The Free Market
Environmental Law Clinic

REQUEST UNDER THE FREEDOM OF INFORMATION ACT

July 24, 2013

National Freedom of Information Officer
U.S. EPA
Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)

BY ELECTRONIC MAIL: hq.foia@epa.gov [1]

RE: **Certain Agency Records -- Pond, Passmore correspondence to, from, or copying Margaret Palmer**

To EPA's National Freedom of Information Office:

On behalf of the Free Market Environmental Law Clinic (FMELC), please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*. FMELC is a non-profit public policy organization and law clinic organized under section 501(c)(3) of the tax code and with research, legal, investigative science and publication functions, as well as a transparency initiative seeking public records relating to environmental- and energy-related 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.

[1] We choose to not file this via FOIAOnline because, as we have noted to FOIAOnline tech support and in recent requests to no useful effect, of that system's deficiencies with certain web browsers impeding requester's ability to attach additional discussion and limiting discussion of, *e.g.*, fee waiver, to two thousand characters per field.

Please provide within twenty working days[2] **copies of all emails, text messages and/or instant messages to or from Greg Pond and/or Margaret Passmore**[3] **(including also as cc: or bcc:), to or from Margaret Palmer (including also as cc: or bcc:)**[4] dated from January 1, 2009 through April 28, 2010, inclusive).

By "correspondence" and "documents" we mean in **any** form of each, including regular mail, emails, text messages, and/or instant messages.

Public Interest in and Relevance of Responsive Records

Responsive records will relate, directly or indirectly, to a campaign to control selenium, what EPA calls conductivity pollution resulting from certain earth-moving operations, and/or to EPA's efforts premised on those grounds to stop certain mining activities. This relates to the current administration targeting the coal industry for decline, our nation's largest source of electricity production and an industry employing many thousands and supporting hundreds of communities, in a fashion widely described as its "war on coal". That campaign extends to the point of promoting policies that the president has acknowledged would lead to "bankrupt[ing]" the industry's customers if they sought to expand use of certain the industry's product for electricity generation. There are plainly other elements in this campaign, using various agencies and various statutes. The instant request is relevant to one of those other elements.

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[2] *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion at page 17, *infra*.

[3] Both Pond and Passmore work on EPA's freshwater biology team in Wheeling, West Virginia.

[4] Ms. Palmer is with of the University of Maryland. The instant request is made without regard to what email or text/IM account is used by or for Ms. Palmer, whether or not it was a University address such as mpalmer@umd.edu or other; we include this identification to make plain to the searching officers, who should be neither Pond nor Passmore, to whom we refer.

Similarly, responsive records will relate to an unprecedented Agency action of retroactively vetoing a "dredge and fill" permit under Section 404 of the Clean Water Act after it had already been issued by the Army Corps of Engineers (EPA now claims a relevant precedent).[5] This action was one of effectively trading bugs for jobs, using the Clean Water Act when the Endangered Species Act exists for the apparently relevant purposes, and over the objection of state officials, admittedly to ban surface mining (a political objective).

This request seeks EPA records reflecting discussions between certain officials and a particular academic activist on the subject. These records, therefore, relate to whatever communications certain relevant EPA officials had with the lead author of a paper supporting EPA's efforts the timing of which, as certain (conductivity) guidance was being formulated, was beneficial to EPA's effort. (Ms. Palmer was lead author of a story given cover-placement in *Science* magazine in January 2010, Science 8 January 2010: Vol. 327 no. 5962 pp. 148-149 DOI: 10.1126/science.1180543. *See also, e.g.*, "Experts Urge Officials To End Mountaintop Mining", National Public Radio, January 7, 2010, http://www.npr.org/templates/story/story.php?storyId=122297492).

EPA Owes FMELC 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).

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[5] This decision halted the disposal of mining waste in streams at the Mingo-Logan Coal Company's Spruce No. 1 coal mine. We also are aware of certain email correspondence, produced to congressional investigators by former Region 8 administrator James Martin, among EPA, environmentalist pressure groups, activist academics and select, non-coal industry leaders discussing how EPA came to select this mine. These messages represent examples of discussions that are not legitimately part of any "b5" or deliberative process exemption.

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.)). For example, searches, particularly but not exclusively of non-EPA provided accounts, must be performed by other than the account holder, or at minimum supervised.

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 FOIA's discretionary exemptions. Regardless, pursuant to high-profile and repeated promises and instructions from the president and attorney general (see, *infra*) we request EPA err on the side of disclosure and not delay production of this information of great public interest through lengthy review processes to deliberate withholdings.

In this vein we particularly note that Margaret Palmer in fact has no EPA affiliation, and as such responsive records are far less likely than in most any other request to involve any actual deliberative process as implicated as delineated by the courts in, *e.g*., *Jordan v. Do*J, 591 F.2d 753, 774 (D.C. Cir. 1978). In fact, the likelihood of this is zero.

Pursuant to high-profile and repeated promises and instructions from the president and attorney general (see, *infra*) we request EPA err on the side of disclosure and not delay production of this information through lengthy review processes to deliberate which

withholdings they may be able to justify. This is particularly true for any information that EPA seeks to claim as reflecting (as in the oft-abused exemption, per Attorney General Holder) "deliberative process", in the absence of such correspondence with the media being part of any actual formal EPA deliberation being underway which is truly antecedent to the adoption of an agency policy on the relevant matters.[6]

Therefore, if EPA 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).

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[6] In this vein we also acknowledge EPA's Inspector General undertaking the review noted here, http://www.epa.gov/oig/reports/notificationMemos/newStarts_07-19-13_FOIA_process.pdf.

We remind EPA 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). Regarding how entire records should not be withheld when there is reasonably segregable information, we note that basic identifying information (who, what, when) is not "deliberative". As the courts have emphasized, "the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process." *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (emphasis added).

If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Department of the Air Force*, 455 F.2d at 261. 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 and related email, text or Instant message threads as the case may be.

Request for Fee Waiver

This discussion is detailed as a result of our recent experience of agencies, particularly EPA, improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records, despite our history of regularly obtaining fee waivers. We are not alone in this experience.[7]

A. In the Public Interest

1. Subject of the Request. The information sought by FMELC in this FOIA request will be used to better the public's understanding of how the federal government makes controversial decisions under multiple statutes and regulatory systems and with respect to the

[7] *See* February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of "exorbitant fees" under FOIA as a barrier to access, available at http:// images.politico.com/global/2012/03/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, February 23, 2012, http://www.openthegovernment.org/node/3372.

role high visibility advocates play in such decision-making. The requested records are requested for their reflection of agency work on the above-described controversy that generated national media attention and great public interest, not limited to the local communities directly impacted. It will address the means by which the federal government arguably exceeded its authority under law (as reasonably argued and as found at the district court judge, overturned on appeal). The subject of the request thus concerns the operations and activities of the government.

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).

2. Informative value of the information. Impacted communities and otherwise the general public have expressed concern about the means and vigor behind the federal government's efforts to reduce the use of coal for generation of electricity despite the fact that coal-fired electric generating units are under strict regulations regarding their carbon dioxide emissions, and the growing evidence that carbon dioxide has not significantly contributed to meaningful climate change over the past 17 years. This extends to the campaign to reduce coal production. The public's concerns have also been expressed through their representatives in Congress. The federal government's "war on coal" has manifested itself in use of laws in novel and seemingly unprecedented ways (in this specific context, including the Clean Water Act, Clean Air Act and the Surface Mining Control and Reclamation Act), to halt ongoing permitted modern mining operations, stop planned construction or requested permits for electric utility

plants and now, at the president's request, to force closure of existing power plants.

These "backdoor" approaches, although often upheld by the courts due to the expansive and increasingly abused "*Chevron* deference", are recent developments in what the courts have found to be acceptable in some cases (and unacceptable in others). Despite congressional efforts to illuminate these government operations and activities, the agencies have not been forthcoming. Requests from a relevant chairman of a congressional oversight committee have gone unanswered. Correspondence between EPA and select interests including pressure groups, interested activist academics and industry officials that are not part of the rule-making record are solely in the possession of the corresponding parties. EPA's copies are public records. The public has no other means to secure information on these government operations other than through the Freedom of Information Act. This makes the information sought highly likely to contribute to an understanding of government operations and activities.

3. Contribution to an understanding by the general public. In their capacity as counsel FMELC attorneys have a record of obtaining and producing information as would a news media outlet and as a legal/policy organization that broadly disseminates information on important energy- and environmental-policy related issues. FMELC and its staff are now undertaking publication of studies on national and state regulatory programs and their environmental and economic consequences. In addition to being functionally a news outlet, FMELC has disseminated its studies in a manner that results in coverage by national news outlets on television, in national newspapers, and in policy newsletters from state and national policy institutes. FMELC staff's work has also been cited by congressional committees and FMELC staff have been asked to testify on their work. FMELC has a Ph.D. environmental

scientist with three decades' experience as a scientist and attorney, including with EPA, with similarly lengthy experience with environmental regulatory and permitting programs. FMELC also has the assistance on this matter of a lawyer experienced in broadly disseminating for public understanding large-document FOIA productions, particularly from EPA. These individuals will lead the study team and is capable of translating highly technical information into a report that is accessible to the public at large. FMELC and its staff have a longstanding interest in and reputation for leading relevant policy debates and expertise in the subject of energy and environment-related regulatory policies, and it and its staff's publications demonstrate FMELC has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the "public-at-large."

4. Significance to public understanding. As previously explained, the public has no source of information on how the federal government has significantly expanded its statutory authorities without legislative mandates -- what U.S. District Court Judge Amy Berman Jackson called "a stunning power for an agency to arrogate to itself when there is absolutely no mention of it in the statute" -- merely its arguments (rejected by the lower court, accepted by the court of appeals) as to why EPA finds this permissible. Nor has the role of activist organizations in propounding and directing these regulatory and statutory expansions been exposed to public view, especially in light of the fact that many of these organizations are grantees of the federal government and also legal adversaries engaged in "friendly suits." There is no information in the public domain about any coordination or collaboration between EPA staff and the author of a helpful, influential paper. The entirety of these relationships are now coming under congressional

and legal scrutiny. 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.

B. Commercial Interests of the Requester.

1. No Commercial Interest. The information sought in this request is not sought for a commercial purpose. FMELC is organized and recognized by the Internal Revenue Service as 501(c)(3) educational organization. FMELC does not charge for copies of its reports. Information provided to FMELC cannot result in any form of commercial gain to FMELC.

2. Primary Interest in Disclosure. 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. FMELC also satisfies this factor as a news media outlet.

As such and also for the following reasons FM ELC requests waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester"); see also 29 CFR §70.40(c)(2), "When an educational or non-commercial scientific institution makes a request, only reproduction costs will be assessed, excluding charges for the first 100 pages" (as most documents sought are by their nature inherently electronic, and we request them in electronic format, there should be no copying costs). We also cite to §70.41(a), because "(i) Disclosure of the requested 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 (ii) Disclosure of the information is not primarily

in the commercial interest of the requester".

As a non-commercial requester, FMELC is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. 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); SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).[8]

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."

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[8] 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*.

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.

"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).

FMELC's ability to utilize FOIA -- as well as many nonprofit organizations, educational institutions and news media who will benefit from disclosure -- depends on its ability to obtain fee waivers. For this reason, "Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the 'public benefit' test for FOIA fee waivers. This waiver provision was added

to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as '"toll gates" on the public access road to information.'" *Better Gov't Ass'n v. Department of State*.

As the *Better Government* court also recognized, public interest groups employ FOIA for activities "essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." That is true in the instant matter as well. 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, pertain to EPA's activities of great public and congressional interest -- the above-described revocation of an already issued permit, which made national news on several occasions, and also the underlying argument for this action for

which, it is a reasonable surmise, EPA will replicate in the future to the great detriment of numerous local communities. They also directly relate to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration, ever". 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").

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

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 expect 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). EPA must at least to inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires EPA to immediately notify FMELC with a particularized and substantive determination, and of its determination and its reasoning, as well as FMELC'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,[9] but *as necessary* in hard copy to my attention. We inform EPA of our intention to protect our appellate rights on this matter at the earliest date should EPA not comply with FOIA per, e.g., *CREW v. FEC*.

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[9] For any mailing that EPA finds necessary, we request you use 1489 Kinross Lane, Keswick, Virginia, 22947 Attn. Chris Horner.

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

Respectfully submitted,

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