EARTHJUSTICE

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.

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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]

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[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-whi/.

[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]

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[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 Enf't,* 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

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[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 requester" 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: tcmar@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