events. Potentially responsive records reflect State's reinterpretation of past agreements and Senate instructions regarding climate agreements.

For the aforementioned reasons, potentially responsive records unquestionably reflect "identifiable operations or activities of the government" with a connection that is direct and clear, not remote.

The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case.

2) **Requester intends to broadly disseminate responsive information**. As demonstrated herein requester has both the intent and the ability to convey any information obtained through this request to the public.[13]

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[13] Examples include *e.g.*, Stephen Dinan, *Trump advisors propose declaring Obama's climate deal a 'treaty', sending it to Senate to die*, WASHINGTON TIMES, Apr. 26, 2017, at A1; Jack Fitzpatrick, *Treaty or Not? Debate Over Paris Climate Accord Revives Key Question*, MORNING CONSULT, April 27, 2017; Stephen Dinan, *Do Text Messages from Feds Belong on Record? EPA's Chief's Case Opens Legal Battle*, WASHINGTON TIMES, Apr. 30, 2011, at A1; Peter Foster, *More Good News for Keystone*, NATIONAL POST, Jan. 9, 2013, at 11; Juliet Eilperin, *EPA IG Audits Jackson's Private E-mail Account*, WASHINGTON POST, Dec. 19, 2013, at A6; James Gill, *From the Same Town, But Universes Apart*, NEW ORLEANS TIMES-PICAYUNE, Jan. 2, 2013, at B1; Kyle Smith, *Hide & Sneak*, NEW YORK POST, Jan. 6, 2013, at 23; Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, WASHINGTON TIMES, Apr. 9, 2013, at A4; Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, WASHINGTON TIMES, Apr. 2, 2013, at A1, Dinan, "Researcher: NASA hiding climate data", WASHINGTON TIMES, Dec. 3, 2009, at A1, Dawn Reeves, *EPA Emails Reveal Push To End State Air Group's Contract Over Conflict*, INSIDE EPA, Aug. 14, 2013. *See also*, Christopher C. Horner, *EPA administrators invent excuses to avoid transparency*, WASHINGTON EXAMINER, Nov. 25, 2012, http://washingtonexaminer.com/epa-administrators-invent-excuses-to-avoid-transparency/article/2514301#.ULOaPYf7L9U; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013, http://www.breitbart.com/Big-Government/2013/01/16/What-s-in-a-Name-EPA-Goes-Full-Bunker-in-Richard-Windsor-EMail-Scandal; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013; *Nothing to See Here! Shredding Parties and Hiding the Decline in Taxpayer-Funded Science*, WATTS UP WITH THAT, Feb. 17, 2014; *The Collusion of the Climate Crowd*, WASHINGTON EXAMINER, Jul. 6, 2012; *Obama Admin Hides Official IPCC Correspondence from FOIA Using Former Romney Adviser John Holdren*, BREITBART, Oct. 17, 2013; *Most Secretive Ever? Seeing Through 'Transparent' Obama's Tricks,* WASHINGTON EXAMINER, Nov. 3, 2011; *NOAA releases tranche of FOIA documents -- 2 years later*, WATTS UP WITH THAT (two-time "science blog of the year"), Aug. 21, 2012; *EPA Doc Dump: Heavily redacted emails of former chief released*, BREITBART, Feb. 22, 2013; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013, *DOJ to release secret emails*, BREITBART, Jan. 16, 2013; *EPA administrators invent excuses to avoid transparency*, WASHINGTON EXAMINER, Nov. 25, 2012; *Chris Horner responds to the EPA statement today on the question of them running a black-ops program*, WATTS UP WITH THAT, Nov. 20, 2012; *FOIA and the coming US Carbon Tax via the US Treasury*, WATTS UP WITH THAT, Mar. 22, 2013; *Treasury evasions on carbon tax email mock Obama's 'most transparent administration ever' claim*, WASHINGTON EXAMINER, Oct. 25, 2013.

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CEI regularly publishes works and are regularly cited in newspapers and trade and political publications, representing a practice of broadly disseminating public information obtained under FOIA, which practice requester intends to continue in the instant matter.

3) **Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request.** Requesters intend to broadly disseminate responsive information. The requested records have an informative value and are "likely to contribute to an understanding of Federal government operations or activities," just as have numerous of requester's other FOIA requests, and just as with those requests this issue is of significant and increasing public interest. That interest will surely escalate dramatically this Autumn with resumption of the annual event, the Conference of the Parties to the UN Framework Convention, designed to raise alarm about catastrophic man-made climate change in an effort to compel U.S. participation in a successor treaty, in this case the Paris agreement. This is not subject to reasonable dispute.

However, **the Department of Justice's Freedom of Information Act Guide makes it clear that, in the DoJ's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain**. It cannot be denied that, to the extent the requested information is available to any parties, this is information held only by State (or NSC), is therefore clear that the requested records are "likely to contribute" to an understanding of your agency's decisions because they are

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not otherwise accessible other than through a FOIA request.

Thus, disclosure and dissemination of this information will facilitate meaningful public participation in the policy debate, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of your agency's above-described reinterpretation of climate agreements.

4) **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.** Requesters have an established practice of utilizing FOIA to educate the public, lawmakers, and news media about the government’s operations and, in particular and as illustrated in detail above, have brought to light important information about policies grounded in energy and environmental policy. CEI intends to continue this effort in the context of and using records responsive to this request, as debate, analysis and publication continue on these regulations.

CEI is dedicated to and have documented records of promoting the public interest, advocating sensible policies to protect human health and the environment, broadly disseminating public information, and routinely receiving fee waivers under FOIA.

With a demonstrated interest and record in the relevant policy debates and expertise in the subject of energy- and environment-related regulatory policies, requesters unquestionably have 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.”

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5) **The disclosure will contribute "significantly" to public understanding of government operations or activities**. *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is "likely to contribute" to an understanding of specific government operations or activities*.

There is no publicly available information on the discussions this request seeks. Because there is no such information or any such analysis in existence, any increase in public understanding of this issue is a significant contribution to this increasingly important issue as regards the operation and function of government.

Because requesters have no commercial interests of any kind, disclosure can only result in serving the needs of the public interest.

Other Considerations

State must consider four conditions to determine whether a request is in the public interest and uses four factors in making that determination. We have addressed all factors, but add the following additional considerations relevant to factors 2 and 4.

Factor 2

FOIA requires the Requester to show that the disclosure is likely to contribute to an understanding of government operations or activities. Under this factor, agencies assess the "informative value" of the records and demands "an increase" in understanding. This factor 2 has a fatal logical defect. Agencies offer no authority for requiring an "increase" in understanding, nor does it provide a metric by which to measure an increase. And, agencies offer no criteria by

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which to determine under what conditions information that is in the records and is already somewhere in the public domain would be likely to contribute to public understanding.

Agencies typically argue that they evaluate Factor 2 (and all others) on a case by case basis. In doing so, it "must pour 'some definitional content' into a vague statutory term by 'defining the criteria it is applying.'" *PDK Labs. v. United States DEA*, 438 F.3d 1184, 1194, (D.C. Cir. 2006)(citations omitted). "To refuse to define the criteria it is applying is equivalent to simply saying no without explanation." *Id*. "A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush." *Paralyzed Veterans of Am. V. D.C. Arena LP*, 117 F. 3d 579, 584 (D.C. Cir. 1997). Agency failure to pour any definitional content into the term "increase" does not even rise to the level of mush.

Despite the lack of any metric on what would constitute a sufficient increase in public understanding, requesters meet the requirement because for the information we seek there is no public information. The information we seek will be used to increase the public's understanding of the above-described proceedings. There is no public information available on this issue Any information on that would increase the public's knowledge.

The public has no other means to secure information on these government operations other than through the Freedom of Information Act. Absent access to the public record, the public cannot learn about these governmental activities and operations.

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Factor 4

Agencies requires requesters to show how the disclosure is likely to contribute significantly to public understanding of government operations or activities.

Once again, we note that agencies have not provided any definitional content into the vague statutory term "significantly," offering no criteria or metric by which to measure the significance of the contribution to public understanding CEI will provide. Nevertheless, as previously explained, the public has no source of information on the issue. Any increase in public understanding of this issue is a significant contribution to this highly visible and politically important issue as regards the operation and function of government, especially at a time when agency transparency is (rightly) so controversial.

As such, requester has stated "with reasonable specificity that their request pertains to operations of the government," that they intend to broadly disseminate responsive records. "[T]he informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

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We note that federal agencies regularly waive requester CEI's fees for substantial productions arising from requests expressing the same intention, even using the same language as used in the instant request.[14] This request is unlikely to yield substantial document production.

For all of these reasons, requesters' fees should be waived in the instant matter.

Alternately, CEI qualifies as a media organization for purposes of fee waiver

The provisions for determining whether a requesting party is a representative of the news media, and the "significant public interest" provision, are not mutually exclusive. Again, as CEI is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event State refuses to waive our fees under the "significant public interest" test, which we would then appeal while requesting State proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)("fees shall be limited to reasonable standard charges for document

[14] *See, e.g*., no fees required by other agencies for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language include: **DoI** OS-2012-00113, OS-2012-00124, OS-2012-00172, FWS-2012-00380, BLM-2014-00004, BLM-2012-016, BLM: EFTS 2012-00264, CASO 2012-00278, NVSO 2012-00277; **NOAA** 2013-001089, 2013-000297, 2013-000298, 2010-0199, and "Peterson-Stocker letter" FOIA (August 6, 2012 request, no tracking number assigned, records produced); **DoL** (689053, 689056, 691856 (all from 2012)); **FERC** 14-10; **DoE** HQ-2010-01442-F, 2010-00825-F, HQ-2011-01846, HQ-2012-00351-F, HQ-2014-00161-F, HQ-2010-0096-F, GO-09-060, GO-12-185, HQ-2012-00707-F; **NSF** (10-141); **OSTP** 12-21, 12-43, 12-45, 14-02.; **EPA** HQ-2013-000606, HQ-FOI-01087-12, HQ-2013-001343, R6-2013-00361, R6-2013-00362, R6-2013-00363, HQ-FOI-01312-10, R9-2013-007631, HQ-FOI-01268-12, HQ-FOI-01269, HQ-FOI-01270-12, HQ-2014-006434. These latter examples involve EPA either waiving fees, not addressing the fee issue, or denying fee waiver but dropping that posture when requester sued.

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duplication when records are not sought for commercial use and the request is made by.... a representative of the news media…").

However, we note that as documents (emails) are requested and available electronically, there are no copying costs.

Requester repeats by reference the discussion as to its publishing practices, reach and intentions to broadly disseminate, all in fulfillment of CEI's mission, set forth *supra*.

Also, the federal government has already acknowledged that CEI qualifies as a media organization under FOIA.[15]

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

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

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

As the court in *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) noted, this test is met not only by outlets in the business of publishing such as newspapers; instead, citing to the *National Security Archives* court, it noted one key fact

[15] *See e.g.*, Treasury FOIA Nos. 2012-08-053, 2012-08-054.

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is determinative, the "*plan to act, in essence, as a publisher*, both in print and other media." *EPIC v. DOD,* 241 F.Supp.2d at 10 (*emphases* added). "In short, the court of appeals in National Security Archive held that '[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.'" *Id*. at 11. *See also, Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989).

For these reasons, requester CEI 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 EPIC v. Dep't of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, particularly after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format, so there should be no costs.

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Conclusion

We expect State to release within the statutory period all responsive records and any segregable portions of responsive records containing properly exempt information, to disclose records possibly subject to exemptions to the maximum extent permitted by FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears").

We expect all aspects of this request including the search for responsive records be processed free from conflict of interest. We request State provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). State must at least inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires State to immediately notify CEI with a particularized and substantive determination, and of its determination and its reasoning, as well as CEI's right to appeal; further, FOIA's unusual circumstances safety valve to

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extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013). *See also*, *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records, such that the agency furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform State of our intention to protect our appellate rights on this matter at the earliest date should State not comply with FOIA per, *e.g.*, *CREW v. Fed. Election Comm'n*, 711 F.3d 180 (D.C. Cir. 2013).

If you have any questions please do not hesitate to contact the undersigned. We look forward to your timely response.

Respectfully submitted,

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