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12
13 IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION

15 SIERRA CLUB,)
) Case No.
16 Plaintiff,)
)
17 v.) **COMPLAINT**
)
18 UNITED STATES ENVIRONMENTAL) (Freedom of Information Act Case)
19 PROTECTION AGENCY,)
)
20 Defendant.)
21)
_____)

22 **STATEMENT OF THE CASE**

23 1. Plaintiff Sierra Club asserts violations of the Freedom of Information Act (“FOIA”),
24 5 U.S.C. § 552, by Defendant United States Environmental Protection Agency (“EPA” or “Agency”)
25 for failing to produce requested agency records concerning policies or guidelines governing EPA’s
26 processing or disposition of FOIA requests that were created, stored, or received since January 20,
27 2017.
28

1 2. Sierra Club’s FOIA request, which is attached hereto as Exhibit A, was submitted on
2 October 31, 2017 and assigned tracking number EPA-HQ-2018-001207. The request seeks records
3 in five discrete categories that are described in detail in the request. For each category of records
4 requested, Sierra Club identifies by title the specific staff at EPA who are likely custodians of the
5 records sought.

6 3. EPA’s handling of FOIA requests is a topic of great public interest and importance.
7 Under EPA Administrator E. Scott Pruitt, the Agency has changed a number of agency practices
8 concerning transparency and reduced the amount of information that it voluntarily makes public
9 about its activities. *See, e.g., Coral Davenport & Eric Lipton, Scott Pruitt Is Carrying Out His*
10 *E.P.A. Agenda in Secret, Critics Say*, N.Y. Times, Aug. 11, 2017, available
11 at <https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html>. At least in part as a
12 response to these changes, EPA under the Pruitt Administration has experienced significant
13 increases in the number of FOIA requests that it has received and the number of lawsuits that have
14 been filed against EPA for failure to provide information under FOIA.

15 4. At the same time, EPA appears to have increased the level of scrutiny that the Agency
16 is applying to at least some FOIA requests submitted by the public. For example, in December
17 2017, the *Washington Post* reported that “high-level officials” within the Pruitt EPA have involved
18 themselves in reviewing responses to FOIA requests before they are released to the public. Dino
19 Grandoni & Juliet Eilperin, *Trump Environmental Officials are Keeping Tight Rein over Stampede*
20 *of FOIA Requests*, Wash. Post, Dec. 15, 2017, available
21 at [https://www.washingtonpost.com/news/powerpost/wp/2017/12/15/trump-environmental-officials-](https://www.washingtonpost.com/news/powerpost/wp/2017/12/15/trump-environmental-officials-are-keeping-tight-rein-over-stampede-of-foia-requests/?utm_term=.5939e6c263d0)
22 [are-keeping-tight-rein-over-stampede-of-foia-requests/?utm_term=.5939e6c263d0](https://www.washingtonpost.com/news/powerpost/wp/2017/12/15/trump-environmental-officials-are-keeping-tight-rein-over-stampede-of-foia-requests/?utm_term=.5939e6c263d0). This apparent
23 new EPA procedure of political staff involving themselves in review of FOIA responses before they
24 are released to the public contributes additional delay to the time that EPA takes to process and
25 respond to FOIA requests, and it raises concerns that political considerations are improperly
26 influencing the timing and substance of EPA’s responses to FOIA requests.

1 5. Upon information and belief, EPA has not made public any policies or guidance that
2 it has issued concerning any changes that have been made to the processing or disposition of FOIA
3 requests under the new Administration.

4 6. To date, EPA has not provided a final determination on Sierra Club's October 31,
5 2017 FOIA request, and EPA has not produced any records in response to the request or provided
6 any date by which it will do so. As a result, EPA has failed to provide a complete and lawful
7 response to Sierra Club's request within the timeframe required by FOIA.

8 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

9 7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C.
10 § 552(a)(4)(B).

11 8. Venue is proper in this district because plaintiff Sierra Club resides and has its
12 principal place of business in Oakland, California. 5 U.S.C. § 552(a)(4)(B).

13 9. For the same reason, intradistrict assignment is proper in the Oakland Division. *See*
14 *N.D. Cal. L.R. 3-2.*

15 **PARTIES**

16 10. Plaintiff Sierra Club was founded in 1892 and is the nation's oldest grassroots
17 environmental organization. Sierra Club's national headquarters is located in Oakland, California.
18 Sierra Club is a nonprofit, membership organization incorporated in California with more than
19 828,000 members in all 50 states and the District of Columbia. Sierra Club's purpose is to explore,
20 enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the
21 earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the
22 quality of the natural and human environments.

23 11. Sierra Club is a leading non-governmental organization that seeks to educate and
24 mobilize the public on public health and environmental issues such as clean air, clean water, and
25 climate change.

26 12. Sierra Club routinely uses FOIA to obtain information from federal agencies, which
27 Sierra Club's legal and policy experts analyze in order to inform their members and the public about
28 public health and environmental issues. Sierra Club regularly conveys important information to its

1 members and the public through publications and press releases, as well as by publicly releasing
2 information and documents obtained through FOIA requests.

3 13. Sierra Club brings this action on its own behalf and on behalf of its members. Sierra
4 Club and its members have been and continue to be injured by EPA's failure to provide requested
5 records within the timeframe mandated by FOIA. The requested relief will redress these injuries.

6 14. Defendant EPA is a federal agency within the meaning of FOIA, 5 U.S.C. §
7 552(f)(1), and has possession or control of the records that Sierra Club seeks in this action.

8 LEGAL BACKGROUND

9 15. Enacted in 1966, the Freedom of Information Act was designed to protect citizens'
10 "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters*
11 *Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (internal quotations omitted). "The
12 basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic
13 society, needed to check against corruption and to hold the governors accountable to the governed."
14 *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The statute was
15 intended "to permit access to official information long shielded unnecessarily from public view and
16 . . . to create a judicially enforceable public right to secure such information from possibly unwilling
17 official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973).

18 16. To this end, FOIA requires agencies of the federal government to release, upon
19 request, information to the public, unless one of nine specific statutory exemptions applies. 5 U.S.C.
20 § 552(a)(3)(A). These exemptions are narrowly construed, and the agency bears the burden of
21 establishing the applicability of each exemption as to each record for which it is claimed. *See Milner*
22 *v. Dep't of Navy*, 562 U.S. 562, 565 (2011); *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 973 (9th
23 Cir. 2009) (noting FOIA's "strong presumption in favor of disclosure" and that an agency bears the
24 burden for demonstrating an exemption properly applies).

25 17. Upon receiving a FOIA request, an agency has twenty working days to respond by
26 determining whether responsive documents exist and whether the agency will release them. 5
27 U.S.C. § 552(a)(6)(A); 40 C.F.R. § 2.104(a). Agencies must make reasonable efforts to search for
28 records in a manner that is reasonably calculated to locate all records that are responsive to the FOIA

1 request. 5 U.S.C. § 552(a)(3)(C)–(D). An agency may delay an initial determination by ten working
2 days only if the agency can demonstrate that it faces “unusual circumstances.” 5 U.S.C. §
3 552(a)(6)(B); 40 C.F.R. § 2.104(d). FOIA further requires agencies to make records themselves
4 “promptly available” to requesting parties. 5 U.S.C. § 552(a)(3)(A).

5 18. If an agency withholds responsive records, in whole or in part, the burden is on the
6 agency to prove that an exemption applies and that it outweighs FOIA’s policy of disclosure. *See,*
7 *e.g.*, 5 U.S.C. § 552(a)(4)(B); *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991).

8 19. Whenever an agency determines that a portion of a record should be withheld under
9 one of FOIA’s exemptions, the agency must still release to the public any portions of that record that
10 contain “reasonably segregable” non-exempt information. 5 U.S.C. § 552(b).

11 20. If an agency makes an initial determination that it will deny a FOIA request in whole
12 or in part, the requester is entitled to administratively appeal the determination. *Id.* §
13 552(a)(6)(A)(ii). EPA regulations require administrative appeals to be filed within thirty calendar
14 days. 40 C.F.R. § 2.104(j). FOIA requires the agency to make a determination with respect to an
15 administrative appeal of a denial of a request within twenty working days. 5 U.S.C. §
16 552(a)(6)(A)(ii); *see also* 40 C.F.R. § 2.104(k).

17 21. If the agency fails to comply with the statutory time limits to respond to a FOIA
18 request or appeal, the requester is deemed to have exhausted its administrative remedies and may
19 commence litigation in district court to compel an adequate response from the agency. 5 U.S.C.
20 § 552(a)(4)(B), (a)(6)(C)(i). FOIA provides that the district court shall have jurisdiction “to enjoin
21 [an] agency from withholding agency records and to order the production of any agency records
22 improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

23 22. FOIA and EPA’s regulations state that a requester is entitled to a waiver of fees
24 associated with responding to a FOIA request when the information sought “is likely to contribute
25 significantly to public understanding of the operations or activities of the government and is not
26 primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. §
27 2.107(l)(1). Further, an agency cannot assess fees against a requester if it does not respond to the
28 request within the time established by FOIA. *See* 5 U.S.C. § 552(a)(4)(A)(viii).

1 23. FOIA permits the Court to “assess . . . reasonable attorney fees and other litigation
2 costs reasonably incurred in any case under this section in which the complainant has substantially
3 prevailed.” 5 U.S.C. § 552(a)(4)(E)(i).

4 **FACTUAL BACKGROUND**

5 24. On October 31, 2017, Sierra Club submitted a FOIA request to EPA seeking records
6 regarding policies or guidelines governing EPA’s handling, processing, and disposition of FOIA
7 requests created, stored, or received since January 20, 2017. Sierra Club’s request is attached as
8 Exhibit A. The Sierra Club FOIA request identified five specific categories of records that were
9 requested, providing for each category a detailed description of the records sought.

10 25. On October 31, 2017, EPA sent an automated response acknowledging receipt of
11 Sierra Club’s FOIA request and assigning it tracking number EPA-HQ-2018-001207.

12 26. On January 9, 2018, EPA sent a letter to Sierra Club’s counsel stating that it did not
13 believe it would charge Sierra Club any fees for its response to Sierra Club’s FOIA request.

14 Concerning the timing of EPA’s response to Sierra Club’s FOIA request, the letter stated only that
15 EPA “will be responding” to the request. The January 9, 2018 EPA letter is attached as Exhibit B.

16 27. Other than the October 31, 2017 acknowledgement of receipt and the January 9, 2018
17 letter concerning fees, Sierra Club has not received any response from EPA to its FOIA request.
18 EPA has not made any final determination in response to Sierra Club’s FOIA request, nor has EPA
19 released any agency records in response to the request.

20 **CLAIM FOR RELIEF**

21 28. Plaintiffs hereby reallege and incorporate by reference all allegations in the preceding
22 paragraphs.

23 29. By failing to make a final determination or produce records in response to Sierra
24 Club’s October 31, 2017 FOIA request, EPA has violated FOIA’s mandate to provide a complete
25 response and “promptly” release agency records within the timeframe required by the statute. *See* 5
26 U.S.C. § 552(a)(3)(A) & (a)(6).

27 30. EPA has wrongfully withheld the requested records from Sierra Club.

28 31. Sierra Club has exhausted the applicable administrative remedies.

32. Sierra Club is entitled to obtain the requested records immediately at no cost.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(1) declare that EPA has violated FOIA by failing to provide all records responsive to Sierra Club’s FOIA request;

(2) order that EPA make all requested records available to Sierra Club promptly and at no cost;

(3) retain jurisdiction over this case to rule on any assertions by EPA that any responsive records, in whole or in part, are exempt from disclosure;

(4) award Sierra Club’s litigation costs and reasonable attorneys’ fees in this action; and

(5) order such other relief as the Court may deem just and proper.

DATED: February 1, 2018

Respectfully submitted,

/s/ Stacey P. Geis
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* To be admitted *pro hac vice*

Counsel for Sierra Club

EXHIBIT A



October 31, 2017

By FOIA Online

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (Mail Code 2822T)
Washington, DC 20460
(202) 566-1677

**Re: Freedom of Information Act Request for EPA FOIA Guidelines or Policies
Effectuated Since January 20, 2017**

Dear National Freedom of Information Officer:

On behalf of the Sierra Club, we submit this request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the implementing regulations of the U.S. Environmental Protection Agency (“EPA” or the “Agency”), 40 C.F.R. Part 2. The focus of this request is records regarding policies or guidelines governing EPA’s processing and disposition of FOIA requests created, stored, or received since January 20, 2017. Earthjustice submitted a substantively similar request on its own behalf in June of this year. That request (“Earthjustice FOIA”) was given tracking number EPA-HQ-2017-008747. To date, no records have been provided in response to the Earthjustice FOIA.

Sierra Club requests a public interest fee waiver for this FOIA request.

RECORDS REQUESTED

For purposes of this request, the term “records” means information and documents of any kind, including, but not limited to: documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, diagrams, maps, graphs, charts, photographs, minutes of meetings, summaries of telephone conversations, notes and summaries of interviews, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

Further, for purposes of this request, the term “records” includes any personal email messages, telephone voice mails or text messages, and internet “chat” or social media messages, to the full extent that any such messages fall within the definition of “agency records” subject to FOIA, and including any attachments. Per EPA records management policy, electronic messages such as text messages are agency records, which must be preserved and made accessible under the Freedom of Information Act. As such, a satisfactory search for responsive records includes a search for records created by the individuals listed above using any of the following services: Google Chat, Skype for Business, IBM Sametime, Novell Groupwise Messenger, Facebook Messaging, iMessage, Short Message Service and Multimedia Messaging Service on devices, such as Blackberry, Windows, Apple or Android devices; Google Voice, Twitter Direct Message, Slack, WhatsApp, Pigeon, Yammer, Jive, or other internal collaboration networks.

Specifically, we seek:

- 1) From the time period starting on January 20, 2017, up to and including the date of EPA's search for records, all records reflecting any communication, written or verbal, to any FOIA Officer, FOIA Coordinator, Primary FOIA Coordinator, FOIA Public Liaison, FOIA Specialist, FOIA Professional, Managers and Supervisors, or other Authorized Officials,¹ in any program or regional office within EPA, concerning any policies, procedures, guidelines, protocols, directives or other instructions on the processing, assignment, handling, or disposition of FOIA requests received by the Agency (including but not limited to records regarding the release of records, determinations regarding fee waiver requests, assignment to Action Offices, processing within Action Offices, collection and review of responsive records, approvals to release or withhold records, claims of exemption, or instructions to subject matter experts)²;
- 2) From the time period starting on January 20, 2017, up to and including the date of EPA's search for records, all records reflecting any communication, written or verbal, involving the Office of General Counsel, Office of Inspector General, or any Office of Regional Counsel, concerning the handling, processing, or disposition of FOIA requests;
- 3) From the time period starting on January 20, 2017, up to and including the date of EPA's search for records, all records reflecting any communication, written or verbal, involving the designated Chief FOIA Officer at EPA, concerning the handling, processing, or disposition of FOIA requests;
- 4) From the time period starting on January 20, 2017, up to and including the date of EPA's search for records, all records reflecting any communication, written or verbal, between any representative of the National FOIA Program and any FOIA Officer, FOIA Coordinator, Primary FOIA Coordinator, FOIA Specialist, FOIA Professional, FOIA Public Liaison, the Chief FOIA Officer at EPA, the Office of General Counsel, the Office of Regional Counsel, or the Office of Inspector General, concerning the handling, processing, or disposition of FOIA requests; and
- 5) From the time period starting on January 20, 2017, up to and including the date of EPA's search for records, all records reflecting any communication, written or verbal, to or from the designated Chief FOIA Officer at EPA, or any other FOIA Officer, concerning instituting a process for review of FOIA responses by the Office of Executive Secretariat of the EPA Administrator's Office prior to their release.

To the extent that any records described above fall within the scope of Sierra Club's October 10, 2017 FOIA Request to EPA, assigned tracking number EPA-HQ-

¹ Throughout this request, we use personnel designations as defined in EPA's Information Directive Procedure issued in 2014 regarding procedures for responding to FOIA Requests. *See* EPA, Information Directive Procedure, CIO Transmittal No. 14-006, *Procedures for Responding to Freedom of Information Act Requests* (Sept. 30, 2014).

² For brevity, we will use the phrase "handling, processing, or disposition of FOIA requests" for subsequent requests. This phrase is meant to capture any FOIA-related records as designated in Item #1.

2018-000318, seeking communications related to EPA's response to existing FOIA requests for Administrator Scott Pruitt's schedule, those records may be excluded from the instant request. This exclusion should be narrowly construed based on the text of the October 10th FOIA Request and does not apply to any records that fall within scope of Requests #1-5 above and do not pertain to Mr. Pruitt's schedule or calendar.

RECORD DELIVERY

To the extent practicable, Sierra Club requests electronic copies of the above documents. We are seeking full disclosure of all information in the requested records. In the event that you determine that you can disclose only some of the information contained in a record that falls within the scope of this request, please provide us with a copy of the record with only the information that you have determined to be properly treated as exempt redacted.

If any information requested herein was, but is no longer, in EPA's possession or subject to its control, state whether it is (a) missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) otherwise disposed of, and in each instance, explain the circumstances surrounding and authorization for such disposition of it and state the date or approximate date of it.

Agencies are advised to "make discretionary disclosures of information" and refrain from withholding records "merely because [they] can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption." Memorandum from the Attorney General to Heads of Executive Departments and Agencies (Mar. 19, 2009), <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf> ("DOJ FOIA Memo"). If you claim that any of the foregoing information is exempt from mandatory disclosure, we respectfully request that you:

- (1) Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
- (2) State the exemption you deem to be applicable to each information request;
- (3) State with particularity the reason why such exemption is applicable to each information request;
- (4) Examine each information request to determine if reasonably segregable non-exempt information exists which may be released after redacting information deemed to be exempt; and
- (5) Exercise your discretion to release such records notwithstanding the availability of a basis for withholding.

FEE WAIVER REQUEST

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), Sierra Club requests a fee waiver because "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 is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R.

§ 2.107(l)(1). EPA examines four factors when considering whether a request contributes to public understanding: 1) the subject of the request; 2) the informative value of the information being disclosed; 3) the contribution to an understanding of the subject by the public is likely to result from disclosure; and 4) the significance of the contribution to public understanding. *See* 40 C.F.R. § 2.107(l)(2). Additionally, to determine whether the request “is not primarily in the commercial interest of the requester” the government will consider two factors: 1) the existence and magnitude of a commercial interest, and 2) the primary interest in disclosure. *See id.* § 2.107(l)(3).

As demonstrated below, each of the factors related to the fee waiver requirements specified in EPA’s FOIA regulations at 40 C.F.R. § 2.107(l)(2)–(3), weigh in favor of granting Sierra Club’s fee waiver request. Moreover, federal courts have held that FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)). Indeed, EPA has already determined the public interest nature of the records requested by granting a fee waiver for the Earthjustice FOIA, which, as mentioned above, is essentially identical to the instant request.³

For these reasons, Sierra Club is entitled to a fee waiver here.

A. The Request is in the Public Interest.

Factor 1: The Request Seeks Information That Has a “Direct and Clear” Connection to Operations or Activities of the Federal Government.

The first factor for a fee waiver requires that the subject of the request “concern[s] identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.” 40 C.F.R. § 2.107(l)(2)(i). The instant request meets this test insofar as the records sought relate to EPA’s performing of its obligations under federal law to provide information to the public. It is recognized that FOIA “reflects our nation’s fundamental commitment to open government.” *See* DOJ FOIA Memo. The requested records pertain to EPA’s activities as it pertains to this fundamental commitment. Therefore, the requested records have a direct and clear connection to operations and activities of the federal government.

Factor 2: Disclosure of the Requested Records is “Likely to Contribute” to Public Understanding of Government Operations or Activities.

The next factor EPA considers is whether disclosure of the requested records is “likely to contribute” to an “understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii). To satisfy this requirement, the disclosable records must be “meaningfully informative about government operations or activities.” *Id.* Information not “already... in the public domain” is considered more likely to contribute to an understanding of government operations or activities. *Id.*

³ Letter from Larry F. Gottesman, Nat’l FOIA Officer, to Alok Disa, Earthjustice (July 6, 2017) (granting fee waiver for the Earthjustice FOIA, No. EPA-HQ-2017-008747).

Here, the records being sought will provide Sierra Club and the general public meaningful information about government operations and activities because such disclosure will increase understanding of EPA's policies regarding the processing of FOIA requests under the new Administration. Since January 20, the number of FOIA requests has surged,⁴ but the public has been stymied in gaining access to records under FOIA.⁵ Experts expect that this will continue.⁶ Coupled with the Administration's documented removal of "a wide variety of information that until recently was provided to the public" and the White House's overarching "less-is-more public disclosure practices,"⁷ public understanding of any new policies or procedures regarding FOIA takes on added importance.⁸

This general trend towards secrecy mirrors disclosure practices at EPA.⁹ A recent report notes that EPA has been "subject to intense scrutiny" and that EPA has received over several thousand requests since the summer. The same report documents the efforts at EPA to "curb certain public information" by ending data collection of emissions for certain sectors and by taking down almost 2,000 public webpages on major topics under EPA's bailiwick such as climate change.¹⁰ Moreover, a group of Senators wrote to EPA Administrator Scott Pruitt this summer to express "serious concern" about efforts at EPA intended to "thwart transparency."¹¹ This letter notes EPA's failure "to respond in a timely way to FOIA requests" and cites a lawsuit filed by the California Attorney General to gain access to records requested under FOIA.¹²

⁴ See Meredith Somers, *Surge in Information Requests, Hiring Freeze Puts Pressure on Overburdened FOIA Offices*, Fed. News Radio, Jan. 30, 2017, <https://federalnewsradio.com/management/2017/01/surge-information-requests-hiring-freeze-puts-pressure-overburdened-foia-offices/>.

⁵ See, e.g., Delcianna J. Winders, *Freedom of Information in Peril: What Transparency Looks Like in Trump's Government*, Salon, May 14, 2017, <http://www.salon.com/2017/05/14/freedom-of-information-in-peril-what-transparency-looks-like-in-trumps-government/>; see also Michael Morisy, *Under Trump's First 100 Days, FOIA a Little Slower While Open Data Takes a Hit*, MuckRock, Apr. 28, 2017, <https://www.muckrock.com/news/archives/2017/apr/28/under-trumps-first-100-days-foia-little-slower-why/>.

⁶ Benjamin Mullin, *Report: Access to Government Information Will Probably Worsen in the Trump Administration*, Poynter, Mar. 13, 2017, <http://www.poynter.org/2017/report-access-to-government-information-will-probably-worsen-in-the-trump-administration/452133/>; see also Kevin Bogardus, *Sessions Stalled FOIA Reform – What Would He Do as AG?*, Greenwire, Dec. 22, 2016, <https://www.eenews.net/stories/1060047596>.

⁷ Glenn Thrush, *Spicer Argues That More Public Disclosure Is Unnecessary, Even Harmful*, N.Y. Times, Apr. 17, 2017, https://www.nytimes.com/2017/04/17/us/politics/spicer-argues-that-more-public-disclosure-is-unnecessary-even-harmful.html?_r=1; see also Andy Wright & Justin Florence, *Opinion, How Can Congress Overcome White House Obstruction?*, Newsweek, June 7, 2017, <http://www.newsweek.com/how-can-congress-overcome-white-house-obstruction-621745>.

⁸ Juliet Eilperin, *Under Trump, Inconvenient Data is Being Sidelined*, Wash. Post, May 14, 2017, https://www.washingtonpost.com/politics/under-trump-inconvenient-data-is-being-sidelined/2017/05/14/3ae22c28-3106-11e7-8674-437ddb6e813e_story.html?tid=ss_tw&utm_term=.709cdd6042eb; see also Emily Atkin, *Scientists Feared Federal Data Might Disappear Under Trump. They Were Right.*, New Republic, <https://newrepublic.com/minutes/142704/scientists-feared-federal-data-might-disappear-trump-right> ("The disappearance of federal government information is unprecedented" since "so much information has been made public and accessible online in the last decade.").

⁹ Coral Davenport & Eric Lipton, *Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say*, N.Y. Times, Aug. 11, 2017, https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html?_r=0.

¹⁰ *Id.*

¹¹ Letter from Kamala D. Harris, United States Senator, et al., to Hon. E. Scott Pruitt, Adm'r, EPA (Aug. 31, 2017), <https://www.whitehouse.senate.gov/imo/media/doc/2017-08-31%20Oversight%20Letter%20to%20Pruitt%20re%20Transparency.pdf>.

¹² *Id.*

There is strong evidence that, under the new Administration, FOIA practices and policies have changed. Disclosure of the requested records will allow the public to better understand how EPA intends to make records available, thereby increasing access to such information for the public. The requested records will also enable other requesters to file requests in a manner consistent with Agency policy so as to increase accessibility to these documents.

Information as to the agency's new FOIA procedures is not already available through EPA's website or otherwise in the public domain.

Factor 3: Disclosure of the Requested Records Will Contribute to “Public Understanding” of EPA’s FOIA Process.

EPA next considers whether disclosure will contribute to “public understanding” of the subject. *Id.* § 2.107(l)(2)(iii). To qualify for a fee waiver, disclosure should “contribute to the understanding of a reasonably broad audience of persons interested in” the subject matter of the FOIA request, as opposed to the “individual understanding” of the requester. *Id.* In evaluating a fee waiver request, EPA considers whether the requester has “expertise in the subject area and ability and intention to effectively convey information to the public.” *Id.* Federal courts have held that public interest groups satisfy this requirement where they demonstrate an “ability to understand and disseminate the information.” *Judicial Watch, Inc. v. Dep’t of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000). Here, widespread interest in the government’s handling of FOIA requests is demonstrated by the fact that dozens of lawsuits have already been filed by various public interest groups against governmental agencies alleging violations of FOIA.¹³

¹³ At least two dozen lawsuits have been filed regarding FOIAs seeking records related to the environment and public health alone. *See, e.g.*, Complaint for Declaratory and Injunctive Relief, *Sierra Club v. U.S. EPA*, No. 17-1906 (D.D.C. filed Sept. 18, 2017); Complaint for Declaratory and Injunctive Relief, *Sierra Club v. U.S. Dep’t of Homeland Sec. and U.S. Customs and Border Prot.*, No. 17-5273 (N.D. Cal. filed Sept. 12, 2017); Complaint, *S. Envtl. Law Center v. U.S. EPA*, No. 17-061 (W.D. Va. filed Aug. 23, 2017); Complaint for Declaratory and Injunctive Relief, *Public Citizen v. U.S. Secret Service*, No. 17-1669 (D.D.C. filed Aug. 17, 2017); Complaint for Declaratory and Injunctive Relief, *Sierra Club v. U.S. Dep’t of Energy*, No. 17-4663 (N.D. Cal. filed Aug. 14, 2017); Complaint for Declaratory and Injunctive Relief, *Natural Res. Def. Council v. U.S. EPA*, No. 17-5928 (S.D.N.Y. filed Aug. 4, 2017); Complaint, *Am. Oversight v. U.S. EPA*, No. 17-1261 (D.D.C. filed June 27, 2017); Complaint for Declaratory and Injunctive Relief, *Natural Res. Def. Council v. U.S. EPA*, No. 17-1243 (D.D.C. filed June 26, 2017); Complaint, *Am. Oversight v. U.S. EPA*, No. 17-1227 (D.D.C. filed June 22, 2017); Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt. and U.S. Dep’t of Interior*, No. 17-1208 (D.D.C. filed June 20, 2017); Complaint for Declaratory and Injunctive Relief, *Envtl. Integrity Project v. U.S. EPA*, No. 17-1203 (D.D.C. filed June 19, 2017); Complaint for Declaratory and Injunctive Relief, *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, No. 17-1161 (D.D.C. filed June 14, 2017); Complaint for Declaratory and Injunctive Relief, *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, No. 17-1160 (D.D.C. filed June 14, 2017); Complaint for Declaratory and Injunctive Relief, *WildEarth Guardians v. Animal and Plant Health Inspection Serv.*, No. 17-1153 (D.D.C. filed June 13, 2017); Complaint for Declaratory and Injunctive Relief, *WildEarth Guardians v. U.S. Office of Surface Mining Reclamation and Enft.*, No. 17-1151 (D.D.C. filed June 13, 2017); Complaint for Declaratory and Injunctive Relief, *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, No. 17-1149 (D.D.C. filed June 13, 2017); Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity v. U.S. EPA*, No. 17-1044 (D.D.C. filed June 1, 2017); Complaint for Declaratory and Injunctive Relief, *Natural Res. Def. Council v. U.S. EPA*, No. 17-4084 (S.D.N.Y. filed May 31, 2017); Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 17-974 (D.D.C. filed May 23, 2017); Complaint, *Am. Oversight v. U.S. Dep’t of Interior*, No. 17-958 (D.D.C. filed May 22, 2017); Complaint for Declaratory and Injunctive Relief, *Natural Res. Def. Council v. U.S. EPA*, No. 17-3519 (S.D.N.Y. filed May 11, 2017); Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity v. U.S. EPA*, No. 17-816 (D.D.C. filed May 3, 2017); Complaint, *Protect Democracy Project v. U.S. EPA*, No. 17-779 (D.D.C. filed Apr. 27, 2017); Complaint, *Pub. Emps. for Envtl. Responsibility v. U.S. EPA*, No. 17-652 (D.D.C. filed Apr. 13, 2017).

Disclosure of the requested records will allow the public to assess and understand how EPA will process requests going forward. Given the documented spike in FOIA requests submitted since January 20th, the concomitant strain on federal agencies, and the number of lawsuits challenging agencies' actions under FOIA, greater understanding of the government's handling of FOIA requests is a matter of great public interest.

Sierra Club is particularly able to ensure that the information requested will be disseminated to the general public. As the nation's oldest and largest grassroots environmental organization, Sierra Club will draw on its institutional expertise to increase public understanding of issues related to the environment and to the public health, as well as the operations of the federal government related to those issues. Sierra Club has approximately 3 million members and supporters, including online activists and newsletter subscribers. Sierra Club intends to make publicly available any significant information released pursuant to this request through its website, which is highly trafficked, and through social media and other channels. Sierra Club media and communications reach hundreds of thousands of people through an extensive digital communications network and online information system, print magazine, radio show, web videos, and news reports.

Sierra Club will also leverage its position as the nation's oldest and largest grassroots environmental organization to gain earned media coverage in newspapers, radio, and television for any newsworthy information obtained as a result of this request.

For these reasons, Sierra Club is well-situated to contribute to public understanding of the subject area, and therefore satisfies this factor in its request for a fee waiver.

Factor 4: Disclosure of the Requested Records Will Make a "Significant" Contribution to the Public's Understanding of EPA's FOIA Process.

The fourth factor EPA considers is whether the records are "likely to contribute 'significantly' to public understanding of government operations or activities." 40 C.F.R. § 2.107(l)(2)(iv); *see also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (the relevant test is whether public understanding will be increased after disclosure, as opposed to the public's understanding prior to the disclosure). Where information is not currently available to the general public, and where "dissemination of information . . . will enhance the public's understanding," the fourth public interest factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

Here, the request satisfies the fourth factor. As documented above, there is significant evidence that FOIA practices have changed at EPA and in the Administration more generally; yet, at present, the public has little to no knowledge regarding these changes. Nor does the public have information as to how EPA intends to comply with its statutory duties under FOIA while dealing with the recent surge in requests. To our knowledge, neither EPA nor the U.S. Department of Justice, nor any other agency has published new guidance on the interpretation of FOIA under the new Administration. Therefore, because the requested information is not available to the public, release of the requested information will contribute significantly to the understanding of a broad public audience of persons interested in this subject.

Further, the subject of the request concerns the operations and activities of the federal government, which the public has a right to know about. Transparency is crucial to the proper functioning of government, and requestors should not have to file lawsuits to motivate EPA to fulfill its obligations under FOIA. Observers have noted changes to the timing as well as the

content of responses to FOIA requests since the presidential transition,¹⁴ and EPA's practices have led to several lawsuits regarding its handling of FOIA requests.¹⁵ As such, disclosure of the requested records will make a "significant" contribution to public understanding in this regulatory area.

B. There is no Commercial Interest in Disclosure of the Requested Records

In addition, the second fee waiver requirement – that the request "is not primarily in the commercial interest of the requester," 40 C.F.R. § 2.107(l)(1) – is also met here. The requester, Sierra Club, is a 501(c)(3) nonprofit organization and does not have any "commercial interest that would be furthered by the requested disclosure" of information.¹⁶ *Id.* § 2.107(l)(3)(i). Indeed, Sierra Club's sole interest in obtaining the requested information is to broaden public understanding of EPA's FOIA policies, guidelines and directives regarding the processing of FOIA requests. Sierra Club has no commercial interest in these records, and neither Sierra Club nor any other party will benefit from the disclosure of these records to Sierra Club.

* * *

For the foregoing reasons, Sierra Club is entitled to a fee waiver for this request. Furthermore, Earthjustice submitted a substantively similar FOIA request on its own behalf for which a fee waiver was granted.¹⁷ EPA would have no basis for denying a fee waiver in this instance, having just granted one two months ago.

In the event that fees are not waived, please notify and inform us of the basis for your decision, as required by FOIA.

In the event fees are not waived, Sierra Club requests that fees be limited to the costs associated with document duplication and that the first 100 pages of duplication be provided free of charge. FOIA provides that fees shall be "limited to reasonable standard charges for document duplication" if the requester is a "representative of the news media." 5 U.S.C. § 552(a)(4)(A)(ii)(II). FOIA defines "representative of the news media" as "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 distinct work, and distributes that work to an audience." *Id.* § 552(a)(4)(A)(ii)(III). FOIA also provides examples of entities that would qualify for a limitation of fees under this provision, one of which is "publishers of periodicals . . . who make their products available . . . for subscription by or free distribution to the general public," so long as the entity disseminates "news" under the meaning of FOIA, i.e., "information that is about current events or that would be of current interest to the public." *Id.* FOIA explicitly includes

¹⁴ See Winders, *supra* note 2; Morisy, *supra* note 2; Harris et al., *supra* note 11.

¹⁵ See *supra* note 13.

¹⁶ Indeed, 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. See *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984).

¹⁷ See Letter from Alok Disa, Earthjustice, to Nat'l Freedom of Information Officer, EPA (June 22, 2017) (later assigned tracking number EPA-HQ-2017-008747); Letter from Larry F. Gottesman, Nat'l FOIA Officer, to Alok Disa, Earthjustice (July 7, 2017) (granting the fee waiver for Request No. EPA-HQ-2017-008747).

electronically disseminated news in this definition. *Id.* Moreover, courts have recognized that “non-profit public interest organization[s]” can qualify for preferred fee status as a representative of the news media under FOIA if they publish newsletters or books. *See Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 6, 15 (D.D.C. 2003).

Under the definitions laid out in FOIA, Sierra Club qualifies as a representative of the news media and is entitled to a fee limitation. Sierra Club produces a magazine, *Sierra*, that publishes bimonthly in print and every day online. Therefore, Sierra Club qualifies as a “representative of the news media” under FOIA and EPA’s implementing regulations. Sierra Club employs staff editors who help craft award-winning content that reaches a large audience. The print edition of *Sierra* reaches over one million subscribers, and the online edition reaches hundreds of thousands additional readers. *Sierra Magazine* publishes on a range of environmental issues, including climate and energy. For instance, *Sierra* recently published a story urging oil refineries and other chemical companies to prepare for severe floods related to climate change. Heather Smith, *Planning for the 100-Year Flood Applies to You Too, Chemical Company*, *Sierra* (Aug. 31, 2017), <http://www.sierraclub.org/sierra/planning-for-100-year-flood-applies-you-too-chemical-company>. In another example, *Sierra* reported on coal ash dumps and the health hazards of coal ash based in part on information gathered under FOIA. Paul Rauber, *Solving the Climate Puzzle: One Piece at a Time*, *Sierra* (Nov./Dec. 2009), <http://vault.sierraclub.org/sierra/200911/climate.aspx>. In addition, *Sierra* has been awarded multiple Maggie awards from the western Publications Association, and has been recognized repeatedly for excellence in design by *Folio* magazine’s Ozzie Awards. Therefore, *Sierra* qualifies as a disseminator of “news” under the meaning of FOIA. In fact, Sierra Club has been granted this type of preferred status for FOIA requests before several federal agencies.¹⁸

Finally, as described above, there is no commercial interest in this request, and the records sought are for journalistic and non-commercial uses.

Thus, even if EPA fails to grant a fee waiver for this request – which it should – Sierra Club is entitled to a fee limitation and should only incur the costs of duplication related to producing records responsive to this request.

CONCLUSION

Per FOIA and EPA regulations, we expect a reply within twenty working days, *see* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a), and at minimum this reply “must... indicate within the relevant time period the scope of documents [EPA] will produce.” *Citizens for*

¹⁸ *E.g.*, Letter from Clarice Julka, FOIA Officer, U.S. Dep’t of Interior, to Alexander Rony (July 27, 2017) (classifying Sierra Club as a “media use requestor” for FOIA No. OS-2017-00932 to the Department of Interior); Letter from Clarice Julka, FOIA Officer, U.S. Dep’t of Interior, to Alexander Rony, MuckRock (July 25, 2017) (same for FOIA No. OS-2017-00915 to the Department of Interior); Email from Howard Sun, Council of Environmental Quality, Exec. Office of the President, to Alexander Rony, Sierra Club (July 5, 2017) (granting media requestor status for FOIA No. FY2017-111 submitted by Sierra Club to the Council on Environmental Quality); Letter from David M. Hardy, U.S. Dep’t of Justice, to Alexander Rony (May 24, 2017) (determining that Sierra Club qualified as “representative of the news media requestor” for FOIAPA Request No. 1373758-00 to the Federal Bureau of Investigation).

Responsibility & Ethics in Washington v. Fed. Election Comm'n, 711 F.3d 180, 182–83 (D.C. Cir. 2013). We appreciate your expeditious help in obtaining the requested information. Please promptly make available copies of all requested records, either through the FOIA Online system, or via mail/email at the contact information below:

Thomas Cmar
Earthjustice
1101 Lake St., Ste. 405B
Oak Park, IL 60301
E: tcmr@earthjustice.org.

If you find that this request is unclear or if the responsive records are voluminous please contact me at (212) 845-7387 to discuss the proper scope of this request.

Thank you in advance for your assistance with this matter.

Sincerely,

/s/Thomas Cmar _____
Thomas Cmar
EARTHJUSTICE

Submitted on behalf of:
SIERRA CLUB

EXHIBIT B



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 9 2018

OFFICE OF
ENVIRONMENTAL INFORMATION

Mr. Thomas Cmar
Earthjustice
1101 Lake Street
Suite 405B
Chicago, IL 60301

RE: Request Numbers EPA-HQ-2018-001207

Dear Mr. Cmar:

This is in response to your fee waiver request in connection with the above referenced Freedom of Information Act request.

Based upon a review of your request, and the information available to us at this time, we have determined that the total fee that would be incurred in processing this request does not reach a billable amount. The Environmental Protection Agency will be responding to your information request.

If you have any questions concerning this determination please contact me at (202) 566-1667.

Sincerely,

A handwritten signature in blue ink, appearing to read "Larry F. Gottesman".

Larry F. Gottesman
National FOIA Officer