The Free Market Environmental Law Clinic

REQUEST UNDER THE FREEDOM OF INFORMATION ACT

August 16, 2013

Attn: Cindy Blacker
NSA FOIA Requester Service Center/DJ4
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Telephone: (301) 688-6527
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BY ELECTRONIC MAIL: foiarsc@nsa.gov

Re: Request under the Freedom of Information Act -- Certain Agency Records, Telephony Metadata for Lisa P. Jackson's Verizon account

To NSA's FOIA Office,

On behalf of the American Tradition Institute (ATI), and the Free Market Environmental Law Clinic (ELC) as co-requester, please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*. Both entities are non-profit public policy and/or legal institutes 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 metadata (duration and time of the communication, sender and recipient, *etc*.) from Verizon voice and/or data accounts in NSA's possession[2] for the phone/PDA/text/instant message and/or email account(s) held by Lisa P. Jackson. To properly identify the individual at issue in this matter, one such email account associated with Ms. Jackson's Verizon account and which was used to conduct public business[3] is LisaPJackson@Verizon.net. Due to the dates of this account's activity we expect the telephone account likely carries an area code assigned to Washington, DC; however, it is possible it bears one of the New Jersey area codes.

Background to the Request and the Relevant Public Interest

Ms. Jackson is the former Administrator of the Environmental Protection Agency (EPA). A FOIA request revealed that Ms. Jackson used an EPA.gov email in a false identity of "Richard Windsor" for certain official correspondence and who also, ELC counsel recently learned from public records, used her Verizon email and a certain other (ATT) Blackberry email address for EPA-related correspondence, all in violation of federal law and policy.

When NSA made the decision to obtain information on Verizon customers not due to any particular suspicion or as part of any law enforcement action, it determined that any privacy

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[1] *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion at pages 23-24, *infra*.

[2] *See, e.g.*, "Foreign Intelligence Surveillance Court Renews Authority to Collect Telephony Metadata", Friday, July 19, 2013, http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/898-foreign-intelligence-surveillance-court-renews-authority-to-collect-telephony-metadata.

[3] *See* Stephen Dinan, "Sunshine law gets cloudy when federal officials take email home," *Washington Times*, August 13, 2013, http://www.washingtontimes.com/news/2013/aug/13/sunshine-law-gets-cloudy-when-federal-officials-ta/?utm_source=RSS_Feed&utm_medium=RSS. We are also aware that Ms. Jackson conducted Agency business on at least one separate Blackberry email account.

concerns were outweighed by the public's interest in NSA possessing such records. One necessary consideration was that, by obtaining these records, NSA made them "agency records" under FOIA, and thereby subject to release barring the legitimate application of one of FOIA's nine exemptions (numerous of which are not mandatory, but discretionary). FOIA, as you are aware, has the broadest definition of the term "records" in relevant federal recordkeeping and disclosure statutory regimes.[4] We also note that Verizon asserts Ms. Jackson would have agreed to such sharing as part of the privacy clause in her customer agreement.[5] Further, the fact that much of the information responsive to this request is inherently, by law identifies "agency records" subject to FOIA, whether NSA ever obtained it or not, if created in a way to evade FOIA, demonstrates the presumption of disclosure that should accompany them.

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[4] For example, EPA acknowledges on its website that "[t]he definition of a record under the Freedom of Information Act (FOIA) is broader than the definition under the Federal Records Act." Environmental Protection Agency, "What Is a Federal Record?" http://www.epa.gov/records/tools/toolkits/procedures/part2.htm. *See also* 44 U.S.C. § 3301 (2013).
Further,

> In accordance with the Federal Records Act and guidance from the D.C. Circuit, federal agencies must preserve e-mail messages if they are: "made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them."

Letter of January 28, 2013 from Darrell Issa, Chairman, Oversight and Government Reform, and David Vitter, Ranking Member, Environment and Public Works, to James B. Martin, Administrator, Region 8, U.S. Environmental Protection Agency, at 1-2 (letter available at http://wattsupwiththat.files.wordpress.com/2013/01/region-8-joint-letter-final-vitterissa-01292013-1.pdf; *Vitter, Issa Investigate EPA's Transparency Problem, More Suspicious E-Mail Accounts; EPA Region 8 Administrator Violates E-Mail Rule, Uses Private E-Mail Accounts to Conduct Official Business*, State News Service, January 29, 2013 (publishing text of the letter) (available in Westlaw Allnews database at 1/29/13 States News Serv. 00:00:00), citing *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1278 (D.C. Cir. 1993).

[5] *See*, *e.g.*, https://community.verizonwireless.com/thread/799872.

The public interest in these records as described, *infra*, is greater than NSA's interest in obtaining the specific records that were obtained not due to any particular suspicion or as part of any law enforcement action yet still over any privacy concerns. As such, we do not anticipate NSA claiming that, *e.g*., responsive records are exempt from production under FOIA's privacy exemption or the exemption for information compiled for law enforcement purposes. We refer NSA to the Department of Justice's Guide to FOIA addressing the proper scope of these two exemptions.[6]

As described in further detail, *infra*, we also note that the public interest in the records sought in this request is distinct from the public interest in others NSA obtained as part of its acquisition of individuals' telephony metadata, as it involves learning the extent that the individual used this account(s) for EPA-related emailing and texting (which is in violation of federal law and policy, although a requester need not demonstrate that the records would contain any particular evidence, such as of misconduct, *see Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir. 2003)). It involves an account(s) that ATI and ELC assert, from our experience and the experience of others including as determined by a federal court,[7] was likely not searched in response to FOIA requests for Ms. Jackson's EPA-related emails and texts, and created on

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[6] *See* http://www.justice.gov/oip/foia_guide09/exemption6.pdf and http://www.justice.gov/oip/foia_guide09/exemption7.pdf.

[7] *See, e.g.*, Memorandum Opinion (Royce C. Lamberth, R.C), pp. 6-7, in *Landmark Legal Foundation v. EPA*, D.D.C., CV 12-1726, August 14, 2013, available at http://landmarklegal.org/uploads/EPA%20Opinion%20in%20FOIA%20case.pdf.

non-official accounts for precisely the purpose of avoiding production under federal record-keeping and disclosure laws.[8]

As such, however, we note that ***EPA does not possess and does not claim ownership of records responsive to this request***. They are "agency records" by virtue of NSA obtaining them; the EPA-related aspect is merely further evidence of the strong public interest in their release.

NSA Owes ATI and ELC a Reasonable Search

FOIA requires a federal agency or department 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, 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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[8] *See also, e.g.*, Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform,, to Hon. Lisa Jackson, Vice President of Environmental Initiatives, Apple, Inc., and former Administrator, U.S. Envtl. Prot. Agency (August 15, 2013, http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=83a0e7cb-b869-e4c1-9b5e-1a2b94cf1367.

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 larger 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").)

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.

We understand that certain responsive information might fall under one of FOIA's discretionary exemptions. Regardless, pursuant to high-profile and repeated promises and instructions from the President and Attorney General (see, *infra*), we request NSA err on the side

of disclosure and not delay production of this information of great public interest through lengthy review processes to deliberate withholdings.

If NSA claims any records or portions thereof are exempt under one of FOIA's discretionary exemptions, we request you exercise that discretion and release them consistent with statements by the 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**. Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5." (Department of Justice, Office of Information Policy, OIP Guidance, "Creating a 'New Era of Open Government,'" emphasis added.)

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. 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).

If NSA chooses to exempt any responsive records under FOIA's privacy exemption, please also articulate the concern with privacy that applies here, by FOIA's standard, which did not apply when NSA elected to obtain these records simply to possess them or

for random screening of a sort, not due to any particular suspicion or as part of any specific law enforcement action and with the knowledge that records obtained by federal agencies become "agency records" under FOIA unless release is excluded under one of FOIA's nine exemptions.

We remind NSA it 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." *King v. Department of Justice*, 830 F.2d 210, at 254 n.28 (D.C. Cir. 1987).

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. Further, we request that you provide us with an index of those documents as required under V*aughn 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 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.

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 federal agencies improperly using denial of fee waivers to impose an economic barrier to or otherwise means to delay and deny access to public records, despite our history of regularly obtaining fee waivers. We are not alone in this experience.[9]

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

The information sought by ATI and ELC in this FOIA request will be used to better the public's understanding of NSA's data gathering but also the unfolding scandal involving senior administration officials using private email and other communications resources to conduct

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[9] *See* Feb. 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/aclufffeewvrfoialtr.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, Feb. 23, 2012, http://www.openthegovernment.org/node/3372.

official business. All of this involves agencies or their employees using taxpayer funding to support and/or advance conduct that is of significant interest to the public, that ultimately is not only paid for by the public, and thus the public has a right to know and understand what is occurring in terms of practice, but also in which the public has a demonstrable interest in terms of the potential outcomes of such practice, such as regulatory decision-making. Further, the public will see if there is a benefit to NSA's controversial metadata-gathering program in that it, e.g., served as a safety net when a former senior official(s) failed to comply with federal law and policy regarding use of private resources for, and preservation of, work-related correspondence.

We emphasize that **a 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).

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

The information sought in this request is not sought for a commercial purpose. Requesters are organized and recognized by the Internal Revenue Service as 501(c)3 educational organizations (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"). Neither group charges for copies of its reports. Information provided to ELC cannot result in any form of commercial gain to ELC. 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.

As non-commercial requesters, ATI and ELC are 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).

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); S. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).[10]

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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[10] 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 which 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.

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, pertaining to a controversial program of obtaining telephony metadata from citizens not on any suspicion or in pursuit of any particular law enforcement action, as well as to the extralegal use of non-official email and phone accounts for work-related correspondence by a former high-ranking administration official (in addition to a false identity to conduct certain official correspondence), directly relate to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration in history."[11] This transparency promise, in its serial incarnations, demanded and spawned widespread media coverage; thereafter, it demanded both widespread media coverage of the reality of the Administration's transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (see, *e.g.*, an internet search of "study Obama transparency").

Particularly after recent discoveries using FOIA and specifically those made by an individual also serving as counsel for ATI and ELC, related publicizing of certain federal agency

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[11] Jonathan Easley, Obama says his is 'most transparent administration' ever, THE HILL, Feb. 14, 2013, available at http://thehill.com/blogs/blog-briefing-room/news/283335-obama-this-is-the-most-transparent-administration-in-history.

record-management and electronic communication practices (including, particularly, Ms. Jackson's), and related other efforts to disseminate the information, the public, the media, and congressional oversight bodies are very interested in discovering just how widespread the flaunting of this pledge of unprecedented transparency as well as of federal law and policy is, and as such are particularly interested in the issue central to the present request. With the above-cited August 14, 2013, Memorandum Opinion and related Order by Judge Lamberth in the District Court for the District of Columbia, we note that this has also obtained the courts' interest.

This request, when satisfied, will further inform this ongoing public discussion.

Further, the documents in question will inform a discussion which has obtained focused legislative oversight attention. The Chairman of the House Oversight Committee and the Ranking Member on the Senate Committee on Environment and Public Works recently wrote to another now-former senior EPA official, then-Region 8 Administrator James Mr. Martin, expressing concern about his use of his non-official email account to conduct government business:

> We write to inquire about your use of Apple's me.com, a non-official e-mail account to conduct official business as the Region 8 Administrator for the Environmental Protection Agency. In particular, documents released pursuant to litigation recently obtained by the Committees confirm that you have used this non-official e-mail account to conduct official business. We are concerned that your use of the me.com e-mail account may be an attempt to circumvent the Federal Records Act, the Freedom of Information Act, and Congressional oversight. Accordingly, we are writing to request your cooperation as the Committees

investigate whether this is an isolated incident or symptomatic of a broader problem at EPA.[12]

The now-demonstrated broader practice is the subject of an EPA Inspector General inquiry.[13]

Also, ELC is engaged in a study on the operation of government, government ethics, and the degree to which (particularly) EPA follows its own rules and laws controlling its administrative activities. ELC's analysis will inform a discussion of EPA's compliance with the law including whether EPA does or does not appear to be following applicable laws.

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.

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[12] *See* Letter of January 28, 2013 from Darrell Issa, Chairman, Oversight and Government Reform, and David Vitter, Ranking Member, Environment and Public Works, to James B. Martin, Administrator, Region 8, U.S. Environmental Protection Agency, at 1 (letter available at http://wattsupwiththat.files.wordpress.com/2013/01/region-8-joint-letter-final-vitterissa-01292013-1.pdf; *Vitter, Issa Investigate EPA's Transparency Problem, More Suspicious E-Mail Accounts; EPA Region 8 Administrator Violates E-Mail Rule, Uses Private E-Mail Accounts to Conduct Official Business*, State News Service, January 29, 2013 (publishing text of the letter) (available in Westlaw Allnews database at 1/29/13 States News Serv. 00:00:00).

[13] Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Technology, to Hon. Arthur A. Elkins, Jr., Reg'l Adm'r, Inspector General, U.S. Envtl. Prot. Agency (Feb. 7, 2013); *see also* Memorandum from Carolyn Copper, Asst. Inspector General, Office of Program Evaluation, U.S. Envtl. Prot. Agency Office of Inspector General, to Malcolm D. Jackson, Asst. Adm'r and Chief Information Officer, Office of Environmental Information,. U.S. Envtl. Prot. Agency, *Notification of Evaluation of EPA's Freedom of Information Act Fee Waiver Process* (Jun. 19, 2013) *available at* http://www.epa.gov/oig/reports/notificationMemos/newStarts_06-19-13_FOIA_Fee_Waiver_Process.pdf.

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. ATI's and ELC's analysis will examine the degree to which EPA has succeeded in following laws regarding use of appropriated funds. The information sought is specifically targeted to that task. ATI and ELC have not found any other study for EPA that directly examines such compliance with the law. Citizens have a deep interest in proper usage of appropriated taxpayer dollars, particularly in light of growing public debt and budget deficits and claims that a reduction in the rate of growth of government spending, or surely even a decrease, will lead to all manner of catastrophic results; in short, the taxpaying public has a vested interest in knowing that the money being spent is the bare minimum that should reasonably be allocated to agencies and is being spent properly. The question that the information sought will help answer is whether EPA has properly spent its appropriated funds or misdirected them to unauthorized purposes. In the absence of this information, the public cannot know if EPA is following the law. Only this information that presumably NSA alone,possesses (as EPA did not obtain copies as required by federal law and policy), combined with an analysis of the kind ATI and ELC intend to conduct, will provide information on this subject.

Given the economic and social impact of the policies and activities embarked upon by EPA after Ms. Jackson's appointment to the position of Administrator, it is important for information relating to discussions Ms. Jackson had with those individuals in or outside of the

Agency in correspondence that by law and policy must be kept as part of the public record but which was not.

Further, given the tremendous public, media and congressional interest in and discussion over Ms. Jackson's decision to adopt a false identity for email correspondence, and the recent revelation of her using two private email accounts for EPA-related correspondence, in addition to the false-identity, the notion that disclosure will not significantly inform the public at large about operations or activities of government is facially absurd.

Instead, recent experience derived from related EPA email and Jackson-related FOIA disclosures cited above, makes plain that by disclosure and dissemination, this information will facilitate meaningful public participation in the decision-making process, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of your agency's decision-making process with regard to the high hazard sites.

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, this is information held only by NSA. It is therefore clear that the requested records are "likely to contribute" to an understanding of your agency's apparently random data gathering activities, including the possible benefit to the public

of obtaining records that EPA was bound by law and policy to obtain, but did not, because they are not otherwise accessible other than through a FOIA request *to NSA*.

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. ELC intends to present these records for public scrutiny and otherwise to broadly disseminate the information it obtains under this request by the means described, herein. ATI and ELC counsel have spent a great portion of their respective energies over the past two years promoting the public interest advocating sensible policies to protect human health and the environment, routinely receiving fee waivers under FOIA (until recently, but even then on appeal) for its ability to disseminate public information.

Further, as demonstrated herein and in the above litany of exemplars of newsworthy FOIA activity, requester and particularly ATI and ELC 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.[14]

Requesters also intend to disseminate the information gathered by this request via media appearances (ATI and ELC counsel appear regularly, to discuss related 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 foundational, institutional interests in and reputations for playing leading roles in the relevant policy debates and expertise in the subject of transparency, energy- and environment-related regulatory policies, the undersigned 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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[14] This involves ELC counsel's work relating not only to 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* see also requests by the undersigned on behalf of a similarly situated party, the Competitive Enterprise Institute (CEI) requests of the Departments of Treasury (s*ee, e.g*., http://www.cbsnews.com/8301-504383_162-5314040-504383.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), 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/), and 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 numerous others discussion of most of which is available online.

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*.

As previously explained, the public has no source of information on EPA's compliance with limitations on use of appropriated funds. The ELC study will provide on this unstudied area of government operations. Because there is no such analysis currently existent, 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.

Because ATI and ELC have no commercial interests of any kind, disclosure can only result in serving the needs of the public interest. ELC also satisfy this factor as a news media outlet.

As such, the requesters have 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, ELC qualify as media organizations 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 and ELC are non-commercial requesters, and are 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 NSA 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 NSA 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...").

However, we note that as documents are requested to be produced, and likely are available, electronically, there should be no copying costs.

Requesters repeat by reference the discussion as to their publishing practices, reach and intentions to broadly disseminate, all in fulfillment of ATI and ELC's missions, from pages 19-20, *supra*.

Government information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with Agency activities in this controversial area or, as the Supreme Court once noted, what their government is up to.

For these reasons, requesters qualify as "representatives 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 organizations that gathered information and published it in newsletters and otherwise for

general distribution qualified as representatives 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 and are requested in electronic format; as such, there are no duplication costs other than the cost of a compact disc(s).

CONCLUSION

We expect the agency to release within the statutory period of time all segregable portions of responsive records containing 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 NSA 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). NSA 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 NSA to immediately notify ATI and ELC with a particularized and substantive determination, and of its determination and its reasoning, as well as ATI's and ELC'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 CREW v. FEC*, 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 the attention of the requesters as soon as they are identified, preferably electronically, but *as necessary* in hard copy to our attention at the address below. We inform NSA of our intention to protect our appellate rights on this matter at the earliest date should NSA not comply with FOIA per, *e.g.*, *CREW v. FEC*.

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

Respectfully submitted,

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