

REQUEST UNDER THE FREEDOM OF INFORMATION ACT

November 26, 2014

U.S. Department of Energy
FOIA Requester Service Center
1000 Independence Avenue, SW
Mail Stop MA-90
Washington, DC 20585

BY EMAIL: alexander.morris@hq.doe.gov

RE: Request under the Freedom of Information Act — **Agreement Between the Department of Energy and The Mississippi Power Company and/or The Southern Company Concerning the Kemper Project, Also Called the Kemper County Energy Facility**

To Department of Energy FOIA Officer:

On behalf of the Energy & Environment Legal Institute (E&E Legal) and the Free Market Environmental Law Clinic (FMELC) as co-requester and E&E Legal counsel, please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. Both entities are nonprofit 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 policy makers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us within twenty working days¹ **a copy of any cooperative research and development agreement (CRADA) between the Department of Energy (DoE) or any of its**

¹ See *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), see also, 5 U.S.C. § 552(a)(6)(A)(I).

offices and the Mississippi Power Company (MPC), and/or MPC’s holding company, the Southern Company, concerning the Kemper County Energy Facility (KCEF), located in Kemper County, Mississippi (“Kemper”).

We do not know the exact date that DoE entered such an agreement(s), but public reports suggest that the principal, possibly sole such agreement came about in Spring (possibly May), 2008, when the Department of Energy reportedly agreed to \$270 million in federal financing for Kemper, and that it was actually implemented in August, 2010, when DoE provided the funds through its Clean Coal Power Initiative (CCPI) to the Southern Company.²

We also request any revisions or additions to said agreement made since the original agreement 2008, by the date DoE processes this request.

Records responsive to this request are most likely held at DoE headquarters, possibly its Office of Fossil Energy, or one of DoE’s National Laboratories, e.g., NETL.

We do not seek any pre-decisional draft copies of the agreement, nor any memos, emails, media talking points, or any other documents related to the agreement. We seek only the actual agreement, or agreements, themselves.

Public Interest in and Relevance of Responsive Records

The Kemper Project, and the public tax dollars that have gone toward subsidizing it, have been controversial from the very beginning. This is even more true now given the Environmental Protection Agency (EPA) assertion that Kemper is an example of how Carbon Capture and Sequestration (CCS) has been “adequately demonstrated” for purposes of the Clean

² See Kemper County Energy Facility (formerly Kemper County IGCC Project) website. Available at: <http://www.globalccsinstitute.com/project/kemper-county-energy-facility>.

Air Act (CAA) section 111. It is our understanding that the CRADA includes a provision for release of information some period of time after the project has attained a substantial level of completion. As a high-profile example long-cited by federal government of CCS's being adequately demonstrated, we are confident that period has begun, if not already lapsed.

What's more, the Kemper Project has suffered from considerable cost overruns, as much as double the original projected cost according to the Massachusetts Institute of Technology,³ or even three times according to the Southern Company.⁴ For these reasons, and many others, the public has a right to examine these agreements to know what its government is "up to" and draw its own conclusions about the wisdom concerning the Government's activities related to the Kemper Project.

DoE Owes Requesters 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). In this situation, there should be no difficulty in finding these documents. While the exact location the documents are held is unknown to requesters, the agreement sought is an important document that is an important part of a major project that has been the subject of considerable public and media discussion and congressional interest.

³ *See*, Kemper County IGCC Fact Sheet: Carbon Dioxide Capture and Storage Project. Available at: <https://sequestration.mit.edu/tools/projects/kemper.html>

⁴ *See e.g.*, Jim Polson and Mark Chediak, "Southern Clean Coal Project Cost Almost Triple on Delays", Oct. 28, 2014, <http://www.bloomberg.com/news/2014-10-28/southern-clean-coal-project-cost-almost-triple-on-delays.html>

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 we request DoE err on the side of disclosure and not delay production of this information of great public interest through lengthy review processes over which withholdings they may be able to justify. In the unlikely event that DoE claims any records or portions thereof are exempt under any 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.”** (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 DoE it cannot withhold entire documents rather than producing their

“factual content” and redacting any information that is legally withheld under FOIA exemptions. 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). While it is possible that certain sections of this agreement could plausibly be withheld under exemption (b)(4) “trade secrets,” even this is unlikely, and it is totally implausible that the entire document could be legally withheld.

While it is unlikely such a position would be tenable, if it is your position that a document contains non-exempt segments and that those nonexempt 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 all such withheld documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA” pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959(D.C. Cir. 1979), and “describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information.” *King v. Department of Justice*, 830 F.2d 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 that may be relevant to fully understanding the document.

Request for Fee Waiver

This discussion through page 22 is detailed as a result of our recent experience (and that of others⁵) with agencies 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. It is only relevant if DoE questions our fee waiver.

⁵See February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of “exorbitant fees” under FOIA as a barrier to access, available at <http://images.politico.com/global/2012/03/acluefffeewvrfoialtr.pdf>; see also *National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); see also “Groups Protest CIA’s Covert Attack on Public Access,” OpenTheGovernment.org, February 23, 2012, <http://www.openthegovernment.org/node/3372>. See also Memorandum from Carolyn Copper, Assistant Inspector General, Office of Program Evaluation, Office of the Inspector General, U.S. Env’tl. Prot. Agency, to Malcolm D. Jackson, Assistant Adm’r and Chief Information Officer, Office of Env’tl. Information, U.S. Env’tl. Prot. Agency, “Notification of Evaluation of EPA’s Freedom of Information Act Fee Waiver Process,” Jun. 19, 2013, available at http://www.epa.gov/oig/reports/notificationMemos/newStarts_06-19-13_FOIA_Fee_Waiver_Process.pdf See also Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env’t & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Technology, to Hon. Arthur A. Elkins, Jr., Reg’l Adm’r, Inspector General, U.S. Env’tl. Prot. Agency (Feb. 7, 2013).

A. Pursuant to the Public Interest, 5 U.S.C. § 522(a)(4)(A)(iii)

1. Subject of the Request

As previously discussed, the information sought will provide important insights into agreements DoE has made with private companies to subsidize a controversial power plant that uses new and controversial technology that not only affects taxpayers who provided the subsidy, but also rate payers and all other parties affected by the EPA regulations premised in substantial part on the Kemper Project having been adequately demonstrated (which, in turn, inherently asserts it has been substantially completed). The requested records will provide the public with original source knowledge concerning matters of DoE's administration of the subsidies that have generated extensive media coverage, as well as significant interest from Congress. The requested records thus clearly concern the operations and activities of 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

FOIA requesters and other individuals and organizations concerned with good government and otherwise concerned with wise use of taxpayer money, and sound environmental and energy policy, have a clear interest in this topic. Congressional interest in potential unwise uses of taxpayer money administered by DoE as well as the use of the Kemper Project to justify

EPA regulations is further demonstration of a significant public interest in this information.

Providing this information will allow for a first-hand, unfiltered look at the terms associated with DoE expenditure of substantial public funds. DoE'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 significantly contribute to an understanding of government operations and activities.

3. Contribution to an understanding by the general public.

Requesters 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, including how various agencies related to energy and environmental policies conduct themselves related to transparency efforts from outside organizations such as E&E Legal and FMELC. In addition to being functionally a news outlet, both requesters have disseminated their work 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.⁶ Requesters have a recognized interest in and reputation for leading relevant policy debates and expertise in the subject of energy and environment-related regulatory policies, including how related agencies respond to transparency efforts, and they and their staffs' publications demonstrate requesters have the "specialized knowledge" and "ability and intention" to broadly disseminate the information requested in the broad manner, and to do so in a manner that significantly contributes to the understanding of the "public-at-large."

⁶ Print examples, only, to the exclusion of dozens of national electronic media broadcasts, include, *e.g.*, Dawn Reeves, EPA Emails Reveal Push To End State Air Group's Contract Over Conflict, INSIDE EPA, Aug. 14, 2013; Editorial, Public interest group sues EPA for FOIA delays, claims agency ordered officials to ignore requests, WASHINGTON EXAMINER, Jan. 28, 2013; Michal Conger, Emails show green group influence on EPA coal rule, WASHINGTON EXAMINER, Jan. 9, 2014; C.J. Ciaramella, Sierra Club Pressed EPA to Create Impossible Coal Standards, WASHINGTON FREE BEACON, Jan. 10, 2014; C.J. Ciaramella, Emails Show Extensive Collaboration Between EPA, Environmentalist Orgs, WASHINGTON FREE BEACON, Jan. 15, 2014; Stephanie Paige Ogburn, Climate scientists, facing skeptics' demands for personal [sic] emails, learn how to cope, E&E NEWS, Jan. 21, 2014; Anthony Watts, New FOIA emails show EPA in cahoots with enviro groups, giving them special access, WATTS UP WITH THAT, Jan. 15, 2014; Stephen Dinan, Obama energy nominee Ron Binz faces rocky confirmation hearing, THE WASHINGTON TIMES, Sept. 17, 2013; Stephen Dinan, Top Obama energy nominee Ron Binz asked oil company employees for confirmation help, THE WASHINGTON TIMES, Sept. 17, 2013; Vitter, Issa Investigate EPA's Transparency Problem, More Suspicious E-mail Accounts, WATTS UP WITH THAT, Jan. 29, 2013 ("It should also be noted that this has come to light thanks to the work of Chris Horner and ATI, who forced production of these documents by EPA in their FOI litigation."); Stephen Dinan, Obama energy nominee in danger of defeat, THE WASHINGTON TIMES, Sept. 18, 2013; Stephen Dinan, Greens, lobbyists and partisans helping Ron Binz, Obama's FERC pick, move through Senate, THE WASHINGTON TIMES, Sept. 12, 2013; Stephen Dinan, Energy nominee Ron Binz Loses voltage with contradictions, Obama coal rules, THE WASHINGTON TIMES, Sept. 22, 2013; Conn Carroll, FOIA reveals NASA's Hansen was a paid witness, WASHINGTON EXAMINER, Nov. 7, 2011; NASA Scientist accused of using celeb status among environmental groups to enrich himself, FOX NEWS, Jun. 22, 2011; Editorial, The EPA: A leftist agenda, PITTSBURGH TRIBUNE-REVIEW, Jan. 18, 2014; John Roberts, "Secret dealing"? Emails show cozy relationship between EPA, environmental groups, FOX NEWS, Jan. 22, 2014; Elana Schor, Proponents pounce on emails between EPA, enviros on pipeline, E&E NEWS, Jan. 23, 2014; Mike Bastasch, Analysis: Green Hypocrisy in Keystone XL pipeline opposition, DAILY CALLER, Feb. 6, 2014; Mark Tapscott, Emails expose close coordination between EPA, Sierra Club and other liberal environmental activist groups, WASHINGTON EXAMINER, Jan. 23, 2014; Editorial, EPA has ties to radical environmentalists, DETROIT NEWS, Feb. 13, 2014; Michael Bastasch, Report: EPA coal plant rule tainted by secretiveness, collusion with green groups, DAILY CALLER, Mar. 10, 2014; Jennifer G. Hickey, Legality of EPA Rules Questioned by Environmental Litigators, NEWSMAX, March 21, 2014; Michael Bastasch, Confidential document reveals the Sierra Club's plan to shut down the coal industry, DAILY CALLER, March 26, 2014; Michael Bastasch, Conservative group sues EPA over its 'IRS-like' tactics, The Daily Caller, April 1, 2014; Stephen Dinan, Conservative group sues EPA over open-records requests, The Washington Times, April 1,

4. Significance to Public Understanding

Thus far, the public only has second-hand accounts of spare details of DoE's agreement with the Southern Company/Mississippi Power concerning the Kemper Project. Only by DoE releasing this information will public interest groups such as requesters, the media, and the public at large see these terms first hand and draw their own conclusions concerning DoE's administration of the law in relation to the Kemper Project. The significance of this to the public understanding is vast, as it will allow the public to examine the details of an agreement made to spend hundreds of millions of taxpayer money subsidizing new technology that is not only facing considerable cost overruns while serving as the leading U.S. example of a technology that is supported in every instance by taxpayers, but is also cited to justify further regulations.

B. Commercial Interest of Requesters

1. No Commercial Interest

Requesters are organized and recognized by the Internal Revenue Services 501(c)(3) educational organizations. Requesters do not charge for copies of reports. The requested information is not sought for a commercial purpose and cannot result in any form of commercial gain to requesters, who have absolutely no commercial interest in the records.

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. Requesters also satisfy this factor as news media outlets.⁷

⁷ See discussion beginning p. 15.

As such and also for the following reasons requesters seek 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* 10 C.F.R. § 1004.9 (a)(8), “The DoE will furnish documents without charge or at reduced charges 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 disclosure is not primarily in the commercial interest of the requester. ” (As we request documents in electronic format, there should be no copying costs).

As non-commercial requesters, requesters are entitled to liberal construction of the fee waiver standards. 5 U.S.C. § 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.” *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* at 94 (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.*

⁸ This was grounded in the recognition that the two plaintiffs in that merged appeal were, like requesters, 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* at 93. They therefore, like requesters, “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.*

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 requesters. "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). Requesters' 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* 780 F.2d 86, 94 (D.C. Cir. 1986). 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. (*emphasis added*). 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 DoE’s activities of great public and congressional interest, as previously described. 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, 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).

C. In The Alternative, E&E Legal and FMELC Qualify as a Media Organization under 5 U.S.C. § 522(a)(4)(A)(ii)(II)

As authorized under FOIA, DoE must waive fees for representatives of the news media. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II), *see also* 10 C.F.R. § 1004.9 (b)(3). In the alternative in the event DoE denies requesters’ fee waiver under FOIA’s public interest prong, E&E Legal and FMELC meets the criteria for a fee waiver as a representative of the news media; also, FMELC meets this test, as a “representative of the news media” is defined as any person actively gathering information about current events or of current interest to the public ("news") for an entity that is organized and operated to publish or broadcast news to the public. Office of Management and Budget Guidelines, 52 Fed. Reg. 10012, 10018 (March 27, 1987).

The White House Office of Management and Budget (OMB) published guidance on its interpretation of the term “representative of the news media.” OMB includes in this category publishers of newsletters and similar periodicals, publishers of books, and radio and television broadcasting. However, “labels and titles alone do not govern; the organizations’ substantive activities control.” *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 21 (D.C.D.C. 2003).

Courts have affirmed that non-profit requesters like E&E Legal and FMELC who are not traditional news media outlets can qualify as representatives of the new media for purposes of the 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). The courts use a three prong test of an organization's activities. A representative of the news media is a person or entity that (1) gathers information of potential interest to a segment of the public; (2) uses its editorial skills to turn the raw materials into a distinct work; and (3) distributes that work to an audience. *Nat'l Sec. Archive v. U.S. Dep't of Def.*, 880 F.2d 1381, 1387, 279 U.S. App. D.C. 308 (D.C. Cir. 1989). This reflects OMB's regulatory preamble language indicating a representative of the news media must "perform an active rather than passive role in dissemination." OMB Guidelines, 52 Fed. Reg. at 10015. Requesters meet all three prongs.

1. E&E Legal and FMELC seek information of interest to a broad segment of the public.

E&E Legal and FMELC have taken a leadership role of late in assessing various agencies compliance with the President's commitment to transparency. Evidence that such information is of potential interest to a segment of the public is manifest in the use of this information by other publication entities, lawmakers and the public, a point we make explicit in this request. E&E Legal and FMELC has an established practice of using FOIA to educate the public, lawmakers and news media about the government's operations and, in particular, has brought to light important information about policies grounded in energy and environmental policy, as well as how agencies react to transparency efforts.

2. E&E Legal and staff use their editorial skills to turn the raw materials into distinct work

Undersigned counsel/E&E Legal fellow Christopher Horner uses editorial skills to turn raw materials into distinct work published under his name, as found in the Washington Examiner,

on Breitbart and on the premier electronic science daily publication WattsUpWithThat. E&E Legal's General Counsel David Schnare & Mr. Horner have each written and/or edited multiple books addressing environmental issues. Dr. Schnare has routinely contributed works to the Thomas Jefferson Institute for Public Policy's Jefferson Journal.⁹ Thomas Tanton, E&E Senior Fellow, authored E&E Legal's report entitled "The Hidden Cost of Wind Energy." E&E Legal and FMELC staff not only has a lengthy history of turning raw materials into distinct works, and specifically news articles, they have done so as staff to E&E Legal and for E&E Legal publications, and as discussed above, and plan on doing so again, using, in part, the documents received under this request.

3. E&E Legal and FMELC distributes that work to an audience

The key to whether an organization merits "media" fee waiver is whether a group publishes, as E&E Legal most surely does. In *National Security Archive v. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the D.C. Circuit wrote:

The relevant legislative history is simple to state: because one of the purposes of FOIA is to encourage the dissemination of information in Government files, as Senator Leahy (a sponsor) said: "It is critical that the phrase representative of the news media' be broadly interpreted if the act is to work as expected.... If fact, any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a `representative of the news media.'" Id. at 1385-86.

As the court in *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) noted, this test is met not only by outlets in the business of publishing such as newspapers; instead, citing to the *National Security Archives* court, it noted one key fact is determinative, the "plan to act, in essence, as a publisher, both in print and other media."

⁹ See <http://www.jeffersonpolicyjournal.com>.

EPIC v. DOD, 241 F.Supp.2d at 10 (emphases added). “In short, the court of appeals in National Security Archive held that “[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.” *Id.* at 11. See also, *Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989).

Specifically, E&E Legal is a publisher of books and reports that address matters associated with energy, the environment and federal bureaucratic pathologies.¹⁰ E&E Legal published Greg Walcher’s “Smoking Them Out – The Theft of the Environment and How to Take it Back.” It published seven reports on the true cost of renewable portfolio standards.¹¹ FMELC and E&E Legal co-published Dr. Schnare’s legal treatise “Protecting Federalism and State Sovereignty through Anti-Commandeering Litigations. In addition, E&E Legal publishes a quarterly newsletter entitled E&E Legal Letters in which General Counsel David Schnare, Senior Legal Fellow Horner (Also undersigned counsel on behalf of FME Law), staff attorneys and guest experts author an informative and educational article on an aspect of the law that emerges as part of E&E Legal’s activities, including its transparency initiative.¹²

¹⁰ Requesters point to their website for examples of its reports and publications. See http://eelegal.org/?page_id=2070.

¹¹ See True Cost of Renewable Portfolio Standards, http://eelegal.org/?page_id=1734.

¹² See http://eelegal.org/?page_id=1798.

E&E Legal publishes materials based upon its research via print and electronic media, as well as in newsletters to legislators, education professionals, and other interested parties.¹³ FMELC publishes scholarly works and contributes to non-scholarly media as experts on bureaucratic governmental practices.¹⁴ Those activities are in fulfillment of E&E Legal and FMELC's purposes and missions. We intend to disseminate the information gathered by this request to the public at large and at no cost through one or more of the following: (a) newsletters; (b) opinion pieces in newspapers or magazines; (c) E&E Legal and FMELC's websites; (d) in-house publications for public dissemination; (e) scholarly articles prepared for publication in peer-reviewed law journals (f) other electronic journals, including blogs to which our professionals contribute; (g) local and syndicated radio programs dedicated to discussing public policy; (h) to the extent that Congress or states engaged in relevant oversight or related legislative or judicial activities find that which is received noteworthy, it will become part of the public record on deliberations of the legislative branches of the federal and state governments on the relevant issues. E&E Legal and FMELC staffs also intend to disseminate the information gathered by this request via media appearances.

¹³ See *EPIC v. DOD*, 241 F.Supp.2d 5 (D.D.C. 2003) (court ruled that the publisher of a bi-weekly electronic newsletter qualified as the media, entitling it to a waiver of fees on its FOIA request); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that "aims to place the information on the Internet"; "Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities").

¹⁴ See e.g., FME Law Director participation on a panel dealing with use of FOIA with respect to scientific endeavors, most particularly the instant requesters', sponsored by the National Academy of Sciences and George Washington University (April 1, 2014, Washington D.C.), relevant findings of which scholarly research E&E Legal intends to continue publishing in its publications.

E&E Legal, with FMELC's assistance, has produced two extensive reports, one on collusion between EPA and environmentalist pressure groups in its "war on coal", and another on what our and similar groups' use of FOIA has revealed about EPA operations and activities, more broadly. E&E Legal has conducted several studies on the operation of government, government ethics and the degree to which EPA follows its own rules and laws controlling its administrative activities.

E&E Legal's publication of books, reports and newsletters far surpasses the publishing plan that was, standing alone, sufficient in *National Security Archive, v. Dep't of Defense*, 880 F. 2d at 1386 (tax-exempt corporations achieve news media status through publication activities, including being a publisher of periodicals such as the E&E Legal Letter). *See also, Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d at 21-22 & 24-25 (tax-exempt corporations achieve news media status through publication activities, including being a publisher of periodicals such as the E&E Legal Letter); and *Id.* at 27 ("The fact that EPIC's newsletter is disseminated via the Internet to subscribers' e-mail addresses does not change the analysis."); and see, *Media Access Project v. FCC*, 883 F.2d 1063, 1070 (D.C. Cir. 1989) ("In the case sub judice, the Commission virtually concedes that petitioners [People for the American Way] and [Union of Concerned Scientists] would qualify for preferred status as representatives of the news media" due to their "regular publication of a newsletter or periodical.").

In addition to print publications undersigned counsel Horner appears regularly, to discuss his work including specifically on matters of energy and environmental policy, on national television and national and local radio shows.

We conclude by noting, “In short, the court of appeals in *National Security Archive* held that “[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.” *EPIC*, 241 F.Supp. at 11.¹⁵ As already discussed with extensive supporting precedent, government information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with Agency activities in this controversial area or, as the Supreme Court once noted, what their government is up to.

For these reasons, requester E&E Legal and FMELC 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 2005 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,

¹⁵ See also, *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that “aims to place the information on the Internet”; “Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities”).

2012). Because E&E Legal meet each prong of the *Nat'l Sec. Archive* test, it qualifies as a representative of the news media and a fee waiver on that basis.

D. In the Alternative, FMELC Qualifies as an Educational Institution under 5 U.S.C. § 522(a)(4)(ii)(II)

In similar measure, FMELC qualifies as an educational institution. Under OMB guidance, an institution of professional education or an institution of vocational education, which operate a program or programs of scholarly research qualifies for a fee waiver under FOIA.¹⁶

FMELC provides education to law students, its Director is an Adjunct Professor of Law at George Mason University School of Law, it provides continuing legal education to attorneys in Virginia (a vocational education function) and it conducts a program of research on bureaucratic pathologies and Constitutional restraints to federal government overreach. These facts reflect the exact formulation for qualification for fee waiver under 5 U.S.C. §552(a)(4)(A)(ii)(II), *see also* 10 C.F.R. § 1004.9 (b)(3), as explained by the White House Office of Management and Budget. Accordingly, any fees charged under this categorization 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).

DoE must address this alternate basis for fee waiver in the event it denies fee waiver on the basis of the public interest. Failure to do is *prima facie* arbitrary and capricious.

CONCLUSION

We expect the Department to release within the statutory period of time all segregable portions of responsive records containing properly exempt information, and to provide

¹⁶ See 52 Fed. Reg. 10014 (March 27, 1987).

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).

FOIA specifically requires DoE to immediately notify requesters with a particularized and substantive determination, and of its determination and its reasoning, as well as requesters' 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, should it be necessary, such that the agency furnishes records to my attention as soon as they are identified, preferably electronically,¹⁷ but as necessary in hard copy to my attention. We inform DoE of our intention to protect our appellate rights on this matter at

¹⁷ For any mailing that DoE finds necessary, we request you use 1489 Kinross Lane, Keswick, Virginia, 22947 Attn. Chris Horner.

the earliest date should DoE not comply with FOIA per, e.g., *CREW v. FEC*. If you have any questions please do not hesitate to contact undersigned.

Respectfully submitted,



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