The Free Market
Environmental Law Clinic

REQUEST UNDER THE FREEDOM OF INFORMATION ACT

August 22, 2013

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

RE: Request under the Freedom of Information Act – Certain Department Records Regarding the Recent Campaign by Organizing for America (OFA)

National Freedom of Information Officer,

On behalf of the American Tradition Institute (ATI), and the Free Market Environmental Law Clinic (ELC) as co-requester and ATI counsel, 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, which we intend for records responsive to the instant request, as well.

Please read the following request in the context of our interest in correspondence and other records relevant to events coordinated by OFA, and those participated in by administration officials, for example those held August 14, 2013, in Hartford, Connecticut, and Providence,

Rhode Island. Please provide us, within twenty working days,[1] copies of all records meeting the following description:

1) Any and all electronic or other correspondence dated from June 24, 2013, to the date you process this request, inclusive, sent or received by Special Envoy for Climate Change Todd Stern, Jonathan Pershing, or others, a) with any official, staff person, or representative of Organizing for Action ("OFA"), paid or unpaid, whatsoever, b) which references "OFA" or c) which references "Climate Action Coalition";
2) Any and all phone logs, notes from telephone conversations, voicemail messages, or records of any such calls from June 24, 2013, to the date you process this request, inclusive, sent, received, created or held by Special Envoy for Climate Change Todd Stern, Jonathan Pershing, or others, relating to the public events coordinated by OFA, and those participated in by administration officials, for example those held August 14, 2013, in Hartford, Connecticut, and Providence, Rhode Island.

For these purposes "records" means email (including any attachments), letters, memoranda, facsimiles, text messages, Sametime or Oracle or Office 360 or other instant messages, images, and/or other hard copy or electronic documents (we request all responsive records in electronic format, however).

We note our experience and the experience of others, including as recently determined by a federal court,[2] that Administration officials are regularly using non-official email accounts for official business-related correspondence, which accounts they then are not searching in response

[1] *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion at page 22, *infra*.
[2] *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.

to FOIA requests. As such, we emphasize that a reasonable search *must* also include any non-official email, text message or instant message account used for business-related correspondence as well as all official accounts, and that non-official accounts be searched in a non-conflicted fashion, meaning, at minimum, supervised by someone other than the Department of State employee/account holder.

The Department of State Owes ATI and ELC 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., 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*.

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.)).

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(see, *infra*) we request the Department of State err on the side of disclosure and not delay production of this information of great public interest through lengthy review processes to deliberate withholdings. This is particularly true for any recorded information, to which recording the parties must have agreed in advance and therefore about which they have no expectation of privacy.

If the Department of State 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'").

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).

We remind the Department of State 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 Department 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). 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).

For example, the Department of State must not withhold information which is not in fact truly antecedent to the adoption of an Department policy (*see Jordan v. Do*J, 591 F.2d 753, 774 (D.C. Cir. 1978)), but merely embarrassing or inconvenient to disclose. If the Department claims b5 for the requested information, it is in effect asserting that these represent *ex parte* communications; instead, we are sure this public engagement represents just that and is subject to release in full under FOIA.

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, without any deletions or other edits and with any appendices or attachments as the case may be.

Request for Fee Waiver

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 meetings and correspondence and possible coordination between the Department and nominally independent, non-coordinating special interest, political, or pressure groups with which it has a close working relationship pursuing a shared regulatory agenda. The particular group in question in this matter, OFA, is the subject of heightened public interest for its close relationships with the current administration and the possibility of coordinating with federal officials on promoting a shared agenda particularly as it involves the potential for politically-driven and campaign-associated actions undertaken by EPA, CEQ, and State.

Specifically, we seek information relating to apparent coordination between "Organizing for Action" and the federal executive branch. This group publicly insisted, in response to challenge, that it was not coordinating with federal officials of the current administration, in

violation of the law and its tax-exempt status. However, events indicated that this may not be the case. Instead, there is the appearance of coordination with a campaign on which the Administration also spent great sums of taxpayer dollars to promote this shared agenda.

Furthermore, President Obama has expressed that ratifying the international treaty to reduce carbon emissions is a priority for this Administration.[3] The Department of State is the arm of the federal executive branch charged with collaborating with international entities which would participate in such an agreement, and as such, the Department must have records relating to the President's agenda on climate change, particularly insofar as it relates to preparation for the 2015 Conference of the Parties to the United Nations Framework Convention on Climate Change in Paris, France. Releasing any records of this sort involving collaboration with OFA would benefit the public by enabling Americans to understand what impacts the decision-making of their government on a global stage.

We see that congressional oversight inquiries have been sent to CEQ and at least one state-level official asserting, *inter alia*, the appearance of certain "events, coordinated by the White House Council on Environmental Quality (CEQ), have coincidentally fallen in conjunction with the Obama political apparatus, Organizing for Action's (OFA) massive campaign this week against sitting Members of Congress whose views on climate change oppose those of the President."[4] The letter also referenced media reports that "OFA was selling quarterly meetings with the President in exchange for $500,000 donations," which the White House

[3] President Barack Obama, Remarks by the President on Climate Change at Georgetown University, Washington, D.C., Jun. 25, 2013, *available at* http://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change.

[4] *See* August 14, 2013 Letters from Hon. James Inhofe, Ranking Member, Subcomm. on Oversight, S. Comm. on Env't & Pub. Works, to Hon. NAncy Sutley, Chair, Council on Environmental Quality and to Hon. Curt Spalding, Administrator, Environmental Protection Agency (Massachussetts).

responded to by insisting on OFA's independence from the administration, and that it was not an extension thereof. The Department of State has a unique role in advancing the President's agenda for climate on an international level, and as such, we believe records depicting how the Department works with outside groups like OFA serve the public interest by demonstrating how foreign policy initiatives are tied to political actions.

Given the legal and policy implications and public interest to date,[5] and the fact that the White House has chosen to address the matter, agency information on these issues is plainly of public interest.

Additionally, these records, if produced, will shed light on the Department's compliance with its obligations to maintain such records of meetings and coordination, when they are recorded, as required by federal record-keeping and disclosure laws, such as the Presidential Records Act[6] (PRA) and the Federal Records Act[7] (FRA). Requesters are aware of the likelihood of these meetings and records existing due to the presence of senior Administration officials at the OFA events on August 14, 2013.[8]

Requested records are "agency records" under federal record-keeping and disclosure law, representing Department of State officials communicating with a group that engages in political activities, and may now be doing so void of independence from the federal government; as such, these records are of significant public interest for reasons including that their existence is not widely known, nor has the possible collaboration between the Department and OFA potentially

---

[5] *See, e.g.*, Lachlan Markay, *Van Hollen Denies Organizing for Action Engages in Campaign Activities*, THE WASHINGTON FREE BEACON, Aug. 21, 2013, http://freebeacon.com/van-hollen-denies-organizing-for-action-engages-in-campaign-activities/.

[6] *See* 44 U.S.C. § 2201.

[7] *See* 44 U.S.C. § 31.

[8] Jean Chemnick, *Inhofe threatens probe of Obama officials participating in 'clearly political' rallies*, ENERGY & ENVIRONMENT NEWS, Aug. 14, 2013, *available at* www.eenews.net/eenewspm/stories/1059986026/feed.

disclosed therein been made known to the American public. The release of the requested records will significantly benefit the public by increasing the availability of information, thereby enabling the American people to better understand what distinguishes the Administration's activities from those of OFA.

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 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 ATI and ELC cannot result in any form of commercial gain to ATI or 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)).[9]

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*.

[9] 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*.

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.

"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 the Department of State's relationship with an influential political group -- particularly one whose activism, *e.g*., promoting President Obama's climate agenda, does coincide with the Department's priorities -- would contribute significantly to public understanding of the operations or activities of the government about which information there is little other information in the public domain.

As such, release of these records also directly relates to high-level promises by the President of the United States and the Attorney General to be "the most transparent

administration in history."[10] This transparency promise, in its serial incarnations, demanded and spawned widespread media coverage, and then 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 requester's recent discoveries using FOIA, related publicizing of certain record-management and electronic communication practices within the Administration and related other efforts to disseminate the information, the public, media and congressional oversight bodies are very interested in how widespread are the violations of this pledge of unprecedented transparency and, particularly, in the issue central to the present request.

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

Further, ATI and ELC have conducted several studies on the operation of government, government ethics and the degree to which this Administration follows its own rules and laws controlling its administrative activities. For example, in reviewing EPA's document production under *ATI v. EPA*,[11] ATI and ELC are now engaged in an analysis of these relationships and transparency when it comes to groups with which the Administration has demonstrably close relationships pursuing a shared regulatory agenda. Interactions with a pressure group dedicated in large part to influencing and/or generating support for White House policy represents governmental operations or activities. On its face, therefore, information shedding light on this relationship satisfies FOIA's test.

---

[10] 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-themost-transparent-administration-in-history.

[11] 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.

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.

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 requested records have an informative value and are "likely to contribute to an understanding of Federal government operations or activities" in that they relate to and should shed light on the new issue, now the subject of media discourse and congressional oversight, of coordination between the Administration and an influential group with ties to the President. This is precisely the sort of transparency the President promised and in which the public has great interest, and was addressed in 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 heretofore unexplored aspect** of the record-keeping, disclosure and larger "transparency" controversy – coordination between politically favored non-profits and the

Administration -- 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, this is information held only by the Department of State. It is therefore clear that the requested records are "likely to contribute" to an understanding of the Department'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 and ELC intend 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, including through obtaining information from EPA, routinely receiving fee waivers under FOIA (until recently, but even then on appeal) for their ability to disseminate public information.

Further, as demonstrated herein and in the above litany of exemplars of newsworthy FOIA activity, 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.[12]

Requesters also intend to disseminate the information gathered by this request via media appearances (ELC counsel Horner 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 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."

[12] In addition to the coverage of ATI's and undersigned counsel'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* 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 the Department of State's collaboration with OFA, and Congressional interest in the matter has already been expressed. The ATI-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.

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, ATI and 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 the Department of State 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 the Department 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 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 mission, from pages 15-17, *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 Council 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 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 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 Department of State 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 expect this all aspects of this request be processed free from conflict of interest.

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). The Department of State 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 the Department of State to immediately notify ATI and ELC with a particularized and substantive determination, and of its determination and its reasoning, as well as ATI 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 my attention as soon as they are identified, preferably electronically, but *as necessary* in hard copy to my attention at the address below. We inform the Department of State of our intention to protect our appellate rights on this matter at the earliest date should the Department not comply with FOIA per, e.g., *CREW v. FEC.*

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

Respectfully submitted,

Brittany Madni
Research Associate
Washington, D.C. 20006
c/o Free Market Environmental Law Clinic
1489 Kinross Lane
Keswick, VA 22947
brittanymadni@gmail.com
(239) 250-2748 M

David W. Schnare, PhD, Esq.
Environmental Law Center at
the American Tradition Institute
2020 Pennsylvania Ave. NW #186
Washington, DC 20006
SchnareATI@GMail.com
(571) 827-1521 M