



Environmental Law Center  
American Tradition Institute

## REQUEST UNDER THE FREEDOM OF INFORMATION ACT

April 25, 2013

National Freedom of Information Office  
U.S. EPA  
FOIA and Privacy Branch  
1200 Pennsylvania Avenue, N.W. (2822T)  
Washington, DC 20460

**RE: FOIA Request – Certain Agency Records re: “Battelle”, “AAPCA”**

**BY ELECTRONIC MAIL:** [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

National Freedom of Information Officer,

On behalf of the American Tradition Institute (ATI), please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq.<sup>1</sup> ATI is a non-profit public policy institute organized under section 501(c)3 of the tax code and with research, media and other 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.

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<sup>1</sup> We choose to not file this via FOIAOnline because, as we have noted to FOIAOnline tech support and in recent requests to no useful effect, that system does not function with Safari web browser or with the recommended web browsers with (at least the undersigned’s two) Mac computers, impeding requester’s ability to attach additional discussion and limiting discussion of, e.g., fee waiver, to two thousand characters per field.

**Please provide us, within twenty working days,<sup>2</sup> copies of all a) Agency electronic mail, instant messages, text messages, b) sent to or from the Headquarters Office of Air and Radiation and/or Office of the Administrator, c) dated, sent or received from January 2, 2013 to the date you process this request, inclusive, d) that use “AAPCA” and “Battelle”.**

The described records are Agency records on Agency computers or servers, that were sent or received by Agency personnel. This request contemplates copies of documents in electronic format if you possess them as such; by their nature these records all should be held electronically.

#### Background to this Records Request

We are interested in EPA’s discussions of the group of seventeen states that formed in January called the Association of Air Pollution Control Agencies (or AAPCA), a group [formed](#) to exchange technical information regarding state-level compliance with EPA Clear Air Act regulations—technical information that is apparently not well-received within the Agency—and EPA overtures to an AAPCA contractor(s) which might be vulnerable to pressure from EPA to terminate those relationships for fear of jeopardizing current or possible future EPA contacts.

This is the same concern that we understand is shared by, e.g., the Texas Department of Environmental Quality (TCEQ), and expressed to EPA in a recent letter to Assistant Administrator for Air and Radiation Gina McCarthy.

Specifically, TCEQ questioned “EPA inform[ing] Battelle that Battelle would be required to terminate its contract with EPA or jeopardize other already established and future contracts Battelle has with EPA.” It is our understanding based on information and belief that the threat

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<sup>2</sup> See *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, --- F.3d ---, 2013 WL 1296289 (C.A.D.C. ), April 2, 2013, and discussion at page 18, *infra*.

implicitly pertained to all of Battelle's work for EPA. According to USASpending.gov, Battelle has been [awarded \\$14 million in grants and contracts from EPA in FY2012-13](#), and [\\$239 million since 2005](#). This reliance on federal government contracts would explain an EPA assumption such pressure would work which, we also understand, it seems to have, as we are informed that Battelle dissolved the contract with AAPCA in March, 2013 after EPA asserted this position.

**EPA Owes ATI a Reasonable Search, Which Includes a Non-Conflicted Search**

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde 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).

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, 89<sup>th</sup> Cong., 2<sup>nd</sup> 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.*

A search must be “reasonably calculated to uncover all relevant documents.” *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is “reasonable,” courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999)

(“reasonableness” is assessed “consistent with congressional intent tilting the scale in favor of disclosure”).

The reasonableness of the search activity is determined ad hoc but there are rules, including that the search must be conducted free from conflict of interest. (In searching for relevant documents, agencies have a duty “to ensure that abuse and conflicts of interest do not occur.” *Cuban v. S.E.C.*, 744 F.Supp.2d 60, 72 (D.D.C. 2010). See also *Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at \*12, \*24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for the fact that it “was aware that employee had withheld records as ‘personal’ but did not require that ‘he submit those records for review’ by the Department.)).

**For these reasons ATI expects this search be conducted free from conflict of interest. Conflicted parties include the National FOIA Officer Larry Gottesman, whom ATI has informed the Agency on several recent occasions is and has proved himself to be conflicted from reviewing requests by the undersigned due to undersigned having named him in litigation filed by ATI for improper behavior,<sup>3</sup> which Mr. Gottesman followed by a spate of apparently retaliatory actions in his official capacity.** Mr. Gottseman should have no role, formal or informal, in responding to any aspect of this request.

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<sup>3</sup> Re: HQ-FOI-0152-12 and HQ-FOI-0158-12, filed as *American Tradition Institute v. EPA*, CV: 13-112 U.S. District Court for the District of Columbia. This filing also led to unfavorable press coverage (see, e.g., “Public interest group sues EPA for FOIA delays, claims agency ordered officials to ignore requests”, *Washington Examiner*, January 28, 2013, <http://washingtonexaminer.com/public-interest-group-sues-epa-for-foia-delays-claims-agency-ordered-officials-to-ignore-requests/article/2519881>), and was followed by a series of facially improper fee waiver denials to undersigned, by Mr. Gottesman, who regardless should not have participated in the review of these matters.

## 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.<sup>4</sup>**

**1) Disclosure would substantially contribute to the public at large's understanding of governmental operations or activities on a matter of clear public interest**

ATI requests 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).

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[ ]”). With no possible commercial interest in these records, an assessment of that non-existent interest is not required in any balancing test with the public’s interest.

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<sup>4</sup> 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>.

As a non-commercial requester, ATI 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). Specifically, 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)).<sup>5</sup>

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*.

Given this, “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.

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<sup>5</sup> 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.*

“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 to utilize FOIA -- as well as many nonprofit organizations, educational institutions and news media who will benefit from disclosure -- depends on its 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 Ass’n v. Department of 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.” That is true in the instant matter as well.

Indeed, recent EPA assertions to undersigned in relation to various recent FOIA requests, both directly and through counsel reflecting its pique over the robustness of said FOIAing efforts (and subsequent, toned-down restatements of this acknowledgement), prove too much in the context of EPA now serially denying fee waiver requests, given that it reaffirms that ATI is precisely the sort of group the courts have identified in establishing this precedent.

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 relate to credible allegations made by a state regulatory body of facially improper behavior by EPA to intimidate private parties from working with groups opposing EPA's agenda. As such, the request for records possibly relating to this is relevant to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration, ever." This spawned widespread media coverage and then of the reality of the administration's transparency efforts, as well as numerous transparency-oriented groups reporting on this performance, to further media coverage (see, e.g., an internet search of "study Obama transparency").

Particularly after Requester's, and undersigned counsel's, recent FOIA efforts and related dissemination of government information, the public, media and congressional oversight bodies

are very interested in how widespread are the violations of this pledge of unprecedented transparency.

Potentially responsive records reflecting Agency consideration of such intimidation tactics described, *supra*, as one of several means of advancing its regulatory agenda unquestionably reflect “identifiable operations or activities of the government.” 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.

**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.** The disclosure of the requested documents have an informative value and are “likely to contribute to an understanding of Federal government operations or activities” just as did various studies of public records reflecting on the administration’s transparency, returned in the above-cited search “study obama transparency”, and the public records themselves that were released to those groups, contributed to public understanding of specific government operations or activities: this issue is of significant and increasing public interest, in large part due to the administration’s own promises and continuing claims, and revelations by outside groups accessing public records. To deny this and the substantial media and public interest, across the board from Fox News to PBS and The Atlantic, would be arbitrary and capricious, as would be denial that shedding light on this facially troubling issue would further and significantly inform the public.

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.** There is no reasonable claim to deny that, to the extent the requested information is available in the public domain, it is only in the form of correspondence such as the above-cited TCEQ letter to EPA. Further, however, **this aspect of the important public debate, of disparate treatment, has yet to be explored publicly.** It is therefore clear that the requested records are “likely to contribute” to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

**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.** ATI intends to post these records for public scrutiny and otherwise to broadly disseminate the information it obtains under this request by the means described, herein. ATI has received fee waivers under FOIA for its efforts to obtain information as part of its efforts to promote the public interest by advocating sensible policies to protect human health and the environment (until recently, but even then on appeal), due to its status as a 501(c)3 organization with an intention and ability to disseminate public information. Further, as demonstrated herein and in numerous instances of newsworthy FOIA activity, many of which involve EPA and of which EPA has made clear it is acutely aware, requester and particularly undersigned counsel have 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,<sup>6</sup> specifically in recent months relating to transparency.

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. Those activities are in fulfillment of ATI'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) ATI's website; (d) other electronic journals, including blogs to which our professionals contribute; (e) local and syndicated radio programs dedicated to discussing public policy; (f) 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.

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<sup>6</sup> In addition to the coverage of ATI's recent FOIA suit against EPA after learning of an order to perform no work on two requests also involving EPA relationships with key pressure groups, 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)), see also requests by the undersigned on behalf of a similarly situated party, the Competitive Enterprise Institute (CEI) of the Departments of Treasury (see, e.g., [http://www.cbsnews.com/8301-504383\\_162-5314040-504383.html](http://www.cbsnews.com/8301-504383_162-5314040-504383.html), [http://www.cbsnews.com/8301-504383\\_162-5322108-504383.html](http://www.cbsnews.com/8301-504383_162-5322108-504383.html)), and 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>), and 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.

Requester also intends 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”).

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

**The disclosure will contribute “significantly” to public understanding of government operations or activities.** *We repeat 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.*

After disclosure of these records, the public’s understanding of this unexplored practice of intimidating private contractors as one element in advancing a political, regulatory agenda, and the now highly controversial claims of executive branch and administration transparency, will inherently 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).

2) **Alternately, ATI 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 ATI 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 EPA deviates from prior practice on similar requests and refuses to waive our fees under the “significant public interest” test, which we will then appeal while requesting EPA 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 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).

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

Requester repeats by reference the discussion as to its publishing practices, reach and intentions all in fulfillment of ATI’s mission from pages 13-15, *supra*.

Government information in the form of Agency records 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 particularly as controversial as the credibly

alleged behavior at the core of this request, or as the Supreme Court once noted, what their government is up to.

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 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, any fees charged must be limited to duplication costs. The records requested are available electronically, as such, there are no duplication costs other than the cost of a compact disc(s).

In the event one or both requests for waiver or reduction of costs is denied, please notify the undersigned in advance if the anticipated costs exceed \$100.00.

### **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.

We request the agency 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). EPA must at least to 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 EPA to immediately notify ATI with a particularized and substantive determination, and of its determination and its reasoning, as well as ATI's right to appeal; further, FOIA's unusual circumstances safety valve to 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*, --- F.3d ----, 2013 WL 1296289 (C.A.D.C. ), April 2, 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 as soon as they are identified to my attention at:

1489 Kinross Lane  
Keswick, VA 22947

If you have any questions, or would like to discuss this matter further, don't hesitate to contact me by phone at (202) 262-4458 or email at [chris.horner@atinstitute.org](mailto:chris.horner@atinstitute.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Horner", written over a light blue horizontal line.

Christopher C. Horner  
Director of Litigation  
American Tradition Institute  
[chris.horner@atinstitute.org](mailto:chris.horner@atinstitute.org)  
202.262.4458 (M)