EXHIBIT 8

National Aeronautics and Space Administration

Headquarters
Washington, DC 20546-0001

May 2, 2011

Reply to Attn of: Office of the General Counsel

Christopher C. Horner, Esq.
The Environmental Law Center at the
American Tradition Institute
2010 Pennsylvania Ave., NW, # 186
Washington, DC 20006

Dear Mr. Horner:

By letter dated March 15, 2011, the American Tradition Institute (ATI) appealed the initial determination under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq., issued on February 15, 2011, by Mr. Mark S. Hess, Chief, Office of Public Affairs, at Goddard Space Flight Center (GSFC). Your request to GSFC, dated January 19, 2011, asked NASA to provide you with the following materials which are the subject of this appeal:

Paragraph I.1 of your request states:

> All *applications of requests for approval for outside employment* by James E. Hansen of the Goddard Institute for Space Studies (GISS) pursuant to 5 CFR 6901, *and* any documents referenced in or provided with any such applications as attachments or otherwise;

Paragraph II.2 of your request states:

> All approvals or denials of such applications described in "1", *supra,* pursuant to 5 CFR 6901.103(g), *and* any other communications made or other actions taken in response to those applications or requests for approval, and related correspondence, including any documents referenced therein, as attachments or otherwise;

Paragraph III.1 of your request states:

> Any *internal discussion of* any cautions or warning of actual or possible disciplinary action or proceeding pursuant to any of the above-cited authorities, or any other authority, that may be or had already had been provided to James E. Hansen; please note that while any such cautions or warnings may be exempt from FOIA we specifically seek any internal discussion thereof, which are not so exempt.
>
> (Emphasis in original).

On February 15, 2011, Mr. Hess withheld the items described in paragraphs I.1-2 of your request under FOIA Exemption (b)(6), which permits the Government to withhold information about individuals in "personnel and medical files" if disclosure would "constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Mr. Hess determined that you had not made the requisite showing that the documents requested would "contribute to the public's understanding of the activities of the Government, or how it would shed light on NASA's performance of its statutory duties, such that the public's interest in disclosure outweighs Dr. Hansen's privacy interest." Mr. Hess also withheld the records in Paragraph III.1 of your request on grounds that no such documents existed.

Your appeal contends that ATI made the requisite showing of public interest in the items described in Paragraph I.1-2 of ATI's request; thus, NASA is required to balance the privacy interest in the subject records against the public interest in their release. You further contend that NASA released information of a similar nature about another GISS employee, Gavin Schmidt. You also allege that NASA improperly denied access to the records described in Paragraph III.1 due to a misreading of ATI's request.

Your appeal has been reviewed and processed pursuant to applicable statutes and regulations, specifically 14 CFR Part 1206. This process involved consideration of your original request, the initial determination, the assertions made in your appeal, the records at issue and their location, FOIA case law, and consultation with NASA personnel responsible for the documents. Based upon this review, I will affirm the initial determination regarding paragraphs I.1-2 of ATI's original request but reverse the determination in respect of Paragraph III.1, as explained below.

Paragraphs I.1-2

FOIA Exemption (b)(6) protects from disclosure information about an individual in "personnel and medical files" if disclosure would "constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). All information that "applies to a particular individual" meets the threshold requirements for information in personnel, medical and similar files. United States Department of State v. Washington Post Co. 456 U.S. 601 (1982). Moreover, the protection afforded the individuals applies to both the author and subject of a file. N.Y. Times Co v. NASA, 920 F.2d. 1007, 1008 (D.C. Cir. 1990). The determination of whether to withhold or release documents under exemption (b)(6) requires a balancing of the public's right to disclosure with the individual's right to privacy. See Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976). The public's interest in disclosure is not determined based on a requestor's "particular purpose," but on the nature of the requested documents and their relationship to "the public interest overall." U.S. Dep't of Justice v. Reporters Committee, 489 U.S. 772 (1989). This term was held to be limited to "the kind of public interest for which Congress enacted the FOIA" and was further construed to mean information that "sheds light on an agency's performance of its statutory duties." 489 U.S. at 773.

While your appeal letter asserts that Dr. Hansen's privacy interest in these records is less compelling than in other types of personal information, ATI does not dispute that the requested records are of a type for which a clear privacy interest exists. Indeed, the records

include required information on Dr. Hansen's off-duty activities needed for NASA approval for his participation in such activities pursuant to the agency's "outside activity" regulations. These documents include information on Dr. Hansen's personal speaking interests and activities, organizations and entities for which Dr. Hansen was planning speaking engagements to express his personal views, and the financial terms of his appearances.

ATI generally contends that the public would benefit from the release of the documents described in Paragraph I.1-2 , citing the Ethics in Government Act, the importance of ensuring the integrity of the Federal Government, and NASA's compliance with ethics laws. ATI asserts that its interest is to expose wrongdoing in conjunction with agency programs. In National Archives & Records Administration v. Favish, 541 U.S. 157 (2004), the Supreme Court articulated the public interest standard for "agency wrongdoer" claims. The Court determined that mere allegations of wrongdoing are insufficient to satisfy the public interest standard required under the FOIA. See Favish, 541 U.S. at 173. Under this more stringent standard for "agency wrongdoer claims," the "[r]equestor must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." 541 U.S. at 174.

A rational comparable to Favish was applied for FOIA Exemption 6 in a case cited by GSFC in NASA's initial decision, Consumers' Checkbook, Ctr. For the Study of Servs. v. United States, 554 F.3d 1046, 384 U.S. App. D.C. 306 (D.C. Cir. 2009). Relying upon United States Department of State v. Ray, 502 U.S. 164 (1991), Checkbook held that unsupported claims of an agency improperly distributing funds to fraudulent Medicare claimants were insufficient to establish a public interest that could be balanced against a privacy interest in the requested records. 554 F.3d at 1054, 1056, 384 U.S. App. D.C. at 314, 316.

Nowhere in either ATI's original request or appeal does ATI cite evidence sufficient to support a conclusion of Government impropriety. ATI cites a 2007 e-mail (included as Exhibit 6 of ATI's appeal) in which Makiko Sato, a staff scientist, relates that he is working on a graph for a publication Dr. Hansen is working on. However, the production of scientific publications is a basic function of GISS. Dr. Sato has been a co-author with Dr. Hansen on several works produced in their official capacity, which are listed in Dr. Hansen's public bibliography of NASA publications on the Internet at http://pubs.giss.nasa.gov/authors/jhansen.html. Given this context, the e-mail in Exhibit 6 does not provide supportable evidence that an impropriety occurred. Therefore, GSFC's reliance on Checkbook is appropriate.

ATI notes NASA's release of similar records for another employee of GISS, Gavin Schmidt. However, ATI's contentions disregard that release of these documents did not take place under NASA's administrative FOIA process but in conjunction with a summary judgment motion filed by the United States in the case of Competitive Enterprise Institute v. NASA, 1:10-CV-00883, in the United States District Court for the District of Columbia. Though ATI cites an administrative FOIA request (NASA No. 04-040) in support of its appeal, these documents were not disclosed under the FOIA. Moreover, this disclosure was made pursuant to the Privacy Act, 5 U.S.C. § 552a, for purposes consistent with NASA Privacy Act System of Record 10SPER. Accordingly, the standard of review under FOIA Exemption (b)(6) was not at issue for the records concerning Dr. Schmidt's outside activities, so that disclosure of

Dr. Schmidt's materials does not indicate that disclosure of the requested documents about Dr. Hanson is warranted under the FOIA. Moreover, ATI's arguments in connection with Dr. Schmidt's records do not provide any evidence of impropriety at GISS.

Accordingly, I affirm the initial determination with regard to the items identified in Paragraph I.1-2 of your request.

Paragraph III.1

Paragraph III.1 of ATI's request reads:

> Any *internal discussion of* any cautions or warnings of actual or possible disciplinary action or proceeding pursuant to and of the above-cited authorities, or any other authority, that may be or had already been provided to James E. Hansen; please note that while any such cautions or warnings may be exempt from FOIA we specifically seek any internal discussion thereof, which are not so exempt.

GSFC's initial determination stated that the request was for documents that do not exist. It noted that the Agency is not required by the FOIA "to create documents in response to a FOIA request," in the evident belief that ATI was requesting NASA to generate a record of internal discussion.

However, as the appeal letter notes, ATI seeks "records, documents, internal and external communications and other relevant covered material created by, received by, provided to and/or sent by NASA/Goddard Institute for Space Studies (GISS) as described below . . . .," as specified by defining language in its original request. Thus, ATI clearly seeks records already in existence "created by, received by, provided to and/or sent by" GISS. I am therefore reversing the initial determination and, by copy of this letter, direct GSFC to conduct a search for records described in Paragraph III.1.

This is a final determination that is subject to judicial review under the provisions of 5 U.S.C. § 552(a)(4), a copy of which is enclosed.

Sincerely,

Thomas S. Luedtke
Assistant Administrator
for Agency Operations

Enclosure

cc:
GSFC/Mr. Hess

Freedom of Information Act, Section 552(a)(4), as amended

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(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 an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term 'a representative of the news media' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term 'news' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) 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 the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request. [Effective one year from date of enactment of Public Law 110-175]

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the

defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause is shown.

[(D) Repealed. Pub. L. 98-620, title IV, Sec. 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.