VIA FOIAONLINE

February 10, 2016

FOIA Officer
EPA OIG
1200 Pennsylvania Avenue, NW
Mail Code 2411T
Washington, DC 20460-0001

Re: Freedom of Information Act Request

Dear Sir/Madam:

This letter constitutes a request pursuant to the Freedom of Information Act, 5 U.S.C. § 552, (FOIA). I, Benjamin G. Emmel, request that the Environmental Protection Agency (EPA) Office of the Inspector General (OIG) produce the following records, provide the records in an electronic format, and place me in the "representative of the news media" preferred fee category.

I. Records Requested

I request the following records:

The closing documents (e.g. Report of Investigation, Final Report, Closing Memo, Referral Memo, Referral Letter, Management Advisory) for the following EPA OIG cases:

1. Ol-HQ-2015-ADM-0072
2. Ol-HQ-2015-AOM-0073
3. OI-HQ-2015-ADM-0076
4. OI-HQ-2015-AOM-0075

These cases involved the EPA Science Advisory board, were opened on June 8, 2015, closed February 8, 2016, and were described as relating to "Employee Integrity (OPR)".

II. Relevant Statute and Authorities

I call your attention to President Obama's January 21, 2009 Memorandum concerning the Freedom of Information Act, in which he states:

> All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA…The presumption of disclosure should be applied to all decisions involving FOIA.[1]

[1] Freedom of Information Act. Pres. Mem. Of January 21, 2009, 74 Fed. Reg. 4683.

The memo further provides that "[t]he Freedom of Information Act should be administered with a clear presumption: In the case of doubt, openness prevails."

I also call your attention to the provisions of the FOIA Improvement Act of 2016, Pub. L. No. 114-185, amending FOIA at 5 U.S.C. §§ 552(a)(8)(A) permitting the withholding of a record only if an agency reasonably foresees that disclosure would harm an interest protected by an statutory exemption or is prohibited by law; considers whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and takes reasonable steps necessary to segregate and release nonexempt information.

If any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow me to assess of the propriety of the claimed exemption. *Vaugh v. Rosen*, 484 F.2d 820 (D.C. Cir 1973), *cert. denied,* 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided to me after redaction of any allegedly exempt material, as the law requires. 5 U.S.C. § 552(b).

III. Request for Records in Electronic Format

An agency shall "provide records in any form or format requested" by the requestor "if the record is readily reproducible by the agency in that form or format." In addition, agencies shall make "reasonable efforts" to maintain its records that are reproducible. 5 U.S.C. §§ 552(a)(3)(B).

To facilitate record production within the statutory time limit, and pursuant to the presumption in favor of disclosure noted in President Obama's memorandum and in law, I request that you provide records as emails or Portable Document Format (.pdf) files, where available and appropriate. If documents are currently formatted as spreadsheets or schedules, I request that you provide the records as Microsoft Excel (.xls or .xlsx) files.

I request that the files be transmitted by email. However, if file size prevents the transmission of documents via email, I am also willing to accept documents on CD-ROM. When necessary and available, I will also accept the "rolling production" of documents.

IV. Fee Category: Representative of the News Media

I request that I am placed in the "representative of the news media" preferred fee category, as defined under 5 U.S.C. § 552(a)(4)(A)(ii)(II), because my past work and plans for publication qualify me as a representative of the news media. *Cf. National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (defining news media within FOIA context).

I call your attention to the recent decision of the D.C. Circuit, which provided a significantly expanded interpretation and analysis of the requirements one must meet to be a "representative of the news media". *See Cause of Action v. Fed. Trade Comm'n*, 799 F.3d 1108, (D.C. Cir. 2015). A determination that an individual is a representative of the news media is properly focused on the **requester**, not the specific FOIA request at issue. *Id.* at 1121.

As defined in federal statue, a representative of the news media must (1) gather information of potential interest (2) to a segment of the public; (3) use its editorial skills to turn the raw materials into a distinct work; and (4) distribute that work (5) to an audience. *See* 5 U.S.C. § 552(a)(4)(A)(ii). In addition, this fee category applies when an individual requests records that "are not sought for commercial use." *Id*. § 552(a)(4)(A)(ii)(II). I meet each of the requirements, as defined in the relevant statute and case law. My analysis follows:

a. Gather information of potential interest

I have previously obtained records on government operations via FOIA and other means, and I intend to do the same via this request. For example, I have requested documents on cases and reports of federal inspectors general to publicize their work in promoting good government.[2] An established history of requesting records via FOIA satisfies this information-gathering element. *See Cause of Action*, 799 F.3d at 1121.

b. To a segment of the public;

The public has often expressed interest in government operations, especially FOIA and documents received through the FOIA process. For example, per Internet analytics site Keyhole, from December 31, 2016 to January 3, 2017, (a period of four days), 541 people wrote 695 posts on the micro-blogging social media site Twitter using the hashtag #foia that reached 1,487,465 individuals for a total of 2,337,988 impressions.[3] In other words, 1,487,564 people created a social media post on FOIA and distributed it to the public. This significant number of interested individuals constitute members of the public who are the intended target audience of the release of these documents. As my request concerns notable government operations, this audience will be interested in the contents of the requested records. Because the public is certainly interested in FOIA requests accessible through the Internet and social media, it necessarily follows that I satisfy this criterion. *See Cause of Action,* 799 F.3d at 1120 (describing "social media authors[,]" "bloggers[,]" and "those who apply for [FOIA-fee] waivers" as "segments of the public" whose interest in particular information satisfies the second statutory element).

c. Use its editorial skills to turn the raw materials into a distinct work

I have also used my editorial and writing skills to disseminate information via distinct works via collecting documents via FOIA, selecting notable documents and organizing them into sets, adding indices, explanations, and finding aids, and publishing these works on the internet via my

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[2] See, for example, FOIA Requests DODIG 2014-00215, https://www.scribd.com/document/335386053/DODIG-2014-00215, OPM OIG 2016-04826, https://www.scribd.com/document/335386122/OPM-OIG-2015-04826, and Commerce OIG 2015-000228, https://www.scribd.com/document/335386054/Commerce-OIG-2015-000228

[3] Keyhole, *New Report:* #FOIA, generated 1/3/17, available at https://www.scribd.com/document/335635282/Hashtag-FOIA-Analysis-1-3-17

publically available website, Record Releaser.[4] I also make the documents publically available on social media and the Internet, categorizing the records into easily-accessible file folders.

This body of work satisfies this specific criterion. Organizing, categorizing, and distributing records as distinct sets of documents has been recognized as a type of publishing which uses editorial skill to turn raw materials into a distinct work.

For example, the courts have held that entities which merely publish documents *in toto*, with scant editorial commentary, qualify as representatives of the news media. *See Cause of Action*, 799 F.3d at 1121; *see also Nat'l Sec. Archive*, 880 F.2d at 1387. In addition, the D.C. Circuit has held that simply assembling and organizing entire sets of documents qualifies, if the publisher adds an index or other finding aid. *Id*. at 1386–87; *see also Cause of Action*, 799 F.3d at 1122 (noting that "nothing in principle prevents a journalist from producing 'distinct work' that is based exclusively on documents obtained through FOIA"). As noted above, I do add indexes and finding aids, which demonstrate that my Record Releaser collection is indeed comprised of distinct works created through my editorial skills. It logically follows that since I carry out activities identical to those performed by other recognized representatives of the news media, I too am a representative.

Furthermore, I carry out activities besides publishing, indexing, categorizing, and distributing government records on the Internet. For example, I have promoted analysis of FOIA records by creating distinct works of microblogging via Twitter. My social media posts have garnered the attention of the public and other interested FOIA requesters, which has led to further dissemination of government records via the news media site MuckRock. This in turn has led to the creation of news stories in publications such as The Daily Dot[5] and The Daily Mail.[6]
As I have done in the past, I intend to similarly use the records I receive in response to this request for collections and social media posts.

Even if you determine that my publishing record does not constitute distinct works created by the requisite editorial skill, the requirements of FOIA do "not mean that a new news-media venture cannot qualify as a 'representative of the news media' until it has a track record." *Cause of Action*, 799 F.3d at 1124. Instead, I can qualify and demonstrate satisfaction of this criterion by explaining my "firm plans". *Id.* As explained above, my plans include categorizing, indexing, and publishing the records received through this request. These plans are "firm" because my intent to do so is not simply an assertion: I have clearly already published distinct works to an audience on Record Releaser. Thus, I have demonstrated an ability to carry out a plan for using editorial skills to turn the raw materials of FOIA records into distinct works.

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[4] All responsive documents received in response to my FOIA requests are archived publically on the Internet under the *nom de plume* "Records Releaser". See https://www.scribd.com/user/343250298/Record-Releaser

[5] http://www.dailydot.com/layer8/cia-cafeteria-compaints-muckrock/

[6] http://www.dailymail.co.uk/news/article-2692591/Documents-C-I-A-moaning-office-restaurants.html

The totality of this information demonstrates how I satisfy this third criterion of the news media representative test.

d. Distribute that work

As mentioned above, I make the results of the request available at no cost on the Internet. Online means of distribution—such as "posting content to a public website[,]" *Cause of Action*, 799 F.3d at 1123—satisfy the statutory requirement that a requester "distribute[its] work to an audience," 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also id.* § 552(a)(4)(A)(ii) (providing specifically that, "as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities").

e. To an audience

I reach members of the public interested in government operations, FOIA procedures, and the production of government documents through FOIA requests (my audience) by posting collections of records, as noted above. "The statute does not specify what size the audience must be." *Cause of Action*, 799 F.3d at 1124. Readers of my documents range from several dozen to several hundred. More importantly, as noted in the social media analysis on #foia, the number of individuals who are interested in FOIA and government documents counts into the millions.

f. *Not sought for commercial use*

I am an individual researcher and writer, but do not seek to publish for profit or for any other commercial enterprise or purpose. I have no commercial interest in making these documents available publically. I receive no remuneration, payment, or any financial interest through my Record Releaser site.

Lastly, your determination that I am a representative of the news media would agree with other federal agencies. In obtaining records via FOIA, I have been recognized as a member of the news media by several other federal agencies, such as the Department of Energy,[7] United States Agency for International Development,[8] National Archives and Records Administration,[9] the Nuclear Regulatory Commission,[10] the Federal Communications Commission,[11] the National Labor Relations Board,[12] the United States Geological Survey,[13] the Drug Enforcement Administration,[14] and the Federal Bureau of Investigation.[15]

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[7] FOIA Request HQ-2017-00502-F

[8] FOIA Request F-00327-16

[9] FOIA Requests NARA-NGC-2017-000181 and NARA-NGC-2017-000181

[10] FOIA Request FOIA/PA-2017-00215

[11] FOIA Request 2017-000277

[12] FOIA Request LR-2017-0727

[13] FOIA Request USGS-2017-00050

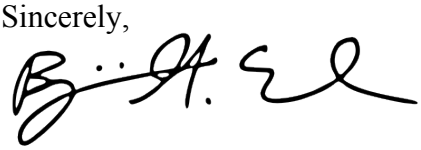
[14] FOIA Request 17-00269-F

In conclusion, under statute and case law, I qualify as a representative of the news media and the preferred fee status that accompanies this designation. In addition, if records are not generally produced within twenty (20) business days, pursuant to the procedures specified in the FOIA Improvement Act of 2016, Pub. L. No. 114-185, amending FOIA at 5 U.S.C. § (a)(4)(A)(viii), I am entitled to a complete waiver of search and duplication fees.

Nonetheless, if my request for a waiver of search and/or duplication costs is denied, I am willing to pay up to $15.00 in search and/or duplication costs. I request that you contact me before any such costs are incurred, so that I can prioritize search and duplication efforts.

If you do not understand this request, or any portion thereof, please contact me at ben.emmel@gmail.com or (608) 301-5562. I look forward to receiving the requested documents within the statutory twenty (20) business days. Thank you for your cooperation.

Sincerely,



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[15] FOIA Request 1364454-000