



September 22, 2014

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U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Information Officer
High Performance Computing and Communications
Attn: Ms. Wendy Schumacher
NOAA Freedom of Information Officer
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, Maryland 20910

Re: Filing of New FOIA Fee Waiver Request to Accompany New FOIA Request
Withdrawal of Fee Waiver Request Relating to Withdrawn FOIA Request No. DOC-NOAA-
2014-000714

Dear Ms. Schumacher:

The nonprofit Institute for Trade, Standards and Sustainable Development (“ITSSD”) hereby files the attached new Freedom of Information Act (“FOIA”) Fee Waiver Request relating to ITSSD’s new FOIA Request recently filed with the National Oceanic and Atmospheric Administration (“NOAA”) under separate cover. This new FOIA Fee Waiver Request supersedes the prior FOIA Fee Waiver Request and Clarification ITSSD previously filed with your offices with respect to FOIA Request No. DOC-NOAA-2014-000714, which are all hereby simultaneously withdrawn.

As this new FOIA Fee Waiver Request shows, ITSSD has satisfactorily demonstrated, consistent with 15 C.F.R. §4.11(k)(1)-(3), that “(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government; and (ii) Disclosure of the information is not primarily in the commercial interest of the requester.”¹ For these reasons, NOAA should grant ITSSD’s new FOIA Fee Waiver Request.

Should NOAA decide not to grant this new Fee Waiver Request under FOIA and the applicable NOAA FOIA regulations, however, ITSSD requests that NOAA treat ITSSD as an “educational institution” contemplated by 5 USC Sec. 552(a)(4)(A)(ii)(II) and 15 C.F.R. §4.11(b)(4), and as thus qualifying for the reduced fee structure applicable to such entities.²

In addition, if NOAA decides not to grant this new FOIA Fee Waiver Request, ITSSD respectfully requests that NOAA, prior to undertaking any of the activities necessary to locate and disclose the identified records, provide notice to ITSSD regarding whether or not it believes such records exist at all. If the records identified in ITSSD’s new FOIA Request exist and can be located and disclosed,

ITSSD respectfully requests that NOAA also notify ITSSD regarding the actual or estimated amount of the fees to be charged therefor,³ and secure ITSSD's advance approval of the anticipated total fee.⁴

We appreciate the opportunity to set forth the clear grounds for granting ITSSD a FOIA fee waiver with respect to its recently filed new FOIA Request, as set forth herein.

Thank you for your prompt attention to this matter.

Very truly yours,

Lawrence A. Kogan

Lawrence A. Kogan

CEO
ITSSD

ITSSD New FOIA Fee Waiver Request

I. Introduction

This new FOIA Fee Waiver Request establishes that ITSSD's new FOIA Request filed with NOAA on September 22, 2014, under separate cover, satisfies each of the criteria identified in NOAA's six-factor fee waiver test set forth in NOAA regulations implementing the Freedom of Information Act - 15 C.F.R. §4.11(k)(1)-(3).

When considering whether ITSSD meets the six-factor fee waiver test, NOAA should recall that FOIA carries a presumption of disclosure and that the FOIA fee waiver amendments of 1986 were designed specifically to allow non-profit public interest groups, such as ITSSD, access to government documents without the payment of fees. The legislative history underlying such FOIA amendments reflected Congress' particular concern that agencies had been using search and duplication costs to prevent critical public monitoring of their activities. As U.S. Senator Leahy then commented,

“Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information...”⁵

In light of Congress' expressed concerns, the District of Columbia Circuit Court of Appeals previously stated, in *Better Gov't Ass'n v. Department of State*⁶ that:

“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.[] In 1980, however, after some experience with the fee waiver provision, a congressional subcommittee concluded that ‘[m]ost agencies have ... been too restrictive with regard to granting fee waivers for the indigent, news media, scholars’ and, therefore, recommended that the DOJ develop guidelines to deal with these problems.”⁷

Significantly, the requesters seeking public disclosure of governmental records in *Better Gov't* were prolific filers of FOIA requests. They consisted of “a nonprofit organization that conduct[ed] investigations designed to expose waste, fraud and abuse in the functioning of government programs”, and “a nonprofit [environmental] organization ‘dedicated to the promotion of conservation principles on behalf of a large national...constituency.’”⁸ If, as *Better Gov't* suggests, it is true that a federal agency cannot inappropriately wield FOIA's fee waiver provisions as an effective obstacle to prevent activist groups such as these (*which were known to utilize FOIA to monitor and challenge government activities*) from obtaining the requested information, it would be highly inappropriate for NOAA EPA

to use 15 C.F.R. §4.11(k)(1)-(3) as an effective obstacle to prevent ITSSD from obtaining the records it requested.

Unlike the nongovernmental organizations in the above-referenced case, ITSSD is primarily an educational nonprofit nongovernmental organization that takes a scholarly approach to publicly developing and disseminating information about government activities it obtains through its own research and development initiatives. ITSSD is not a professional FOIA request filer, and has never, prior to March 14 2014, filed a request under any FOIA statute seeking records from any federal, state or local government agency.

II. ITSSD Satisfaction of Each of the Substantive Elements of the Six-Factor EPA Fee Waiver Test

Factor 1: The Requested Records Concern the Operations or Activities of the Federal Government (15 C.F.R. §4.11(k)(2)(i))

Section I of ITSSD’s new Information Quality Act (“IQA”⁹)-focused FOIA Request defines the scope of the NOAA agency records for which public disclosure is sought. The IQA and relevant binding OMB and NOAA IQA-implementing guidelines ensure that federal agencies remain transparent and accountable to the public, by preventing federal agencies from disseminating ‘junk science’ as the basis for their regulations without first publicly substantiating their rigorous peer review of agency developed, adopted and/or relied upon scientific assessments. The required public substantiation that rigorous scientific peer reviews had been performed serves to prevent federal agencies from secretly enacting costly and burdensome regulations that expressly or implicitly incorporate the extra-World Trade Organization (European) precautionary principle.

Overall, ITSSD’s new FOIA Request provides critical new evidence confirming that NOAA had failed to publicly substantiate that the peer reviews which it and its third-party contractors had previously performed of the ten (10) NOAA-developed climate assessments supporting EPA’s 2009 Clean Air Act Greenhouse Gas (“GHG”) Endangerment Findings had satisfied the most rigorous and least discretionary peer review, transparency, objectivity/bias, independence and conflicts-of-interest standards imposed by the IQA and relevant binding OMB and NOAA IQA-implementing guidelines. NOAA’s, and consequently, EPA’s IQA compliance failures enabled NOAA’s assessments, and ultimately, EPA’s Endangerment Findings, to incorporate precautionary principle-based ‘science’ as the basis for the many new costly & burdensome GHG emissions regulations EPA has since enacted and proposed predicated on such NOAA-developed scientific assessments.

ITSSD’s new FOIA Request effectively seeks disclosure of “all NOAA climate science-related peer review files” created, transmitted, stored and/or archived from January 1, 2005 through December 31, 2011, focusing on ten (10) NOAA-developed climate assessments peer reviewed by NOAA and its third-party contractors. NOAA had prepared nine (9) of those assessments under the auspices of the White House Office of Science and Technology Policy-overseen interagency U.S. Global Change Research Program/Climate Change Science Program (“USGCRP/CCSP”). NOAA’s National

Climatic Data Center had prepared the tenth (10th) assessment as part of an agency annual weather and climate documentation exercise.

These ten (10) assessments included eight (8) synthetic assessment products (“SAPs”), seven (7) of which (SAPs 1.1, 1.3, 2.4, 3.2, 3.3, 5.2, 5.3) the National Research Council of the National Academy of Sciences (“NAS/NRC”) had peer reviewed under contracts with NOAA and other federal agencies, and one of which the interagency USGCRP/CCSP had peer reviewed (SAP2.2). NOAA, which had prepared the ninth (9th) and tenth (10th) assessments known, respectively, as NCA2-2009 - the Second National Climate Assessment (i.e., the *Global Changes in Climate 2009* report) and SOC-2008 (i.e., *State of the Climate in 2008*) also had been responsible for selecting the individual members that sat on the NOAA-established panels that peer reviewed them.

NOAA had classified the first nine (9) assessments as “highly influential scientific assessments” (“HISAs”) and the tenth (10th) assessment as “influential scientific information,” within the meaning of the relevant binding OMB¹⁰ and NOAA¹¹ guidelines implementing the Information Quality Act (“IQA”). The Environmental Protection Agency (“EPA”)-developed Technical Support Document (“EPA-TSD”) accompanying the EPA Administrator’s 2009 Clean Air Act Section 202(a)(1) greenhouse gas (“GHG”) Endangerment and Cause or Contribute Findings (“EPA’s CAA Section 202(a)(1) Findings”) had designated these ten (10) NOAA-developed climate assessments directly and indirectly (at Table 1.1, p. 6 thereof) as “core reference documents”, which the EPA-TSD defined as meaning that the EPA Administrator had primarily relied upon such assessments as the scientific foundation, in part, of the Endangerment Findings.

Section I of ITSSD’s new FOIA Request also provides historical details and analyses, not previously publicly disclosed, of prior interagency maneuverings undertaken by high-ranking NOAA and EPA officials covering *inter alia* the previous ozone layer negotiations of the United Nations Montreal Protocol on Substances that Deplete the Ozone Layer to inaccurately reframe and portray then current ozone and climate science developed by high-ranking NOAA scientists in ways that helped reshape public opinion to result in the execution of said treaty. These interagency agreements also had facilitated the later sharing of then uncertain climate science information, including datasets and computer modeling assumptions and applications, which reveal that certain mid- and upper-level NOAA officials had possessed a high degree of awareness that the ten (10) NOAA-developed assessments would ultimately be utilized by other federal agencies (e.g., EPA) as the foundation for future environmental GHG regulations. One high-ranking NOAA official had previously simultaneously co-chaired the Working Group I portion of the IPCC-AR4, and, along with another high-ranking NOAA official, had made author-contributions to the IPCC-AR4-WGI and to several USGCRP/CCSP assessments.

In addition, both of these high-ranking NOAA officials had participated in peer reviewing the EPA-TSD’s syntheses and summaries of the ten (10) NOAA-developed climate assessments which the EPA-TSD referred to directly and indirectly as “core reference” documents. These interagency agreements, the historical account and analyses of prior NOAA and EPA data and messaging manipulations, and the later participation of high-ranking NOAA officials in reviewing the technical

support documents undergirding the EPA Administrators 2009 Clean Air Act GHG Endangerment Findings conclusively show that NOAA *knew or had reason to know* the EPA Administrator would evaluate and use these ten (10) NOAA-developed climate assessments in reaching its CAA Section 202(a)(1) Findings.

All of the activities described in Section of I of ITSSD's new FOIA Request involve critical and essential government activities and operations, within the meaning of 15 C.F.R. §4.11(k)(2)(i).

Section II of ITSSD's new FOIA Request identifies and describes specific NOAA agency "climate science-related peer review files" ("NOAA peer review records"), as defined in Section III of ITSSD's new FOIA Request, public disclosure of which has not been forthcoming. These files/records are focused on NOAA's development of the ten (10) assessments described above which NOAA and NOAA third-party contractors had peer reviewed.

The files/records described in Section II and defined in Section III of ITSSD's new FOIA Request include those focused on: 1) specific and detail peer review charges, instructions and disclosures issued by NOAA, the NAS/NRC and USGCRP/CCSP, as previously set forth for public availability and access on NOAA websites; 2) NAS/NRC and USGCRP/CCSP peer reviewer comments NOAA received and responded to concerning *inter alia* methods and approaches NOAA could use to address scientific uncertainties and discuss the precautionary principle or precautionary approach; 3) comments made by the NAS/NRC-appointed reviewers of the NAS/NRC Peer Review Panel Reports evaluating NOAA-developed assessments and reports; 4) public comments received by NOAA in response to the public draft of SAP2.2, solicited via federal register notice; 5) author responses to the NRC Peer Review Panel Reports for specific NOAA-developed SAPs; 6) the NOAA and USGCRP/CCSP peer review reports for NCA2-2009 and SOC-2008; 7) all information, including criteria employed, focusing on NOAA's selection of members of federal advisory committees formed to developed certain USGCRP/CCSP SAPs and NCA-2009; 8) the processes and procedures NOAA and its third-party peer reviewer contractors (the NAS/NRC and the USGCRP/CCSP) employed to constitute panels to peer review the ten (10) NOAA-developed assessments, particularly, to: i) identify and assess the quality of prospective peer reviewer professional credentials and experience and of their prior peer reviews; ii) identify, assess, disclose and resolve apparent and actual individual and institutional financial and non-financial conflicts-of-interest potentially and actually arising from prospective and selected peer reviewers' prior and then current affiliations with specific universities and nonprofit institutes that had participated in specifically identified "NOAA grant-funded climate science research-related programs" from January 1, 2005 through December 31, 2011; 9) specific tests performed and safeguards employed by NOAA and NOAA third-party peer review contractors (i.e., the NAS/NRC and the USGCRP/CCSP) to ensure the intellectual independence and objectivity of prospective and selected peer reviewers, the balance of established peer review panels, and that all prospective and selected peer reviewers had been and remained individually and institutionally conflicts-of-interest-free during the course of the peer reviews performed during such period; 10) copies of all "climate science-related agreements" NOAA had entered into: i) with United Nations agencies, offices and/or programs to contribute to and/or review IPCC assessment reports; ii) with other federal agencies to assist in the development and/or peer review of the ten (10) NOAA-

developed assessments; iii) with the NAS/NRC for the peer review of seven (7) specified NOAA-developed SAPs and to develop other climate assessments on NOAA's behalf; iv) with the USGCRP/CCSP for the peer review of two (2) specified NOAA-developed SAPs; and v) with universities and/or nonprofit institutes to establish, reestablish or expand NOAA Cooperative Institute and other NOAA grant-funded climate science research-related programs; 11) evidencing the extent of the involvement of Executive Office of the President personnel, in USGCRP/CCSP activities supporting the development and peer review of the ten (10) NOAA-developed assessments; and 12) evidencing NOAA website activities contemporaneously undertaken to make publicly available and accessible all NOAA climate science peer review files in conformance with IQA and OMB and NOAA IQA-implementing guideline requirements.

Section IV of ITSSD's new FOIA Request discusses many relevant applicable Information Quality Act and OMB and NOAA IQA-implementing guideline standards governing NOAA and NOAA third-party peer review contractor processes and procedures. As noted above, Sections II and III of this new FOIA Request seeks disclosure of all NOAA records focused on ensuring how NOAA and NOAA third-party contractor peer review processes and procedures conformed with such IQA standards,

Sections I and II of the Annotated Addendum accompanying and incorporated by reference within ITSSD's new FOIA Request provide anecdotal evidence developed from independent ITSSD research efforts focused on showing how NOAA and NOAA third-party contractor peer review processes and procedures did *not* conform with such IQA standards, particularly, those relating to peer reviewer independence, objectivity and conflicts-of-interest. Section III of such Annotated Addendum provides further supporting evidence, in the form of fourteen (14) clusters of appendices showing how the processes and procedures NOAA and NOAA third-party contractors had employed to peer review the ten (10) NOAA-developed assessments violated the most rigorous and least discretionary IQA and OMB and IQA-implementing independence, objectivity and conflicts-of-interest standards applicable to "highly influential scientific information" ("HISAs") and "influential scientific information" ("ISI").

In sum, NOAA had been obliged by statute and administrative guidance to document for the administrative record and for public transparency and accountability purposes how it had undertaken each of the congressionally-directed government activities and operations described above. The subject of the specific records identified and discussed in Sections II-III of ITSSD's new FOIA Request and in Sections I-III of the Annotated Addendum accompanying and incorporated by reference within such FOIA Request sufficiently relates to government operations and activities concerning routine peer review science and administrative review processes and procedures applicable to HISAs and ISI supporting major government actions. In other words, the subject of the requested records concern identifiable "operations or activities of the Federal Government, with a connection that is direct and clear"¹² – i.e., records pertaining to the internal and external operations of NOAA.

Therefore, NOAA should find that ITSSD's new FOIA Request satisfies the first factor of the six-factor fee waiver test, consistent with 15 C.F.R. §4.11(k)(2)(i).

Factor 2: Disclosure of the Requested Records Is Likely to Contribute to Public Understanding of Government Operations or Activities (15 C.F.R. §4.11(k)(2)(ii))

As explained above, ITSSD's new FOIA Request identifies and seeks disclosure of specific records substantiating how the scientific peer review operations and activities NOAA and NOAA third-party contractors had undertaken to ensure the quality, objectivity, utility and integrity of the ten (10) NOAA-developed assessments that NOAA *knew or had reason to know* would be used as support for the Administrator's 2009 CAA Section 202(a)(1) Findings had fulfilled NOAA's legal compliance obligations under the Information Quality Act ("IQA") and OMB and NOAA IQA-implementing guidelines.

NOAA had, during the peer review of such assessments, failed to make publicly available, readily accessible and easily understandable in an organized form *on NOAA agency websites* most of the specific records clearly identified, described and defined in Sections II-III of ITSSD's new FOIA Request. These records, had they been publicly disclosed, would have established whether or not NOAA had satisfied its IQA statutory and administrative law obligations. Due to the ongoing unavailability and inaccessibility of such NOAA records on NOAA agency websites, much of the public has remained uninformed and lacks a basic understanding of these critical government operations and activities, the legal bases for their authority, and the indispensable role that legally compliant peer review practices serve in Agency climate science development, policymaking and rulemaking.

NOAA's continued failure to disclose the requested records on easily accessible and understandable NOAA agency websites has given rise to significant and justified public skepticism regarding whether NOAA had previously satisfied these IQA statutory and administrative law obligations. NOAA's prior failure to disclose such records lends credible support to those who have long argued that the peer review practices in which NOAA and its third party contractors had previously engaged to ostensibly validate the ten (10) NOAA-developed assessments that are the subject of this new FOIA Request had then denied public stakeholders their constitutional and statutory rights to due process of law. In addition, such failures violated the very trust that the public has placed in transparent and accountable government which is now held in considerable doubt. These breaches of the law and the public trust are all the more egregious considering that NOAA *knew or had reason to know*, by virtue of its extensive interagency relationships and agreements with EPA, other federal agencies and the White House overseen USGCRP/CCSP, that the prior administration's EPA could potentially, and the current administration's EPA would most likely rely on the ten (10) NOAA-developed assessments as the scientific foundation, in part, for the former EPA Administrator's 2009 Clean Air Act GHG Endangerment Findings, and the subsequent EPA regulations legally triggered as the direct result of such Findings.

NOAA's disclosure of the Agency climate science peer review files/records reasonably and specifically identified and described in Sections II-III of ITSSD's new FOIA Request, as discussed on pages 5-6 above, once compiled, analyzed, edited, explained and disseminated by ITSSD and members of its Board of Advisors will likely reveal "meaningful information" about NOAA

operations or activities that is not already public knowledge. In order for a requester to meet this fee waiver requirement, it “must demonstrate [if] disclosure of the records [would] reveal any meaningful information about government operations or activities [and if] one [can] learn from these records anything about such operations that is not already public knowledge.”¹³

NOAA cannot credibly contest that the public has a significant interest in how NOAA and its third-party contractors had undertaken the peer review of the ten (10) NOAA-developed climate assessments which are the subject of this new FOIA Request - which NOAA *knew or had reason to know* EPA would use as the scientific foundation for its *policy*-based findings.¹⁴ This is especially true where a policy-based finding of public endangerment would trigger, *ipso facto* as a matter of law (i.e., under the Clean Air Act, as interpreted by the U.S. Supreme Court in *Massachusetts v. EPA*),¹⁵ economically significant regulations governing the GHG emissions generated from auto tailpipe emissions, newly constructed energy-generating power plants and existing energy-generating facilities.¹⁶

ITSSD’s new FOIA Request seeks records *inter alia* reflecting affiliations between NOAA grant-funded climate science research-related programs, NOAA scientists, universities and university scientists, nonprofit institutes and nonprofit institute scientists, the National Research Council of the National Academy of Sciences and university, nonprofit institute and U.S. government scientists serving on NAS/NRC peer review panels, peer review report review committees and oversight boards and committees. ITSSD’s new FOIA request also seeks records reflecting contracts and other cooperative agreements between NOAA and these entities/institutions and individuals, between NOAA and other federal agencies, and between NOAA and international organizations. ITSSD has sought these among other records because it believes the information derived from them will contribute to “the public’s understanding of the individuals and organizations that influence, or attempt to influence, public opinion regarding [NOAA and EPA...] policies and programs.”¹⁷ ITSSD has fulfilled this second factor because it “provided details specific to this FOIA request,” has stated that its request is “likely to contribute significantly to public understanding of the activities” of the government *in other than* “perfunctory language,” and has “support[ed] its statements with facts” set forth in Sections I-II of the Annotated Appendix accompanying and incorporated by reference within this new FOIA Request.¹⁸

Furthermore, “the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of the government.”¹⁹ ITSSD’s new FOIA Request explains in careful detail how the institutional affiliations between NOAA and these individuals and entities strongly suggests, if not confirms, the existence of serious institutional conflicts-of-interest, subject matter bias, lack of intellectual independence and peer review panel imbalances which severely compromise the peer reviews that NOAA and its third-party contractors had performed with respect to the ten (10) NOAA-developed climate science-related assessments that are the subject of this new Request. Such infirmities not only violate the letter and spirit of NOAA’s statutory and administrative law obligations under the Information Quality Act and

relevant applicable OMB and NOAA IQA-implementing guidelines, but also compromise the validity of the climate science that had been the subject of those peer reviews.

Moreover, ITSSD's FOIA Request provides sufficient evidence that the requested records have not already been made public on NOAA agency websites, and consequently, that their disclosure by NOAA in response to this new FOIA Request would reveal meaningful information that, for all practical purposes, is not already in the public domain or in the public knowledge.²⁰ While a number of articles have appeared in the media discussing the objectives of and records sought pursuant to the April and June 2014 FOIA Requests ITSSD had filed with EPA and ITSSD's May 2014 clarification of the original FOIA Request filed with NOAA in April 2014, there is "nothing in the administrative record [...] suggest[ing that such records] had been disclosed [by other than ITSSD] to anyone."²¹ In addition, ITSSD's request involves a wider range of documents related to the conflicts-of-interest, subject matter bias, and lack of intellectual independence of the peer reviewers than the records summarily identified in such media reports.²²

Even if NOAA can now say that requested NOAA climate science-related peer review records focused on the USGCRP/CCSP's peer review of NOAA-developed SAP2.2 are currently available and accessible on the NOAA website, "[n]othing in the administrative record suggests that the detailed information [ITSSD has] requested was already in the public domain""²³ at the time the peer review of SAP2.2 had been performed. Much to the contrary, many stakeholders would attest that NOAA had previously failed to make such documents publicly available and accessible on its agency website contemporaneous with the period during which that SAP had been peer reviewed.

Also, while NOAA can now say that many NOAA climate science-related peer review records focused on the NAS/NRC's peer review of NOAA-developed SAPs 1.1, 1.3, 2.4, 3.2, 3.3, 5.2 and 5.3 are currently available and accessible on the USGCRP/CCSP website, this does not prove that such records had been previously available on a NOAA agency website during the period when such SAPs had been peer reviewed. Indeed, were NOAA to cite the current availability of such records on the USGCRP/CCSP website, it would be no better than NOAA saying that "the requested documents were available in the agency's reading room such that they were already publicly available," because this would "have not demonstrated the public's understanding of the information contained in the [requested] documents [ITSSD] seeks."²⁴

Finally, NOAA is unable to say that requested NOAA climate science-related peer review records focused on the USGCRP/CCSP's peer review of the NOAA-developed NCA2-2009 and on NOAA's peer review of the NOAA-developed SOC-2008 are publicly available or accessible on either the NOAA agency or USGCRP/CCSP websites, and thus, NOAA is unable to demonstrate the public's understanding of the information contained in the requested documents ITSSD seeks with respect to such assessments.

In sum, disclosure by NOAA of the records ITSSD requested would be "meaningfully informative" about these critically important "government operations or activities",²⁵ and consequently, "likely to contribute to the [public's] understanding" of them -²⁶ an understanding which did not previously and

does not currently exist. Therefore, NOAA should find that ITSSD's new FOIA Request satisfies the second factor of the six-factor fee waiver test, consistent with 15 C.F.R. §4.11(k)(2)(ii) .

Factor 3: Disclosure of the Requested Records Will Contribute to the Understanding of a Reasonably Broad Audience of Persons Interested in the Subject, as Opposed to the Individual Understanding of the Requester (15 C.F.R. §4.11(k)(2)(iii))

Disclosure of the records ITSSD identified and requested in Sections II-III of ITSSD's new FOIA Request "will contribute to the understanding of a reasonably broad audience interested in the subject", as opposed to "the understanding of the requester or a narrow segment of interested persons," within the meaning of 15 C.F.R. §4.11(k)(2)(iii). In other words, ITSSD, led by its professional staff and members of its Board of Advisors, specifically intends to disseminate, and is technically, intellectually and otherwise capable of disseminating the information, once compiled, analyzed, edited and explained, to a reasonably broad public audience, as set forth in the following discussion of Factor 3.

ITSSD is aware that, like the courts, your office will assess the contribution to the public's understanding that disclosure of such records would provide by considering ITSSD's intention and ability to effectively convey or disseminate the requested information to a reasonably broad public audience.²⁷ ITSSD also recognizes that this provision requires ITSSD to demonstrate an actual ability, and not merely, an intent to disseminate information. This means that, as a FOIA requester, ITSSD must provide specific details, not conclusory allegations, of its intent and ability to disseminate the requested information to the general public to enable the agency to make an informed decision as to whether the fee waiver is appropriate.²⁸

a. *ITSSD's Specific Intent to Disseminate Such Information to a Reasonably Broad Public Audience*

ITSSD specifically intends to disseminate, and is capable of disseminating, the resulting information products to a reasonably broad public audience through use of various methods of communication and forms of online media, including interviews and documentaries, publication of op-eds, letters to the editor, press releases, blog posts, ITSSD website postings, peer reviewed professional law and science journal articles, scholarly reports and studies, congressional briefings and testimony, conferences, symposia and/or debates, webinars, and other methods of online and personal educational communication and outreach. The ITSSD website and blogs are quite easily accessible on the web, as are ITSSD publications.

In support of this statement, ITSSD provides below explicit evidence of its communication efforts to promote public understanding of the complex subject matter discussed in ITSSD's previously and recently filed EPA and NOAA FOIA Requests, and that discussed in its new NOAA FOIA Request.

For example, in May 2014, ITSSD launched a national '[FOIA Education Campaign](#)' via the issuance of a press release on its website. That campaign' focused on alerting the public of the general need for

federal agencies, especially EPA and NOAA, to adequately peer review highly influential scientific assessments underlying economically significant rules, such as those supporting EPA's 2009 Clean Air Act Section 202(a)(1) GHG Endangerment Findings, consistent with the standards imposed by Information Quality Act ("IQA") and relevant OMB, EPA and/or NOAA IQA-implementing guidelines. The ITSSD press release had specifically referred to NOAA-developed climate assessments that had been insufficiently peer reviewed in violation of such standards, and discussed the questionable affiliations between NOAA scientists, university-affiliated scientists participating in NOAA-funded climate research grant programs, and the NAS/NRC.

"NOAA scientists and university-affiliated scientists participating in DOC-NOAA-funded climate research grant programs had been instrumental in contributing not only to the development of these USGCRP/CCSP assessments, but also to the Working Group I portion of the IPCC's Fourth Assessment Report ('AR4')" ITSSD research also reveals that, on six separate occasions, university-affiliated scientists had also played a key role in NRC/NAS peer reviews of the same climate assessments that such DOC-NOAA-employed and -funded scientists had developed. And, on several occasions, without explanation, NRC/NAS had repeatedly used the same reviewer(s) in multiple assessments.

It is true that the OMB guidelines interpreting the IQA presume that NRC/NAS' scientific peer review processes usually fully satisfy IQA requirements. However, this presumption is rebuttable, as where the facts show such peer review science processes had likely been compromised on conflict-of-interest, independence/bias, peer review panel balance, and transparency grounds. At the very least, these OMB guidelines had required NRC/NAS and DOC-NOAA to publicly disclose and resolve apparent conflicts-of-interest (at both the personal and institutional levels), bias and panel imbalance issues. And, this was to have occurred *before* NRC/NAS proceeded to peer review the DOC-NOAA-developed assessments, in order to avoid the *perception of impropriety*."²⁹

ITSSD's new FOIA Request reveals new and additional information that sheds further light on the extent of these IQA violations.

ITSSD can provide further explicit evidence of the media attention that such press release had generated, including references to the specific media outlets and other organizations whose journalists, commentators and/or bloggers had published and disseminated articles and blogs describing to the public the subject matter of ITSSD's recast 145-page FOIA request. In particular, articles had been published by the following journalists and/or media outlets:

1) by the [Daily Caller](#) Foundation (5/22/14, Wash., D.C.) – which article had been posted online *inter alia* to [Facebook.com](#), [National Association of Scholars](#), [Climate Depot.com](#), [Daily Surge](#), [Freedom Outpost.com](#), [BarbWire.com](#), [Liberty Unyielding.com](#), [Conservative News.com](#), [Land and Water USA.com](#), [AtlasNetwork.org](#) (of the Atlas Economic Research

Foundation), the [Global Warming Policy Foundation](#) (UK), [CNGchat.com](#), [ALIPAC](#) and [Maricopa County AZ Republican Committee \(MCRC\) Briefs](#);

2) by energy & environmental freelance journalist Marita Noon for: a) [RedState.com](#) (5/26/14, Arlington, VA), b) [CanadaFreePress.com](#) (5/26/14, Toronto, CN), c) [CFACT.com](#) (5/27/14 – Wash., DC), d) the [Daily Times](#) (5/28/14 - Farmington, New Mexico), d) [WesternJournalism.com](#) (5/30/14 – Anthem, AZ), – which articles had been posted online *inter alia* to [CattleRange.com](#), [Facebook.com](#), [Twitter](#), [JunkScience.com](#), [Center for Regulatory Effectiveness](#) (CRE.com), [Berns Report](#), [The Westerner Blog](#), [GlobalClimateScam.com](#) (Minnesota Majority) and [LibertyBeacon.com](#); and

3) by the [Washington Examiner](#) (6/10/14 – Wash., D.C.), and posted online *inter alia* to [CFACT.com](#), [ClimateDepot.com](#), [Tumblr.com](#), [Twitter.com](#), [Office of Medical & Scientific Justice](#).

In addition, three media outlets had invited ITSSD staff and colleagues to submit authored articles for the purpose of educating a broad public audience about its NOAA and EPA FOIA-related activities:

1) (with Colleague Rick Otis) for the [Washington Times](#) (5/29/14 – Wash., D.C.), and [Asia Law Portal](#), and posted online *inter alia* to [Center for Regulatory Effectiveness](#) (CRE.com), [Philadelphia Herald](#), [Baltimore Star](#), [San Antonio Post](#), [Massachusetts Sun](#), [Arizona Herald](#), [North Carolina Daily](#), [Brazil Sun](#), [Irish Sun](#), [Perth Herald](#), [Israel Herald](#), [Arab Herald](#), [Trinidad Times](#), and [Zimbabwe Star](#); and

2) for the [Los Alamos Monitor Online](#) (6/21/14 – Los Alamos, NM).

ITSSD also had released online via its website a white paper which examined the relationship between recently approved congressional science appropriations, NOAA, EPA and other federal agencies' Information Quality Act-noncompliant peer review science practices, and EPA's use of those improperly peer reviewed NOAA-developed climate assessments as the scientific foundation, in part, of EPA's 2009 Clean Air Act GHG Endangerment Findings and subsequent economically significant GHG emissions regulations. At least one nonprofit group developed its own article/white paper that discussed the subject matter of the ITSSD white paper following its posting on the ITSSD website:

1) White paper posted on the [ITSSD Website](#) (6/3/14 – Princeton, NJ), and written about by the [National Association of Scholars](#), and/or posted online *inter alia* to the [Heartland Institute](#), [WattsUpWithThat?.com](#), [Global Warming Policy Foundation](#) (UK), [Sierra Foothill Commentary](#), [Climate Conversation Group](#) (NZ) and [HotWhopper.com](#) (AU).

ITSSD subsequently shared this document with professional staff at the U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies,

unaware that the House had just adopted floor amendments on H.R. 4660 – The FY 2015 Commerce, Justice, Science Appropriations Act.

During March – September 2014, ITSSD staff presented briefings and/or otherwise personally provided information to various members of the scientific and academic communities, the American Bar Association Section of Administrative Law and Regulatory Practice, and the professional staffs of the U.S. House of Representatives Committees on Science, Space and Technology, Oversight and Government Reform, the Judiciary, and the U.S. Senate Committee on Environment and Public Works, as well as, to the professional staffs of various congressmen and senators. Such outreach was undertaken in an effort to educate these parties about the significance of the subject matter ITSSD addressed in its NOAA and EPA FOIA Requests, and the implications that flawed agency and agency contractor peer review practices has had for regulatory science. In furtherance of such efforts, on May 27, 2014, ITSSD prepared and submitted to House Science Committee professional staff a list of questions and reference documentation to assist them in supporting committee members scheduled to convene a hearing on May 29, 2014, entitled, “[Examining the UN Intergovernmental Panel on Climate Change Process.](#)”

ITSSD can proffer additional evidence of its express intent and ability to broadly and publicly disseminate records that NOAA chooses to prospectively disclose in response to ITSSD’s new FOIA Request filed with EPA on June 30, 2014. Contemporaneous with such filing, five additional articles were published by the following journalists and/or media outlets interested in the Information Quality Act-focus of ITSSD’s FOIA efforts:

- 1) by [Inside Washington Publishers](#), [InsideEPA](#), [InsideEPA’s Clean Energy Report](#), [InsideDefense](#), [Inside US Trade](#) (6/30/14 – Wash., D.C.) and posted online *inter alia* to the [Global Warming Policy Foundation](#) (UK), [The Science & Environmental Policy Project](#) (p. 15), and [WattsUpWithThat?.com](#);
- 2) by [National Association of Scholars](#) (7/10/14) and posted online *inter alia* to [MillCreek.VillageSoup.com](#) (Mill Creek, WA), [WattsUpWithThat?.com](#), [Facebook.com](#) and [HotWhopper.com](#);
- 3) by investigative reporter [Kevin Mooney](#) (7/24/14) and posted online *inter alia* to [Liberty Alliance.com](#), and [Pinterest.com](#);
- 4) by investigative reporter Kevin Mooney for [American Spectator](#) (7/30/14) and posted online *inter alia* to [Freedom of the Press Foundation](#), [MothersAgainstWindTurbines.com](#), and [TinyLetter.com](#);
- 5) by [The Science & Environmental Policy Project](#) (7/19/14) and posted online *inter alia* to [WattsUpWithThat?.com](#), [SpeakUpAmerica.com](#), and [ASME Environmental Engineering Newsletter](#); and

In addition, since the June 30, 2014 filing of its Fee Waiver Request, four media outlets invited ITSSD staff and colleagues to submit authored articles for the purpose of educating a broad public audience about its IQA-focused FOIA activities, and ITSSD staff took the initiative to craft a fifth writing in response to a relevant op-ed appearing in a fifth media outlet:

1. (with colleague Paul Driessen) for [Townhall.com](#) (7/1/14), [CanadaFreePress.com](#) (7/2/14), [Heartland Institute](#) (7/2/14), [WesternJournalism.com](#) (7/7/14), posted online *inter alia* to [DLMReport.com](#), [The Science & Environmental Policy Project](#) (p. 15), [WattsUpWithThat?.com](#) and [JunkScience.com](#), [IceAgeNow.com](#), [EnterStageRight.com](#) and [EnergyforAmerica.com](#).
- 2) for [Wall Street Journal](#) (7/16/14) in response to an [Op-ed](#).
- 3) for [Asia Law Portal](#) (7/23/14).
- 4) (with Colleague Rick Otis) for [CanadaFreePress.com](#) (7/26/14), posted online *inter alia* to [Heartland Institute](#), [Twitter.com](#), [MyTechLab.com](#), [Law and Water USA.com](#), [The Conservative Papers.com](#), [WorldNewsUpdate.com](#) and [GotNewsWire.com](#).
- 5) for [World Coal.com](#) (7/28/14 – London, UK), posted online *inter alia* to [The Carbon Capture Report](#) (Univ. of Illinois).

Furthermore, since this June 30, 2014 FOIA filing, an ITSSD professional staff member attended the Heartland Institute's 9th Climate Change Conference convened in Las Vegas, NV where he liaised with more than six-hundred attendees from around the world. During several panels' Q&A sessions, said staff member engaged in discussion with panelists about ITSSD's IQA-focused NOAA and EPA FOIA requests which revealed the agencies' failure to validate, in conformance with the IQA, the NOAA-developed highly influential scientific assessments that had been publicly disseminated and which NOAA *knew or had reason to know* would be used by EPA as the scientific foundation, in part of that agency's GHG Endangerment Findings. Said staff member's presence and perspective were mentioned briefly by [Vice.com](#) article authored about the event.

Moreover, to bring further public attention to its Information Quality Act-focused FOIA efforts with NOAA and EPA, ITSSD prepared and submitted public comments to EPA, in response to a June 18, 2014 Federal Register notice soliciting public comments with respect to [EPA's proposed rule on GHG emissions standards for existing power plants](#) (Docket No. EPA-HQ-OAR-2013-0602). [ITSSD's detailed and annotated public comments](#), *which are now part of the "public record"*, were filed on August 13, 2014. These comments refer to the proposed regulation as EPA's "Proposed Power Plant Rule." They focus on Sections II.A1-3 of said proposed rule which cite the "major" climate assessments and computer modeling applications (including the ten (10) NOAA-developed climate assessments) supporting the EPA Administrator's 2009 Clean Air Act Section 202(a)(1) GHG Endangerment Findings and NOAA's Third National Climate Assessment, as *the* scientific foundation

for EPA's Proposed Power Plant Rule. In particular, ITSSD's detailed and annotated comments provide powerful and compelling evidence of NOAA's, and ultimately, EPA's commission of *serious Information Quality Act peer review violations* with respect to their validation of these assessments, involving institutional conflicts-of-interest, subject matter bias, lack of intellectual independence, and peer review panel imbalance. ITSSD's comments conclude that "EPA is legally precluded from relying on [these] climate assessments and computer modeling applications [...] as the scientific foundation for its Proposed Power Plant Rule, since EPA & DOC-NOAA failed to validate such science in conformance with the Information Quality Act (44 U.S.C. 3516 note) and relevant binding OMB and EPA IQA-implementing administrative guidance."

Contemporaneous with this filing, three additional articles were published by the following journalists and/or media outlets interested in the Information Quality Act-focus of ITSSD's FOIA efforts:

- 1) by [Daily Caller](#) Foundation (8/14/14 - Wash., D.C.) and posted online *inter alia* to [BarbWire.com](#), [Facebook.com](#), [Daily Surge.com](#), [LegalPlanet.com](#), [GotNewswire.com](#), [Twitter.com](#), [Government Secrets](#), [LockerDome.com](#) and [The Science & Environmental Policy Project](#) (p. 15).
- 2) by [WorldCoal.com](#) (8/15/14 – London, UK) and posted online *inter alia* to [Facebook.com](#), [The Science & Environmental Policy Project](#) (p. 14), [Google+](#), [Land and Water USA.com](#), and [News.Silobreaker.com](#).
- 3) by [InsideEPA](#) (Aug. 18, 2014 – Wash., DC).

Moreover, ITSSD plans to develop a working paper, for which it already has secured a commitment of publication from at least one Washington, DC-based legal publisher. The paper will discuss the legal obligations the Information Quality Act and relevant binding administrative guidance imposes upon federal agencies when they adopt, endorse, use and publicly disseminate agency- and third party-developed scientific assessments as the basis for rulemakings, specific instances where EPA, in particular, has failed to satisfy those obligations, and the public policy implications resulting from such noncompliance. This paper should be published and released during the fourth quarter of 2014. ITSSD also is in the course of discussion with legal and environmental publishers concerning the publication of an article that would discuss the international significance of Information Quality Act obligations with respect to crossborder treatment of scientific assessments used by administrative agencies as the basis for environment, health and safety regulations incident to the current Transatlantic Trade and Investment Partnership ("TTIP") negotiations in fulfillment of the administration's "international regulatory cooperation" initiative.

Finally, contemporaneous with ITSSD's filing of this new FOIA Request, ITSSD has been informed by journalists with whom ITSSD remains in contact that they are in the process of preparing articles will appear in the following publications:

- 1) ***InsideEPA***;

Institute for Trade, Standards and Sustainable Development (ITSSD)
P.O. Box 223
Princeton Junction, New Jersey USA 08550
(609) 658-7417
www.itssd.org

- 2) *Daily Caller Foundation*;
- 3) *WorldCoal.com*; and
- 4) *The Spectator*, etc.

Based on all of the above evidence, it is clear that ITSSD has identified at this early stage, to the best of its ability, a number of specific media outlets and contacts that ITSSD intends to and is capable of working with to secure publication of media-developed and ITSSD-developed materials, articles, op-eds, blog entries, etc., which would explain and discuss, in an understandable manner catering to a broad public audience, the Information Quality Act-focused records that NOAA would disclose in response to ITSSD's new FOIA request. Consistent with current jurisprudence within and beyond the D.C. Federal Circuit, such information should be sufficient to demonstrate ITSSD's "firm intention to publish" and ability to otherwise disseminate information about the subject of its FOIA request, and for EPA to grant a fee waiver.³⁰

b. *ITSSD's Specific Technical and Intellectual Capability to Disseminate Such Information to a Reasonably Broad Public Audience*

ITSSD also provides below specific evidence of its technical and intellectual capability "to understand, process, and disseminate the information" to a reasonably broad public audience. The ITSSD website contains information about the particular educational expertise and skills possessed by ITSSD professional staff and Board of Advisors members, which were previously and are currently utilized to successfully convey important information about complex scientific and legal processes to members of the public, journalists, the academic and scientific communities, Congress, and Executive Branch policymakers operating at the agency and interagency levels. This information is contained in the backgrounds and/or resumes of each ITSSD staff and Board of Advisors member available in the "[About Us](#)" section of the ITSSD website, or in the publicly available documents such individuals have submitted to these bodies or had otherwise published.

ITSSD professional staff and Board of Advisors members have been integrally involved and possess expertise in scientific risk assessment and risk management, scientific peer review, environment, health and safety law and regulatory science policy and atmospheric pollution metrics. This experience spans the fields of chemistry, biology, toxicology, pharmacology, physics and mathematics, engineering and computer simulations of atmospheric pollution, etc. Members of the ITSSD Board of Advisors also have experience in relating complex concepts to undergraduate and graduate students in understandable terms.

For example, several members of the ITSSD Advisory Board currently serve or have served as adjunct and/or tenured faculty or as researchers at the following universities and colleges: Georgetown University School of Medicine (*Moghissi and McBride, visiting – Kogan*); Georgetown University's McCourt School of Public Policy (*McBride*); Arizona State University College of Law and Arizona

State University School of Life Sciences (*Marchant*); Tuskegee University (*Prakash*); Catholic University of America (*Kelly*); University of Georgia (*McBride*); Princeton University (*Zaidi*); and Seton Hall University, School of International Relations and Diplomacy (*Kogan*). One such member also had previously managed the Bioenvironmental/Radiological program at EPA's National Environmental Research Center and Health and Environmental Risk Analysis Program [*Moghissi*], and also represented EPA's Office of Research and Development in a number of working groups responsible for drafting regulations [*Moghissi*]. In addition, one ITSSD professional staff member also has served as a panelist at numerous governmental, academic, industry and civil society conferences addressing various public audiences regarding complex regulatory science and related legal issues.³¹

Various ITSSD professional staff and Board of Advisors members also have experience communicating such complex subject matter to the members of Congress and to federal agencies. For example, during 2009, 2011 and 2012, members of ITSSD's professional staff and/or Board of Advisors submitted oral and written testimony before Congress regarding the need for transparency of the processes EPA uses in performing peer review and formulating regulations based on agency science. (*Moghissi, McBride*)³² During 2011, one member of the ITSSD Board of Advisers submitted oral and written testimony before Congress regarding the need to separate risk assessment, a primarily scientific undertaking, from risk management, a more policy-related undertaking. (*Marchant*)³³ During 2006, several members of the ITSSD Board of Advisers submitted written comments to the Office of Management and Budget's Office of Information and Regulatory Affairs in response to a federal register notice soliciting public comments on OMB's then proposed risk assessment bulletin. (*Moghissi, McBride, Straja*)³⁴ During 2013, at least one member participated in public seminars discussing the potential impact of climate change on public health. (*McBride*)³⁵ During 2010, 2012, and 2013, several members of the ITSSD Board of Advisors authored books on risk assessment, peer review and metrics for evaluating and validating scientific claims,³⁶ (*Moghissi, Straja*) while at least one member of the ITSSD Board of Advisors has served as editor-in-chief of several prestigious peer reviewed scientific journals. (*Moghissi*)³⁷ During 2013, one ITSSD professional staff member and a member of the ITSSD Board of Advisors separately analyzed and reached clearly conveyed findings concerning the potential downstream domestic and international scientific, legal and economic impacts of the federal government potentially pursuing policy-based science in lieu of science-based policy with respect to risk assessment and risk management protocols. (*Kogan*)³⁸ During 2014, this professional staff member's contribution to the public understanding of these issues in the context of ongoing EU-US transatlantic trade negotiations was recognized by this administration, the European Parliament and the New York-based Burton Foundation. (*Kogan*)³⁹

Finally, during 2007-2009, ITSSD, led by its professional staff, successfully prosecuted an effective public education campaign to inform members of a broad public audience about the need for the U.S. Congress to undertake a thorough due diligence review of the environmental regulatory component of the United Nations Convention on the Law of the Sea ("UNCLOS") and its potential downstream impacts on the national economy and military and industrial technology base prior to its being submitted for a full Senate floor vote. ITSSD utilized all of the forms of communication described in Section 3.a above to clearly convey its research findings and recommendations. These included the

ITSSD website, a subject matter-relevant ITSSD journal blog, media op-eds, press releases, law journal and law review articles, congressional briefings, media interviews, and public debates at the Reserve Officers Association and the National Defense University with representatives from the U.S. Department of State, Office of the Legal Adviser, the U.S. Department of the Navy, Director, International and Operational Law, Office of the Judge Advocate General, and the Director, National Security Law, Virginia School of Law, University of Virginia. ITSSD would be pleased to provide NOAA with operable weblinks to all documents describing or otherwise referencing these activities, should NOAA seek to review them at a later time.

Consistent with applicable case law, ITSSD has sufficiently demonstrated it “is able to understand, process, and disseminate the [complex and voluminous] information” NOAA chooses to disclose in response to ITSSD’s new FOIA Request by explaining how the backgrounds of its staff and members of its Board of Advisors qualify them “to perform the analysis necessary to effectively disseminate the information”⁴⁰ once disclosed by NOAA. Having “proffered a list of dissemination mechanisms and expressed intent to disseminate the information”, and “amply showed a capacity to disseminate information generally,” ITSSD need not “have a history of disseminating information derived from FOIA requests to be entitled to a fee waiver.”⁴¹

c. *The Reasonably Broad Public Audience to Which ITSSD Specifically Intends to Disseminate Such Information*

As demonstrated in Sections 3.a and 3.b above, ITSSD specifically intends to disseminate, and is capable of disseminating, the requested information, once disclosed by NOAA, to a broad public audience. This audience consists of journalists, individual members of the public, farmers, ranchers, fisherman, nonprofit civil society organizations, for-profit civil society organizations such as trade associations, individual members of industry, members of the Bar, other professional associations, federal policy-makers, executive branch officials, members of Congress and congressional committee (professional) staffs, and members of the academic, scientific and scholarly communities.

Consistent with District of Columbia precedent, the “broad and diverse public audience ITSSD has identified as the intended recipient of the to-be disseminated NOAA information represents a reasonably large segment of the public; the intended audience does not constitute a limited subset of persons.”⁴² In addition, the Second Circuit Court of Appeals, in the case of *Carney v U.S. Dept. of Justice*,⁴³

“found that a requester’s dissemination of federal agency-disclosed information may satisfy factor 3 of the six-factor FOIA fee waiver test even if the public dissemination assumes the form of scholarly publications. According to the Court the dissemination of scholarly publications ‘often is of great benefit to the public at large’, although it may ‘not reach a general audience’, given ‘the important role of academe in our democracy...[especially where the] evidence in the administrative record [reflects]...that very little has been written regarding [the subject].’⁴⁴

The Court reasoned that scholarly publications, once disseminated, could potentially ‘enlighten[]’ other interested scholars’ who would then incorporate such publications in their own work and writings,⁴⁵ which in turn, would inure to the benefit of society at large. According to the Court, therefore, “[t]he relevant inquiry...is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject” (emphasis added).⁴⁶

Unlike, in *Carney*, where the requester had specifically intended to disseminate the disclosed agency records exclusively via the publication of scholarly articles, ITSSD specifically intends to disseminate disclosed NOAA records through various means and media, including, but not limited to, publication of scholarly articles, and to a broad public audience that includes, but is more diverse than, the scholarly and academic communities. The description of the media articles, to date, set forth in the discussion of ITSSD’s satisfaction of Factor 3.a above, makes clear that ITSSD will disseminate disclosed NOAA records to a broad public audience.

The “[Library](#)”, “[Programs](#)”, “[News](#)”, “[News & Media Archive](#)”, “[References](#)” and “[Testimonials](#)” sections of ITSSD’s website, furthermore, clearly evidence the broad and diversified public audience, to date, to which ITSSD publications, white papers, press releases, media interviews, public debates, and public symposia and conference materials have been disseminated, and the responses to and/or professional recognition of such disseminations ITSSD has received from members of these communities. Indeed, the [ITSSD website](#) has been partially redesigned since the June 30, 2014, to provide the public and the media with simple access to the ITSSD’s NOAA and EPA FOIA Requests and the accompanying exchange of NOAA, EPA and ITSSD correspondences. For example, documents related to ITSSD’s NOAA FOIA Request, Clarification and Fee Waiver Requests are now accessible via the “[ITSSD Portal to NOAA FOIAs](#)” located on the website homepage.⁴⁷ In addition, the redesigned ITSSD website provides easy access to detailed information about [FOIA](#), the [Information Quality Act](#) and [regulatory transparency](#) more generally.

The ITSSD website also provides easy access to these three different types of third party reporting: [mainstream/editorial media](#), [industry/trade/professional media](#) and [NGO/activist media](#) – each of which contains certain articles or blogs discussing ITSSD’s IQA-focused FOIA National Education Campaign. The website homepage (“ITSSD in the News - Media, Trade & NGO”) provides the public with direct access to the most recent of each of these pages, respectively. It also provides the public with direct access to the most recent pages of three types of ITSSD products: [Articles/Op-eds](#), [White Papers](#) and [Letters](#) (Correspondences) which appear in the ITSSD “Library”. The redesign of the ITSSD website demonstrates ITSSD’s specific intent and ability to easily disseminate IQA compliance-related FOIA information, once it has been disclosed by EPA, and then compiled, analyzed and edited by ITSSD.

Lastly, ITSSD readily concedes it is not likely that all members of the public, especially those who support NOAA and IPCC climate science and an aggressive environmental regulatory agenda, will be interested in ITSSD’s dissemination of NOAA’s disclosed peer review records, once compiled, analyzed/processed, edited and explained. Nevertheless, ITSSD is confident that there remains a sizeable group of American voters that will be interested in hearing about the facts behind the NOAA

and NOAA third-party contractor peer reviews of the ten (10) NOAA-developed climate assessments supporting the EPA Administrator's endangerment and cause or contribute findings.

For example, polling conducted by reputable sources since, at least, June 2010 strongly suggests that such a public audience likely consists of no less than one-third of all American voters and, potentially, more than two-thirds of the electorate.⁴⁸ These results generally comport with and are complimentary to the results of two more recent surveys conducted by the U.K.-based market research firm Ipsos MORI (released in 2014) and by the U.S.-based Pew Research Center (released in 2013). The Ipsos MORI survey found with respect to the environment, that 32 percent (% - approximately one third) of all Americans surveyed do not believe that “the climate change we are currently seeing is largely the result of human activity.”⁴⁹ Meanwhile, the Pew Research Center survey found that 40 percent of all Americans surveyed do not believe that global climate change poses a major threat to their country, “making Americans among the least concerned about this issue of the 39 publics surveyed.”⁵⁰

All told, these surveys strongly suggest that a considerable portion of the American electorate remains uncertain about the causes of and risks posed by anthropogenic climate change. These surveys also strongly suggest that such a large percentage of Americans would be interested in receiving information, once disclosed by NOAA, and compiled, analyzed, edited, explained and disseminated by ITSSD, revealing whether NOAA and NOAA's third-party contractors had peer reviewed the ten (10) NOAA-developed assessments which supported the EPA Administrator's 2009 Clean Air Act GHG Endangerment Findings, in conformance with the most rigorous and least discretionary IQA statutory and administrative standards applicable to HISAs and ISI.

Lastly, where an organization seeking a fee waiver has explained its ability to disseminate information to the public by way of presentations to the public, other public interest organizations, participation in conferences, articles in various media and through its website, and has adequately detailed its ability and intent to publicize the disclosed information to more than just a narrow segment of the public, at least one court has held that the group had met the dissemination prong of the public interest test.⁵¹

In sum, ITSSD has demonstrated that it specifically intends to and is capable of disseminating the requested records to a broad public audience in an understandable form through various media, once they have been disclosed by NOAA, and then compiled, analyzed/processed, edited and explained by ITSSD professional staff and Board of Advisors members. Therefore, NOAA should find that ITSSD's new FOIA Request satisfies factor 3 of the six-factor fee waiver test, consistent with 15 C.F.R. §4.11(k)(2)(iii).

Factor 4: The Disclosure of the Requested Information is Likely to Contribute ‘Significantly’ to Public Understanding of Government Operations or Activities (15 C.F.R. §4.11(k)(2)(iv))

Disclosure of the NOAA peer review records clearly identified in ITSSD's new FOIA Request will “contribute significantly to public understanding” of the peer review practices and procedures NOAA and NOAA third-party contractors had actually engaged in to ensure the quality, integrity and

reliability of the ten (10) NOAA-developed climate assessments, in ostensible conformance with the Information Quality Act and relevant OMB and EPA IQA-implementing guidelines, consistent with 15 C.F.R. §4.11(k)(2)(iv).

As the facts set forth in Section I of ITSSD's new FOIA Request reveal, NOAA, especially its Office of General Counsel, *knew or had reason to know* the EPA Administrator would use those assessments in undertaking the type of endangerment analysis under the Clean Air Act the U.S. Supreme Court had required in *Massachusetts v. EPA*. And, consequently, NOAA, especially its Office of General Counsel, *knew or had reason to know* that if the EPA Administrator had reached positive endangerment findings based, in part, on the conclusions drawn in such NOAA-developed climate assessments, the Clean Air Act would require EPA to regulate *all* GHG emissions. The NOAA peer review records ITSSD has requested, particularly, those involving NOAA and NOAA third-party contractor identification, disclosure and resolution of apparent and actual conflicts-of-interest, subject matter bias and intellectual independence issues, have not been effectively disclosed on NOAA websites. Therefore, NOAA's records of such governmental operations or activities have not previously been meaningfully disclosed, if at all, and consequently, have *not* contributed significantly to public understanding of the peer review processes and procedures NOAA and its third-party contractors had employed to validate the IQA conformance of these NOAA-developed assessments. As a result, ITSSD's disclosure of the requested records, once released by NOAA, and subsequently compiled, edited, analyzed, explained and disseminated by ITSSD, will "contribute significantly to public understanding" of those processes - to a much greater degree than NOAA's actual and virtual non-disclosures of such information to-date.

D.C. Circuit precedent holds that "[t]he key inquiry with respect to a FOIA fee waiver request is whether 'dissemination' of the requested information is likely to contribute significantly to citizens' understanding of the workings of their government."⁵² "Thus, a requester satisfies its burden by describing with reasonable specificity the link between the request and the enhancement of public awareness and understanding of governmental activities."⁵³ "[T]his inquiry involves comparing the public understanding with and without the potential disclosure."⁵⁴

The administrative record in the present case does not reveal any NOAA website or media disclosure of the majority of records ITSSD's new FOIA Request has sought disclosure, particularly records that indicate that NOAA and NOAA third-party contractors had identified, evaluated, addressed and/or resolved apparent and actual institutional conflicts-of-interest, subject matter bias and lack of intellectual independence among prospective and selected peer reviewers, for each of the peer review panels established to review the ten (10) NOAA-developed climate assessments. Nor does the administrative record reflect that NOAA has disclosed records on any agency website or to the media that had identified, evaluated, addressed and/or resolved apparent and actual peer review panel imbalances. Even the USGCRP/CCSP website had failed to disclose any such information, and no such information is currently publicly available or accessible on said website. And, neither did NOAA's websites nor the USGCRP/CCSP website ever disclose any information concerning the IQA conformance of the APA notice and comment procedures and the administrative review procedures NOAA had accorded to stakeholders intent upon submitting meaningful comments in response to the

pre-dissemination drafts of the ten (10) NOAA-developed assessments and to stakeholders intent upon securing NOAA responses to requests for correction of the already disseminated assessments.

Whatever peer review records NOAA's website did disclose with respect to these assessments had failed to address these issues, and whatever peer review records the USGCRP/CCSP website did disclose, on NOAA's behalf, with respect to these assessments are akin to an interagency (White House) 'reading room' which did not contribute much, if at all, to public understanding of these issues. As the U.S. Supreme Court has held, "[p]lainly, there is a vast difference between the public records that might be found after a diligent search of courthouse files...and a computerized summary located in a single clearinghouse of information."⁵⁵ This scenario is analogous to the stark distinction between the prior and current failure of NOAA to publicly disclose in a readily accessible and understandable manner, the records ITSSD requested, and ITSSD's *specific intent and ability* to disseminate the requested records, once released by NOAA, following their compilation, detailed analysis, editing and explanation by ITSSD professional staff and members of the ITSSD Board of Advisors. The administrative record does not support any possible argument proffered by NOAA that "there is no new information to be gained through disclos[ure] of the requested documents."⁵⁶

More importantly, the new ITSSD FOIA Request clearly evidences how ITSSD's specific intent and ability to disseminate such records in various forms and via multiple media sources will contribute significantly to citizens' understanding of the critically important peer review practices NOAA and NOAA third-party contractors had employed to ensure the quality, objectivity, utility and integrity of the NOAA-developed climate assessments that NOAA *knew or had reason to know* EPA would use as the scientific foundation of its 2009 CAA GHG Endangerment Findings. In other words, ITSSD's new FOIA Request "clearly describ[es] with reasonable specificity the link between the request and the enhancement of public awareness and understanding of governmental activities."⁵⁷ In particular, ITSSD's new FOIA Request describes and evidences ITSSD's specific "aim to elucidate the ties between"⁵⁸ (i.e., *the institutional affiliations between*) NOAA, NOAA scientists, universities and nonprofit institutes then participating in NOAA grant-funded climate science research-related programs, university and nonprofit scientists, the members of National Research Council of the National Academy of Sciences peer review panels, report review committees and oversight boards and committees. ITSSD's specific intent and ability to undertake these activities "is particularly significant given Congress' intention to encourage 'open and accountable government' under the FOIA fee waiver provision."⁵⁹

Furthermore, "[t]he documents that [ITSSD] plans to make publicly available, coupled with [ITSSD's] analysis thereof, will allow the public to make a more informed assessment of the 'ethical propriety' and wisdom of the actions of [NOAA's] officials [and NOAA's third-party contractors] who administered"⁶⁰ the peer review of the ten (10) NOAA-developed climate assessments. Consequently, "the disclosures likely will result in the expansion of, and therefore a significant contribution to, the public's understanding of the potential conflicts of interest in" the NOAA and NOAA third-party contractor peer reviews of such NOAA-developed assessments."⁶¹

Moreover, although Section I.2.c. of the Annotated Addendum accompanying and incorporated by reference within ITSSD's new FOIA Request discusses the availability in various media of information regarding the impure connections between U.S. government agencies and the National Research Council of the National Academy of Sciences, particularly, the institutional conflicts-of-interest between them, such disclosure "does not obviate the need for further dissemination by [ITSSD] or undermine [ITSSD's] satisfaction of the public interest prong."⁶² Lastly, "[t]he records may also serve to clarify the scope of previously disclosed relations between" NOAA, NOAA scientists, universities and nonprofit institutes then participating in NOAA grant-funded climate science research-related programs, university and nonprofit scientists, the members of National Research Council of the National Academy of Sciences peer review panels, report review committees and oversight boards and committees.⁶³

In sum, ITSSD has demonstrated its specific intent and ability to ensure NOAA's disclosure of the NOAA peer review records ITSSD requested will "contribute significantly to public understanding" of government operations or activities – i.e., the peer review practices and procedures in which NOAA and NOAA third-party contractors had actually engaged to validate the quality, integrity and reliability of the ten (10) NOAA-developed climate assessments, in ostensible conformance with the Information Quality Act and relevant OMB and EPA IQA-implementing guidelines. Therefore, NOAA should find that ITSSD's new FOIA Request satisfies factor 4 of the six-factor fee waiver test, consistent with 15 C.F.R. §4.11(k)(2)(iv).

Factor 5: The Requester Does Not Have a Commercial Interest That Would Be Furthered by the Requested Disclosure (15 C.F.R. §4.11(k)(3)(i))

The Institute for Trade, Standards and Sustainable Development ("ITSSD") is a nonprofit organization which does not have "commercial interest that would be furthered by the requested disclosure."⁶⁴ ITSSD does not seek to benefit commercially from this information. ITSSD is organized under Section 501(c)(3) of the Internal Revenue Code and is funded entirely by tax-deductible contributions from individuals, foundations and corporations. ITSSD neither seeks nor accepts financial support from government sources. ITSSD's scholarly approach to international trade, environment, health and safety (EHS) regulatory, and intellectual property and innovation policy research and analysis relevant to sustainable development has earned it a solid reputation in the public square and in governmental, intergovernmental, and academic venues.

ITSSD's interest in obtaining the requested records is purely to provide a public service. The public service to which ITSSD refers is that of significantly educating a broad public audience about the specific government operations or activities in which NOAA and its third-party peer review contractors had engaged to ensure the quality, integrity and reliability of the ten (10) NOAA-developed climate assessments that NOAA *knew or had reason to know* the EPA Administrator would use in undertaking the endangerment analysis required under the Clean Air Act, and in ultimately reaching positive 2009 Clean Air Act GHG Endangerment Findings. These government operations or activities entail particular NOAA and NOAA third-party contractor peer review practices and procedures that should have been undertaken free from the influence and interests of outside groups,

entities and individuals,⁶⁵ consistent with the most rigorous and least discretionary Information Quality Act statutory and administrative standards applicable to “highly influential scientific assessments” (“HISAs”) and “influential scientific information” (“ISI”).

ITSSD’s interest in securing NOAA’s disclosure of the requested records is to employ the professional capacities of ITSSD staff and Board of Advisors to inform and explain to a reasonably broad public audience how NOAA and NOAA third-party peer review contractors had analyzed and validated these HISAs and ISI, including the scientific and statistical data and modeling information and the testing thereof underlying them, which NOAA “disseminated” to the public when finalized. The ten (10) NOAA-developed climate assessments that are subject of this new FOIA Request ultimately were used by the EPA Administrator as the scientific foundation for EPA’s 2009 CAA GHG Endangerment Findings and subsequent national regulatory actions bearing significant potential economic repercussions. The public interest is herein engendered because such NOAA government operations and activities, which engendered pervasive institutional conflicts-of-interest, subject matter bias, lack of intellectual independence, peer review panel imbalances and lack of constitutional due process, already have had direct and indirect economic and non-economic implications for all members of the American public, and they are entitled to know about them.

International scholars have concluded that freedom of information has become a human right which transcends any improper or unjust attempt by government to directly or indirectly quash the right of citizens to seek and impart information concerning governmental decisions.

“Freedom of information (FOI) is a human right. In order to make governments accountable, citizens have the right to know - the right of access to official documents...Freedom of information is recognized in international law. Article 19 of both the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights provide that every person shall have the right to seek and impart information. There is growing recognition that the right to seek information includes a right of freedom of information.”⁶⁶

The comprehensive disclosure by NOAA of the requested records will also serve a secondary noncommercial educational public interest. ITSSD intends to share its forthcoming compilation, analysis, explanation and dissemination of such records with U.S. and foreign nonprofit policy research and advocacy organizations that are fellow members of the nonprofit Atlas Economic Research Foundation’s global network. These entities are interested in learning about the laws and administrative procedures surrounding the U.S. FOIA and IQA, and in conveying such information to their public audiences to ensure that their governments become and/or remain more transparent. ITSSD is aware that such organizations and the public audiences they serve not only are interested in this subject matter generally, but also are interested in learning about the U.S. scientific peer review process, and specifically, about how that process ensured the quality, integrity and reliability of U.S. federal government climate science. In particular, ITSSD understands that knowledge of the U.S. FOIA and IQA law and procedure could significantly contribute to such organizations’ efforts to

obtain, analyze and disseminate in their own countries government climate science-related records potentially obtainable under analogous FOIA statutes.

Indeed, since the credibility of the peer review process underlying regulatory science is an important element of regulatory transparency, NOAA's comprehensive disclosure of the records ITSSD requested can significantly contribute to improving public confidence in government climate science-related operations and activities, both here and abroad. Public confidence in government transparency initiatives is essential if governments are to successfully conclude politically ambitious trade agreements the primary goal of which is to achieve international regulatory cooperation,⁶⁷ especially where scientific information is shared among governments and can as easily serve as the basis for cross-border regulations as it can for purely domestic regulations. As one recent U.S. Government Accountability Office reveals,

*“there is no bright line that separates international regulatory cooperation activities from regulatory programs. For example, U.S. agencies share scientific and technical information with their foreign counterparts, which can inform all stages of the rulemaking process. In addition, information sharing can help inform an agency's decision on whether or not to regulate a product. When countries have differences in regulations in a particular area, there are opportunities to coordinate on the science underlying regulatory decisions in a particular area. EPA Office of Chemical Safety and Pollution Prevention (OCSPP) officials said that for chemical safety regulations, countries are working within different statutory and regulatory frameworks and different levels of acceptance of risk that can make it difficult to reach full agreement on a regulatory approach. In such cases, sharing information with foreign counterparts can facilitate agreement on a common understanding of the issue or on underlying technical or scientific issues. According to officials that we interviewed, OCSPP also focuses on transparency and good regulatory practices, which lead to commonality between policies, work sharing on scientific reviews, and greater harmonization in the long term” (emphasis added).*⁶⁸

In other words, amid the current environment of international legal positivism and post-modernism where regulatory borders are increasingly viewed as permeable and malleable, there is a real likelihood that hazard-focused precautionary principle-driven policy-based-science rules prevalent in one negotiating jurisdiction will eventually pervade what was once the risk-focused empirical science-based policy framework of another negotiating jurisdiction.⁶⁹ Since governments have often been less than transparent concerning its planned treatment of such arcane and obscure subject matter, the question that remains is whether and if a broad public audience will ever learn about it absent compelled disclosure under FOIA.⁷⁰

It is well recognized that the intention of FOIA is to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”⁷¹ And, since the U.S. FOIA was enacted in 1966, “many countries

[have] [...] follow[ed] the FOIA model on access to government.”⁷² As the nonprofit Privacy International reported in 2006,

“Forty years ago, US President Lyndon Johnson signed the Freedom of Information Act on Independence Day, stating ‘I signed this measure with a deep sense of pride that the United States is an open society in which the people’s right to know is cherished and guarded.’ The FOIA was not the first law of its kind but its adoption was nevertheless a milestone since following the US lead, many countries, first a trickle and then a flood, recognized the crucial importance of the principle and followed suit.”⁷³

According to said report,

“Nearly 70 countries around the world have now adopted comprehensive Freedom of Information Acts to facilitate access to records held by government bodies and another fifty have pending efforts. A few countries have issued decrees or used constitutional provisions. Many countries have adopted other laws that can provide for limited access including data protection laws that allow individuals to access their own records held by government agencies and private organizations, specific statutes that give rights of access in certain areas such as health, environment, government procurement and consumer protection. Although FOI has been around for over 200 years, it is still evolving. Over half of the FOI laws have been adopted in just the last ten years.”⁷⁴

There is a relative lack of experience in many such countries regarding the proper administration of the FOIA laws there enacted. Therefore, ITSSD intends also to use its new FOIA Request and this ITSSD FOIA Fee Waiver Request, in addition to ITSSD’s forthcoming compilation, analysis, editing, explanation and dissemination of the requested records once disclosed by NOAA, as a unique teaching opportunity that will benefit international civil society and the public interest within those countries in which Atlas network members are resident. The 2006 Privacy International report revealed that, while nearly all countries in Western Europe and the Americas⁷⁵ had, at such time, adopted some form of FOIA law, “there ha[d] been more a modest adoption of [FOIA] laws...[i]n the Asia-Pacific region”,⁷⁶ no adoption of such laws in the Middle East outside of Israel, and only the slow progress of such initiatives in Africa.⁷⁷ As a result, the Privacy International report concluded that,

“there is much work to be done to reach truly transparent government. The culture of secrecy remains strong in many countries. Many of the laws are not adequate and promote access in name only. In some countries, the laws lie dormant due to a failure to implement them properly or a lack of demand. In others, the exemptions and fees are abused by governments. Older laws need updating to reflect developments in society and technology. New laws promoting secrecy in the global war on terror have undercut access. International organizations have taken over the

functions of national government but have not subjected themselves to the same rules.”⁷⁸

Regrettably, there is no reason to believe that the administration of FOIA laws around the world has progressed much since the release of said report. During 2010, for example, the nonprofit World Resources Institute (“WRI”) reported that, although “over 80 countries ha[d] enacted some form of FOIA, and the vast majority of these have been introduced in the past five or six years...there is still a lot that needs to be done to improve implementation of these laws. Our research has shown that practice lags behind.”⁷⁹

ITSSD’s compilation, analysis, explanation and dissemination of the requested records once disclosed by NOAA, therefore, would serve the very useful purpose of continuing public awareness, both in the United States and beyond, about U.S. federal government transparency on very important all-encompassing environmental matters bearing serious economic, social, psychological and emotional implications for the U.S. public at large. For example, the United Nations Educational Scientific and Cultural Organization (“UNESCO”) found, in 2008, that “[during the last 15 years [i.e., since 1992], there has been increasing recognition that access to information on the environment is key to sustainable development and effective public participation in environmental governance.”⁸⁰ In support of its findings, UNESCO cited Principle 10 of the 1992 *Rio Declaration on Environment and Development*⁸¹ and the European Union’s *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention)*.⁸²

Similarly, nonprofit WRI previously noted the importance of governments granting access to environmental information, including the scientific underpinnings supporting environmental decision-making:

“Making the right environmental choices - as consumers, voters and shareholders – depends on having access to accurate information on the issues that confront us every day, from the quality of the food we eat, to the impacts of corporate supply chains, to the voting records of parliamentarians. Much of this data is held by or can only be forced into the open by government.”⁸³

ITSSD seeks comprehensive NOAA disclosure of the requested information to further ITSSD’s noncommercial public interest. ITSSD’s noncommercial public interest is to educate a reasonably broad public audience that includes *inter alia* fellow civil society network organizations in and beyond the United States about the quality, integrity and reliability of the foundations of NOAA climate science research and observations that NOAA *knew or had reason to know* EPA would adopt, endorse and disseminate as its own, and which informed the EPA Administrator’s CAA Section 202(a)(1) GHG Endangerment Findings. ITSSD’s noncommercial public interest is also to educate a reasonably broad public audience regarding how federal agency peer review practices that do not satisfy the highest, most stringent and least discretionary of Information Quality Act standards can very well result in the issuance of economically significant regulations premised on the precautionary principle that adversely affect all economic actors and citizens.

ITSSD will not earn a profit from disclosure of the requested information. As discussed above, ITSSD will instead use the responsive records to endeavor to expand the public's and Congress' knowledge and interest in the peer review practices (governmental operations and activities) NOAA and NOAA third-party contractor had employed to validate the climate science, including the datasets, computer models and applications thereof contained in the ten (10) NOAA-developed assessments the EPA Administrator used as support for its Final CAA Section 202(a)(1) Findings. ITSSD is not working on behalf of, and has neither been compensated for nor otherwise paid by, any private party to prepare its new FOIA Request and this FOIA Fee Waiver Request.⁸⁴ ITSSD also will not be working on behalf of, and will be neither compensated nor otherwise paid by, any private party to compile, analyze, explain and disseminate to the public the requested NOAA records once disclosed.

Just as with any other government policy-focused nonprofit nongovernmental organization operating in the public spotlight, including environmental protection and conservation-focused and public transparency-focused nonprofit organizations, however, it is entirely conceivable that ITSSD's informed reporting of the requested records once disclosed by NOAA could potentially indirectly further some ITSSD commercial, trade, or profit interests; but this is purely speculative and uncertain, and is highly unlikely at the present time.

Consequently, ITSSD has adequately demonstrated that it does not seek the requested information for a use or purpose that furthers [its] commercial, trade, or profit interests.⁸⁵ Therefore NOAA should conclude that ITSSD's new FOIA Request satisfies factor 5 of the of six-factor fee waiver test.

Factor 6: The Public Interest in Disclosure is Greater than Any Identified Commercial Interest; Therefore, Disclosure of the Requested Information is Not “Primarily in the Commercial Interest of the Requester” (15 C.F.R. §4.11(k)(3)(ii))

As previously discussed, ITSSD is not working on behalf of, and has not been paid or otherwise compensated by, any private party in connection with its new FOIA Request or this new FOIA Fee Waiver Request. Nevertheless, it is possible, following disclosure of such records, that ITSSD could benefit to some extent, sometime in the future, in reputational terms, which could potentially indirectly enhance its longer term efforts to further develop programs related to its charitable mission.

The applicable NOAA fee waiver regulations obviously contemplate that a requester could “put the records to a commercial use” once they have been disclosed by the agency.⁸⁶ However, such regulations also provide that a fee waiver is justified where “the public interest standard (paragraph (k)(1)(i) of this section) is satisfied and the public interest is greater than any identified commercial interest in disclosure.”⁸⁷ Should, however, the disclosure of the requested information create a profit motive, it is ITSSD's position that this, by itself, does not run afoul of the commercial interest test. The “not primarily in the commercial interest” test is satisfied, provided the information requested is disseminated in the requestor's professional capacity and would further the public interest. For each of the foregoing reasons, this request qualifies as one that is not primarily in the commercial interest of ITSSD.

This statement is supported by D.C. Circuit jurisprudence. In *Campbell v. U.S. Department of Justice*,⁸⁸ the D.C. Federal Court of Appeals recognized the possibility that bona fide scholars may potentially profit from subsequent scholarly endeavors involving their use of records disclosed by a federal agency in response to a previously filed FOIA request. Citing prior circuit precedent,⁸⁹ the Court ruled that such professional activities resulting in personal compensation did not rise to the level of an “overriding commercial interest” so as to convert an otherwise noncommercial dissemination of the requested records “to advance public understanding of government operations” which primarily benefited the general public into a “primarily commercial” use.⁹⁰

“[T]he underlying purpose of the fee waiver provisions [is to] afford ‘special solicitude’ to scholars whose archival research advances public understanding of government operations...The fact that a bona fide scholar profits from his scholarly endeavors is insufficient to render his actions ‘primarily...commercial’ for purposes of calculating a fee waiver, as Congress did not intend for scholars (or journalists and public interest groups) to forego compensation when acting within the scope of their professional roles. The quasi-commercial nature of Campbell’s research was therefore irrelevant for purposes of calculating an appropriate fee waiver.”⁹¹

Considering, in the abstract, that any requested records NOAA would disclose could potentially be put to varied uses, ITSSD has set forth in exhaustive detail above its purposes for securing such information.⁹² NOAA’s “comparison of the private and public benefits” that ITSSD may derive from its compilation, analysis, explanation and dissemination of such information in a clear and understandable manner to a reasonably broad public audience should entail “no more than a garden-variety ‘weighing’ inquiry.”⁹³

Under the present circumstances, ITSSD’s described purposes for seeking NOAA disclosure of the requested information reflect an overriding *noncommercial* interest. Since the extent of any ITSSD commercial interest that has been identified is *not* sufficiently great in magnitude in comparison with the public interest in disclosure, ITSSD has adequately shown that the disclosure of the requested records is “not primarily in the commercial interests of the requester.”⁹⁴ Therefore, NOAA should conclude that ITSSD’s new FOIA Request satisfies factor 6 of the six-factor fee waiver test.

III. Conclusion

In sum, NOAA should grant ITSSD’s new FOIA Fee Waiver Request because ITSSD has satisfactorily demonstrated, consistent with 15 C.F.R. §4.11(k)(1)-(3), that “(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government; and (ii) Disclosure of the information is not primarily in the commercial interest of the requester.”⁹⁵

END

ENDNOTES

¹ See 15 C.F.R. §4.11(k)(1)-(3).

² ITSSD is organized and operated *inter alia* to conduct and publish science law and policy-related research, analysis and commentary on various domestic and international environmental and trade issues. In fulfilling its charitable mission, ITSSD does not intend to promote any particular product or industry. Rather, it endeavors to provide a thorough, informed and balanced analysis of regulatory science, economic and law and policy issues and their impact on a broad public audience. The records requested pursuant to the ITSSD EPA FOIA Requests are integral to ongoing ITSSD research concerning the implementation of government (legislative, regulatory and judicial) transparency and accountability mechanisms related to science and science policy, the aim of which is to educate the public and Congress about the relationship between sustainable development and principles of good administrative governance. See Office of Management and Budget, *The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines*, 52 FR 10012, 10013-10014 (March 27, 1987), available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/foia_fee_schedule_1987.pdf. These guidelines advise federal agencies to evaluate requests on an individual basis and to consider whether requesters can demonstrate that: 1) the request is from an institution that is within the category; 2) the institution has a program of scholarly research; and 3) the documents sought are in furtherance of the institution's program of scholarly research and not for a commercial purpose. *Id.*, at 10014. ITSSD's scholarly approach examines ostensibly impartial, unbiased and objective scientific methodologies used as the basis for regulation to ascertain how they might affect free markets, property rights and the rule of law, considering both the costs and the benefits to the public of a cleaner and healthier environment. ITSSD has published a number of peer-reviewed analyses, including as book chapters, as articles appearing in law reviews, law journals, economic journals, policy journals and as panel presentation materials in domestic and international conferences, all of which are available online at the ITSSD website.

³ See 15 C.F.R. §4.11(e).

⁴ *Id.*

⁵ See 132 Cong. Rec. S. 14298 (statement of Sen. Leahy).

⁶ See *Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 89 (D.C. Cir. 1986), quoting *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D.Mass.1984); SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S.REP. No. 854, 93rd Cong., 2d Sess. 11-12 (1974), U.S. Code Cong. & Admin. News 1974, p. 6267.

⁷ *Id.*

⁸ See *Better Gov't Ass'n v. Department of State*, 780 F. 2d 86, 90.

⁹ See Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153-154 (2000), §515, codified at 44 U.S.C. § 3516 note, available at: <http://www.gpo.gov/fdsys/pkg/PLAW-106publ554/pdf/PLAW-106publ554.pdf>; <http://codes.lp.findlaw.com/uscode/44/35/1/3516/notes>.

¹⁰ See Office of Management and Budget, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies* ("OMB IQA Guidelines") 67 FR 8452 (Feb. 22, 2002), available at: <http://www.whitehouse.gov/sites/default/files/omb/fedreg/reproducible2.pdf>; Office of Management and Budget, *Final Information Quality Bulletin for Peer Review* ("OMB-PRB") (Dec. 16, 2004), available at: <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>.

¹¹ See United States Department of Commerce, National Oceanic and Atmospheric Administration, Office of the Chief Information Officer & High Performance Computing and Communications, *Information Quality*, NOAA website (last visited April 4, 2014), available at: http://www.cio.noaa.gov/services_programs/info_quality.html; United States Department of Commerce, National Oceanic and Atmospheric Administration, Office of the Chief Information Officer & High Performance Computing and Communications, *Information Quality Overview* (July 30, 2010), available at: http://www.cio.noaa.gov/services_programs/pdfs/IQA_Overview_7-30-10-FINAL.pdf. See also United States Department of Commerce, National Oceanic and Atmospheric Administration, Office of the Chief Information Officer & High Performance Computing and Communications, *National Oceanic and Atmospheric Administration Information Quality Guidelines* ("NOAA IQA Guidelines") NOAA website (last visited April 4, 2014), available at: http://www.cio.noaa.gov/services_programs/IQ_Guidelines_011812.html; United States Department of Commerce, National Oceanic and Atmospheric Administration, Office of the Chief Information Officer & High Performance Computing and Communications, *National Oceanic and Atmospheric Administration Policy on Conflicts of Interest For*

Peer Review Subject to OMB's Peer Review Bulletin ("NOAA PRB-COI"), NOAA website (last visited April 4, 2014), available at: http://www.cio.noaa.gov/services_programs/NOAA_PRB_COI_Policy_110606.html; United States Department of Commerce, National Oceanic and Atmospheric Administration National Marine Fisheries Service, *National Marine Fisheries Service Policy Directive PD 04-108 - Science and Technology Policy on the Data Quality Act* (June 27, 2012) ("NMFS-STP/DQA"), available at: <http://www.nmfs.noaa.gov/op/pds/documents/04/04-108.pdf>; United States Department of Commerce, National Oceanic and Atmospheric Administration National Marine Fisheries Service, *National Marine Fisheries Service Instruction 04-108-03 - Science and Technology Information Quality Act Section 515 Pre-Dissemination Review and Documentation Guidelines* (Dec 16, 2004) ("NOAA-ST-IQA/PDR"), NOAA website (last visited April 4, 2014), available at: <http://www.nmfs.noaa.gov/op/pds/documents/04/108/04-108-03.pdf>.

¹² See 15 C.F.R. §4.11(k)(2)(i).

¹³ See *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Health and Human Services*, 481 F. Supp. 2d 99, 108 (D.C.D.C. 2006), U.S. Dist. LEXIS 95700 (Sept. 8, 2006).

¹⁴ See *National Resources Defense Council, Inc. v. Environmental Protection Agency*, 581 F. Supp. 2d 491, 499 (S.D.N.Y. 2008), 2008 U.S. Dist. LEXIS 63184 (Aug. 19, 2008) (finding that "the Government does not contest that the public also has a significant interest in how the Government makes policy decisions regarding the use of EDBC's on potatoes"). *Id.*

¹⁵ See, e.g., *Massachusetts v. Environmental Protection Agency*, 549 U.S. 534 (2007), Slip Op. at p. 30 ("If EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate the emissions of the deleterious pollutant from new motor vehicles.") *Id.*

¹⁶ See, e.g., United States Environmental Protection Agency, *Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule*, 75 FR 25324, 25325-25326, 25402 (May 7, 2010), available at: <http://www.gpo.gov/fdsys/pkg/FR-2010-05-07/pdf/2010-8159.pdf>; United States Environmental Protection Agency, *Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units*; Proposed Rule, 79 FR 1430, 1438-1439 (Jan. 8, 2014), available at: <http://www.gpo.gov/fdsys/pkg/FR-2014-01-08/pdf/2013-28668.pdf>; United States Environmental Protection Agency, *Notice of Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units and Solicitation for Public Comments*, 79 FR 34830, 34841 (June 18, 2014), available at: <http://www.gpo.gov/fdsys/pkg/FR-2014-06-18/pdf/2014-13726.pdf>.

¹⁷ See *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Health and Human Services*, 481 F. Supp. 2d 99, 108 (D.C.D.C. 2006), *supra*.

¹⁸ 481 F. Supp. 2d 99, 109, quoting *Judicial Watch v. U.S. Dep't of Justice*, 185 F. Supp. 2d 54, 61 (D.D.C. 2002).

¹⁹ 481 F. Supp. 2d 99, 109.

²⁰ *Id.* Cf. *VoteHemp, Inc. V. DEA*, 237 F. Supp 55, 60 (D.C. D.C. 2002) ("[D]ocuments that are 'already...in the public domain, in either a duplicative or a substantially identical form' are not 'as likely to contribute' to the public's understanding.") *Id.*

²¹ 481 F. Supp. 2d 99, 110.

²² *Id.*

²³ 481 F. Supp. 2d 99, 111, quoting *Judicial Watch, Inc. v. U.S. Department of Transportation*, Civ. No. 02-566, 2005 U.S. Dist. LEXIS 14025, 2005 WL 1606915 at *5 (D.D.C. July 17, 2005).

²⁴ 481 F. Supp. 2d 99, 111, quoting *Fitzgibbon v. Agency for International Development*, 724 F. Supp. 1048, 1050-1051 (D.D.C. 1989).

²⁵ See 40 C.F.R. § 2.107(l)(2)(ii).

²⁶ See *Project on Military Procurement v. Dep't of Navy*, 710 F. Supp. 362, 365 n. 8 (D.D.C. 1989), holding that the fee waiver criteria concerning whether "the disclosure is likely to contribute to an increased understanding of government operations or activities," and whether the "disclosure is likely to contribute significantly to public understanding of government operations or activities as compared to the level of understanding that existed prior to the disclosure," are "hopelessly intertwined." *Id.*

²⁷ See *Judicial Watch, Inc. v. United States Department of Justice* ("Judicial Watch III"), 185 F. Supp. 2d 54, 62 (DC DC 2002), available at: <https://www.courtlistener.com/dcd/dVgr/judicial-watch-inc-v-us-dept-of-justice/?q=suitNature:Civil>; See also *D.C. Technical Assistance Org. v. U.S. Department of Housing and Urban Development*, 85 F.Supp.2d 46, 49 (DC DC 2000) (Court must look to 'the scope of the requester's proposed dissemination – whether to a large segment of

the public or a limit subset of persons...and the requester's capacity to disseminate the requested information') (citations omitted)".

²⁸ See, e.g., *Judicial Watch, Inc. v. Rossoti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *Larson v. Central Intelligence Agency*, 843 F.2d 1481, 1483, 269 U.S. App. D.C. 153, 15 Media L. Rep. 1961 (D.C. Cir. 1988) (fee waiver request properly denied where requester lacked ability to disseminate information because, *inter alia*, he failed to show contacts "with any major newspaper companies."); *Judicial Watch, Inc. v. U.S. Dept. Of Justice*, 122 F. Supp. 2d 13, 19 (D.D.C. 2000) ("requester who does not give specifics regarding a method of disseminating requested information will not meet this factor, even if the requester has the ability to disseminate information.") (citations omitted).

²⁹ See Institute for Trade, Standards and Sustainable Development, *ITSSD Embarks on Public "Education Campaign" To Ensure Federal Agency Peer Review Science Processes Used to Vet Climate Assessments Supporting EPA's 2009 Greenhouse Gas Endangerment Findings Met Information Quality Act Requirements*, Press Release (May 22, 2014), available at:

<http://nebula.wsimg.com/7e6107fef9a0b6b382e80e921b213c65?AccessKeyId=39A2DC689E4CA87C906D&disposition=O&alloworigin=1>.

³⁰ Cf. *Judicial Watch*, 122 F. Supp. 2d 5, 19; *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (refusing to grant waiver where requestor "did not establish a firm intention to publish the information requested" and "fails to identify any plan for a book, report, or newspaper article for which it will use the requested information.").

³¹ See Institute for Trade, Standards and Sustainable Development, *Programs*, available at: <http://www.itssd.org/programs.html>.

³² See "The Need for Regulatory Science Transparency at the EPA", Statement of A. Alan Moghissi, PhD, President, Institute for Regulatory Science, *Fostering Quality Science at EPA: Perspectives on Common Sense Reform* (Part I and Part II), Hearing Before the Committee on Science, Space, and Technology, Subcommittee on Energy and Environment, U.S. House of Representatives 112th Cong. (1st and 2nd Sessions) (Nov. 30, 2011), available at: https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/113011_Moghissi.pdf. See also A. Alan Moghissi, Dennis K. McBride, Roger R. Stough, and Michael S. Swetnam, *Regulatory Sunshine: Application of Best Available Science Concept and Metrics for Evaluation of Science Claims to Regulatory Transparency*, International Center for Regulatory Science, George Mason University and Potomac Institute for Policy Studies (2012), available at: http://www.nars.org/Documents/Regulatory_Sunshine.pdf; A. Alan Moghissi and Misti Ault Anderson, *Independent Peer Review of Regulatory Science Information*, Institute for Regulatory Science (June 2011), available at: <http://www.nars.org/Documents/Reg-Sci-Peer-Review-ManualFINAL.doc>; Institute for Regulatory Science, *Manual for Independent Peer Reviews and Independent Scientific Assessments* (2009), available at: <http://www.nars.org/Documents/RSI-MTAPR.doc>.

³³ See "Written Testimony of Gary E. Marchant, J.D., M.P.P., Ph.D, Lincoln Professor of Emerging Technologies, Law & Ethics Faculty Director, Center for Law, Science & Innovation, Sandra Day O' Connor College of Law, Arizona State University, Tempe, AZ," at *Fostering Quality Science at EPA: Perspectives on Common Sense Reform*, Hearing Before the Committee of Science, Space and Technology, Subcommittee on Energy and Environment, U.S. House of Representatives, 112th Cong. (Nov. 30, 2011), available at: https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/113011_Marchant.pdf.

³⁴ See Risk Analysis Center (Institute for Regulatory Science and Potomac Institute for Policy Studies), *Response of the Risk Analysis Center to the Office of Management and Budget's Proposed Risk Assessment Bulletin* (2006), available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/comments_rab/rac.pdf.

³⁵ See Potomac Institute for Policy Studies, *Climate Change and Human Health: Prospects for the Future*, CREST Bold Ideas Seminar, Introduction by Dennis K. McBride, (Sept. 13, 2013), available at: <http://www.potomacinstitute.org/bold-ideas-seminar-series/2661-crest-bold-ideas-seminar-climate-change-and-human-health-prospects-for-the-future.html> and <http://www.potomacinstitute.org/attachments/article/2661/Colwell24Feb2014.pdf>.

³⁶ See, e.g., A. Alan Moghissi, Michael Swetnam, Betty R. Love and Sorin R. Straja, *Best Available Science: Fundamental Metrics for Evaluation of Scientific Claims*, Potomac Institute Press (2010), available at: <http://www.amazon.com/Best-Available-Science-Fundamental-Evaluation/dp/0615298192>; A. Alan Moghissi, Betty R. Love and Sorin R. Straja, *Peer Review and Scientific Assessment: A Handbook for Funding Organizations, Regulatory Agencies and Editors*, Institute for Regulatory Science (2013), available at: <http://www.amazon.com/Peer-Review-Scientific-Assessment->

[Organizations/dp/148205888X](http://www.synesisjournal.com/vol3_g/2012_Moghissi_G6-13_abstract.html); Alan Moghissi, PhD, Michael S. Swetnam, Matthew Amin and Conner McNulty, *Ruckelshaus Effect*, Synesis: A Journal of Science, Technology, Ethics & Policy (Potomac Institute Press 2012), available at: http://www.synesisjournal.com/vol3_g/2012_Moghissi_G6-13_abstract.html and http://www.synesisjournal.com/vol3_g/Moghissi_2012_G6-13.pdf.

³⁷ Dr. Alan Moghissi, a longstanding member of the ITSSD Board of Advisors, previously served as Editor-in-Chief of *Environment International* and *Waste Management* (journals of Elsevier Publ.), and of *Technology – Elmsford – Journal of the Franklin Institute*, then *Technology: A Journal of Science Serving Legislative Regulatory and Judicial Systems*.

³⁸ See Lucas Bergkamp and Lawrence Kogan, *Trade, the Precautionary Principle, and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership*, European Journal of Risk Regulation (4/2013) (SSRN), available at: http://www.lexxion.de/pdf/ejrr/12-16-12.04.438_ejrr_2013_04.pdf010.pdf. See also Evergreen Magazine, *The EPA Has a Political Agenda that Doesn't Have Much of Anything To Do With Science - A Conversation with Dr. Alan Moghissi, One of America's Finest and Most Outspoken Scientists*, Evergreen Foundation (Fall 2012) at pp. 5-13, available at: http://www.esipri.org/Library/Evergreen_2012.pdf.

³⁹ See The Burton Awards, *The Burton Awards Announces the 2014 Distinguished Legal Writing Awards Law Firm Winners*, Press Release (April 14, 2014), available at: <http://www.burtonawards.com/news-2014-law-firm-winners.html> (“The Kogan Law Group, P.C. - Lawrence A. Kogan, Prof. Lucas Bergkamp, Partner at Hunton & Williams, Brussels, Belgium, *Trade, the Precautionary Principle, and Post-Modern Regulatory Process*”).

⁴⁰ See *Perkins v. United States Department of Veteran Affairs*, 754 F. Supp. 2d 1, 9 (D.D.C. 2010), *supra* (“It is undisputed that the information plaintiff has requested is both technical and voluminous. Thus, plaintiff must demonstrate that he is able to understand, process, and disseminate the information”, citing *McClellan [Ecological Seepage Situation v. C Carlucci US]* 835 F.2d [1282],...1286 [(9th Cir. 1987)].) ITSSD may do this by explaining how the backgrounds of its staff and members of its Board of Advisors qualify them to perform the analysis necessary to effectively disseminate the information. *Perkins v. United States Department of Veteran Affairs*, 754 F. Supp. 2d at 9-10 (discussing *Western Watersheds Project v. Brown*, 318 F. Supp. 2d 1036 (D. Idaho 2004); *South Utah Wilderness Alliance v. U.S. Bureau of Land Management*, 402 F. Supp. 2d 82 (D.D.C. 2005)).

⁴¹ See *Citizens for Responsibility and Ethics in Washington v. Department of Health and Human Services*, 481 F. Supp. 2d 99, 115 (DC DC 2006), available at: <https://www.courtlistener.com/dcd/domz/citizens-for-res-and-ethics-v-us-dept-of-hhs/> (“[T]he Court is not aware of a statutory requirement that a requesting party must have a history of disseminating information derived from FOIA requests to be entitled to a fee waiver. Indeed, if this were a requirement, a requesting party otherwise entitled to a fee waiver and capable of disseminating information to the public would have to pay fees associated with its initial FOIA requests until it had shown it was capable of disseminating information obtained through a FOIA request, a scenario that has no basis in FOIA or the legislative intent regarding the liberalization of fee waivers. See *McClellan*, 835 F. 2d at 1284. While the court in *Judicial Watch III* referred to the plaintiff’s past dissemination of information derived from FOIA requests as one factor leading to the conclusion that the plaintiff had fulfilled this third prong, the court never indicated that such a record was necessary to be entitled to a fee waiver. 185 F. Supp. 2d at 62. Rather...the requesting party’s past dissemination of information obtained through FOIA requests was one of several factors the court considered in addition to the requester’s proffered list of dissemination mechanisms and expressed intent to disseminate the information. *Id.* Such factors are considered because they illustrate the true inquiry: does the requesting party have the ‘ability and intention to effectively convey’ or disseminate the requested information to the public.’ *VoteHemp*, 237 F. Supp. 2d at 62. (quoting *Judicial Watch III*, 185 F. Supp. 2d at 62). While there is nothing in the administrative record as to whether CREW has disseminated new information derived from a FOIA request, the record does indicate that CREW has the capacity to process and disseminate information and has done so in the past. In addition to stating the mechanisms it uses to disseminate information to the public, including reports, memoranda, and its website, which, consistent with *VoteHemp*, *Judicial Watch III*, and *D.C. Technical*, could have sufficed to fulfill this prong, Plaintiff also cited two specific examples – the Abramoff website and the campaign contribution report – show that CREW has the capacity to compile information and disseminate it to the public. *The Court cannot imagine why a requesting party would have to convince an agency that it was capable of disseminating new information or information obtained through a FOIA request when it has amply showed a capacity to disseminate information generally*) (emphasis added). *Id.*

⁴² See *VoteHemp, Inc. v. Drug Enforcement Administration*, 237 F.Supp.2d 55, 62 (D.D.C. 2002), *supra*, referencing *D.C. Technical Assistance Org. v. U.S. Department of Housing and Urban Development*, 85 F.Supp.2d 46, 49 (DC DC 2000),

supra (“Court must look to ‘the scope of the requester’s proposed dissemination – whether to a large segment of the public or a limited subset of persons...and the requester’s capacity to disseminate the requested information’”).

⁴³ See *Carney v U.S. Dept. of Justice*, 19 F.3d 807, 815 (2nd Cir. 1994). From the information he submitted to the DOJ, we are satisfied that Carney will disseminate the disclosed records to a sufficiently broad audience of students and academics interested in his work. There is evidence in the administrative record that very little has been written regarding the role of DOJ in the selection process, and the DOJ does not dispute this. Thus, we are satisfied that Carney’s work is likely to be considered by other scholars.” *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* “DOJ suggests that, because Carney’s dissertation and proposed articles and book on the role of the DOJ in the judicial selection process are scholarly in nature, they will not reach a general audience and hence will not benefit the public at large. Such work by its nature usually will not reach a general audience, but, by enlightening interested scholars, it often is of great benefit to the public at large. To suggest otherwise is to ignore the important role of academe in our democracy. The relevant inquiry, as we see it, is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Id.*

⁴⁷ Similarly, documents related to ITSSD’s EPA FOIA Requests are now accessible via the “[ITSSD Portal to EPA FOIAs](#)” also located on the website homepage.

⁴⁸ See Lydia Saad, *In 2010, Conservatives Still Outnumber Moderates, Liberals*, Gallup Politics (June 25, 2010), available at: <http://www.gallup.com/poll/141032/2010-Conservatives-Outnumber-Moderates-Liberals.aspx> (A Gallup/USA Today polling in June 2010 revealed that 42% of those surveyed identify as conservative, 35% as moderate, while 20% identify as liberal); Pew Research Center for the People & the Press, *Voters Rate the Parties’ Ideologies - Dems Viewed as Farther from Political Center than is GOP* (July 16, 2010), available at: <http://www.people-press.org/2010/07/16/voters-rate-the-parties-ideologies/> (A June 2010 Pew poll revealed that 40% of American voters identify themselves as conservatives, 36% as moderates and 22% as liberals, with a strong majority of both liberals and conservatives describing themselves as closer to the center than to the extremes); Jeffrey M. Jones, *Liberal Self-Identification Edges Up to New High in 2013*, Gallup Politics (Jan. 10, 2014), available at: <http://www.gallup.com/poll/166787/liberal-self-identification-edges-new-high-2013.aspx> (As of 2013, self-identified conservatives stand at 34%, moderates at 38%, and liberals at 23%); Art Swift, *Wyoming Residents Most Conservative, D.C. Most Liberal* (Jan. 31, 2014), available at: <http://www.gallup.com/poll/167144/wyoming-residents-conservative-liberal.aspx>.

⁴⁹ See Ipsos MORI, *Global Trends 2014 – Environment*, available at: <http://www.ipsosglobaltrends.com/environment.html>.

⁵⁰ See Pew Research Center Global Attitudes Project, *Climate Change and Financial Instability Seen as Top Global Threats - Survey Report* (June 24, 2013) at p. 1, available at: <http://www.pewglobal.org/files/2013/06/Pew-Research-Center-Global-Attitudes-Project-Global-Threats-Report-FINAL-June-24-20131.pdf>.

⁵¹ See *Western Watersheds Project v. Brown*, 318 F. Supp. 2d 1036 (D. Idaho 2004).

⁵² See *Citizens for Responsibility and Ethics in Washington v. United States Department of Education*, 593 F. Supp. 2d 261, 270 (D.D.C. 2009), available at: <https://www.courtlistener.com/dcd/cToa/citizens-for-responsibility-v-us-dept-of-educ/>, quoting *Judicial Watch, Inc. v. Gen. Servs. Admin.*, 2000 U.S. Dist. LEXIS 22872, 2000 WL 35538030, at 11 (D.D.C. 2000) and *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, at 1285 (9th Cir. 1987).

⁵³ *Id.*

⁵⁴ See *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Health and Human Services*, 481 F. Supp. 2d 99, 116 (D.C.D.C. 2006), U.S. Dist. LEXIS 95700 (Sept. 8, 2006).

⁵⁵ See *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764, 109 S.Ct. 1468, 1477, 103 L. Ed. 2d 774 (1989), quoted in *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Health and Human Services*, 481 F. Supp. 2d 99, 117 (D.C.D.C. 2006), U.S. Dist. LEXIS 95700 (Sept. 8, 2006).

⁵⁶ *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Health and Human Services*, 481 F. Supp. 2d 99, 117 (D.C.D.C. 2006), U.S. Dist. LEXIS 95700 (Sept. 8, 2006).

⁵⁷ See *Citizens for Responsibility and Ethics in Washington v. United States Department of Education*, 593 F. Supp. 2d 261, 270 (D.D.C. 2009).

⁵⁸ *Id.*, at 271.

⁵⁹ *Id.*, quoting *Gen. Servs. Admin.*, 2000 U.S. Dist. LEXIS 22872, 2000 WL 35538030, at *11.

⁶⁰ See *Citizens for Responsibility and Ethics in Washington v. United States Department of Education*, 593 F. Supp. 2d 261, 271 (D.D.C. 2009).

⁶¹ *Id.*

⁶² *Id.*, at 271-271, citing *Gen. Servs. Admin.*, 2000 U.S. Dist. LEXIS 22872, 2000 WL 35538030, at *10 (“the fact that...some of the requested information has been released to sources other than requestor, does not necessarily mean that it is readily available to the public.”).

⁶³ See *Id.*, at 272, citing and quoting *Forest Guardians v. U.S. Dep’t of the Interior*, 416 F. 3d 1173, 1181 (10th Cir. 2005) (“(determining that ‘[k]nowing that [an agency or agency program] permits **[or does not permit]** the use of [a practice] is not the same as knowing the [details of that practice and the identifies of specific persons involved.]’”) (bold-faced brackets added; other brackets in original). *Id.*

⁶⁴ See 15 C.F.R. §4.11(k)(3)(i).

⁶⁵ In *Forest Guardians v. DOI*, 416 F. 3d 1173, 1179-1180 (10th Cir. 2005), the Tenth Circuit Court of Appeals held that, “an understanding of how [a federal agency] makes policy decisions, including the influence of any outside groups on this process, is also important to the understanding of the [agency].”

⁶⁶ See Gustav Björkstrand & Juha Mustonen, *Introduction: Anders Chydenius’ Legacy Today*, in “The World’s First Freedom of Information Act,” Anders Chydenius Foundation (2006), at p. 4, available at: http://www.access-info.org/documents/Access_Docs/Thinking/Get_Connected/worlds_first_foia.pdf.

⁶⁷ See Institute for Trade, Standards and Sustainable Development, *International Regulatory Cooperation*, ITSSD website, available at: <http://nebula.wsimg.com/374d8ac5bb729af7b75740edb1e11c98?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

⁶⁸ See United States Government Accountability Office, *International Regulatory Cooperation: Agency Efforts Could Benefit from Increased Collaboration and Interagency Guidance*, Report to the Chairman, Committee on Oversight and Government Reform, House of Representatives (GAO-13-588) (Aug. 2013), at p. 18, available at: <http://www.gao.gov/assets/660/656488.pdf>. “All agencies in our study reported that they engage in a range of international regulatory cooperation activities. These activities include U.S. agencies and foreign counterparts sharing scientific data, developing and using the same international regulatory standards, and recognizing each other’s regulations as equivalent. Cooperation can address both existing and avoid future regulatory differences. These activities generally fall into six broad categories...Activity. Information sharing and scientific collaboration. Description. *Agencies share information with their foreign counterparts on scientific data and regulatory approaches*. Illustrative Examples. Pesticide Tolerance Crop Grouping Revisions Program • Chemical Data Information Sharing • Consumer Product Safety Pilot Alignment Initiative (emphasis added).” *Id.*, at Table 2, p. 10.

⁶⁹ See Environmental Protection Agency, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act* 74 FR 66496, 66506-66509 (Dec. 15, 2009), *supra*; Lawrence Kogan, “Revised U.S. Deep Seabed Mining Policy Reflects UNCLOS and Other International Environmental Law Obligations”, *Emerging Issues* (2013), 6893, available at: <http://nebula.wsimg.com/f97bfb87d31d68c9fba55f48d125fd8a?AccessKeyId=39A2DC689E4CA87C906D&disposition=0&alloworigin=1>.

⁷⁰ See Lucas Bergkamp and Lawrence Kogan, *Trade, the Precautionary Principle, and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership*, *European Journal of Risk Regulation* (4/2013), *supra* at pp. 500, 504-507. See also Jean D’Aspremont, *Hart and Postmodern Positivism in International Law*, 113 *Revue générale de droit international public*, 635-654 (2009), at abstract, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1491493&download=yes; Stanford Encyclopedia of Philosophy, *Legal Positivism*, Center for the Study of Language and Information (Jan. 3, 2003) (last visited 4/25/14), available at: <http://plato.stanford.edu/entries/legal-positivism/>.

⁷¹ See *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 496 (S.D.N.Y. 2008) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

⁷² See Gustav Björkstrand & Juha Mustonen, *Introduction: Anders Chydenius’ Legacy Today*, in “The World’s First Freedom of Information Act,” Anders Chydenius Foundation (2006), *supra* at p. 4.

⁷³ See David Banisar, *Freedom of Information Around the World: A Global Survey of Access to Government Information Laws, Privacy International* (2006), at Foreword, available at: http://www.freedominfo.org/documents/global_survey2006.pdf.

⁷⁴ *Id.*, at p. 6. “There has been a significant increase by nations in the recognition of the importance of access to information both as a human right and as an important right to promote good governance and fight corruption. At least 80 countries have adopted constitutional provisions that provide for a right of access. Nearly 70 countries around the world have adopted national laws on freedom of information and efforts are pending in around another fifty.” *Id.*, at p. 16.

⁷⁵ See United Nations Educational Scientific and Cultural Organization (UNESCO), Communication and Information, *Freedom of Information in Latin America and the Caribbean*, UNESCO website (last visited April 4, 2014), available at: <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/foi-in-latin-america-and-the-caribbean/>.

⁷⁶ *Id.*, at p. 19. See also United Nations Educational Scientific and Cultural Organization (UNESCO), Communication and Information, *Freedom of Information in Asia-Pacific*, UNESCO website (last visited April 4, 2014), available at: <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/foi-in-asia-pacific/>.

⁷⁷ *Id.*, at p. 20. See also United Nations Educational Scientific and Cultural Organization (UNESCO), Communication and Information, *Freedom of Information in Arab States*, UNESCO website (last visited April 4, 2014), available at: <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/foi-in-arab-states/>; United Nations Educational Scientific and Cultural Organization (UNESCO), Communication and Information, *Freedom of Information in Africa*, UNESCO website (last visited April 4, 2014), available at: <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/foi-in-africa/>.

⁷⁸ See David Banisar, *Freedom of Information Around the World: A Global Survey of Access to Government Information Laws, Privacy International* (2006), *supra* at p. 6.

⁷⁹ See Lalanath de Silva, *Freedom of Information Laws Spreading Around the World*, World Resources Institute Blog (Sept. 26, 2010), available at: <http://www.wri.org/blog/freedom-information-laws-spreading-around-world>.

⁸⁰ See Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, United Nations Educational Scientific and Cultural Organization (UNESCO) (2008), at p. 16, available at: http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf.

⁸¹ “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes...” See UN Doc. A/Conf.151/26 (vol. 1).

⁸² “Considering that, to be able to assert [the right to live in a clean environment] citizens must have access to information ... Recognizing that, in the field of environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns ...” See UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the “Environment for Europe” process, 25 June 1998, entered into force 30 October 2001. As of September 2007, there were 41 Parties to the Convention. The text of the Convention in various languages is available at: <http://www.unece.org/env/pp/treatytext.htm>.

⁸³ *Id.*

⁸⁴ ITSSD also was not paid to prepare its previously filed EPA FOIA Request, Clarifications and Fee Waiver Request and Clarification.

⁸⁵ See 15 C.F.R. §4.11(k)(3)(i).

⁸⁶ See 15 C.F.R. 4.11(k)(3)(i); 15 C.F.R. 4.11(b)(1).

⁸⁷ *Id.*

⁸⁸ See *Campbell v. U.S. Department of Justice*, 164 F.3d 20 (DC Circ. 1998).

⁸⁹ See *National Treasury Employees Union v. Griffin*, 811 F.2d 644 (D.C.Cir.1987).

⁹⁰ See 164 F.3d 20, 36, quoting *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 649 (D.C.Cir.1987) (“The legislative history of the fee waiver provision indicates special solicitude for journalists, along with scholars and public

interest groups. See S.Rep. No. 854, 93d Cong., 2d Sess. 3, 11 (1974); *Ettlinger v. FBI*, 596 F.Supp. at 872; Bonine, *Public-Interest Fee Waivers Under the Freedom of Information Act*, 1981 Duke L.J. 213, 238-44.”).

⁹¹ *Id.*

⁹² See *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 649 (D.C.Cir.1987) (“A union, however, may put information to such varied uses, many of which are wholly independent of informing the public, that the relation between public and private benefits is by no means constant. Accordingly, when there is a clear understanding of the requester’s purposes, comparison of the private and public benefits is no more than a garden-variety ‘weighing’ inquiry and is equally susceptible of resolution. Thus, to secure a finding of predominate public benefit, a requesting union must typically submit more detail than a journalist.”). *Id.*

⁹³ *Id.*

⁹⁴ See 15 C.F.R. §4.11(k)(3)(ii).

⁹⁵ See 15 C.F.R. §4.11(k)(1)-(3).