



August 7, 2014

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Ms. Dana Hyland
U.S. Environmental Protection Agency
Office of Air and Radiation
Climate Change Division
1200 Pennsylvania Ave NW
Mailcode 6207J
Washington DC 20460

Re: EPA-OAR Correspondence, Dated 8/1/14
Estimated Search Fees & Payment Assurance
FOIA Request EPA-HQ-2014-008026

Dear Ms. Hyland,

The Institute for Trade, Standards and Sustainable Development (ITSSD) is in receipt of your correspondence dated, August 1, 2014.

ITSSD is pleased your correspondence tacitly acknowledges that ITSSD's FOIA Request reasonably describes at least certain of the "EPA climate science-related peer review files" requested consistent with 5 U.S.C. § 552(a)(3)(A), there exist actual identified records for EPA to search, and that, in accordance with 40 C.F.R. Section 2.106, such "[r]ecords shall not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA."

ITSSD also is pleased that your correspondence presents ITSSD with various alternative options for facilitating EPA's response to said request. Nevertheless, we have several questions regarding these alternatives.

First, your correspondence provides an overall estimated cost, "[a]fter consulting with relevant staff,...[of] searching for documents potentially responsive to [ITSSD's] FOIA request of \$27,020.00 [...] based on the 'other' fee category set out in EPA FOIA regulations at 40 C.F.R. Sec. 2.107." You represent that your "calculation is based on preliminary identification of staff who work on these issues and an estimate of the amount of time each person would need to perform a *search* for documents" (emphasis added). We refer below to this as the "Full Cost Option."

Your discussion of this estimate, however, failed to comply with 40 C.F.R. Sections 2.107(e) and 2.107(c)(2)(i)(C). In particular, your correspondence did not mention that this estimate is "only a portion of the total fee". It should have done so because this estimate does not appear to cover "duplication costs" for searched items once located, "contractor costs" (e.g., for searches performed by staff of other federal agencies on EPA's behalf) or "computer usage costs" incurred by EPA and other federal agency staff, which, if included, would likely raise the amount of this rough estimate. Your discussion also should have included, if possible, an estimate of such additional costs.

Next, your correspondence provides ITSSD with the choice of selecting from among three possible more abbreviated alternative processing options entailing a narrowing of the scope of ITSSD's FOIA request, each with a different associated lesser cost estimate.

Options A and C, which would involve "*only the 5 or 6 staffers* who worked on these issues" (emphasis added), differ with respect to the scope of documents to be searched.

Option A would cover a "*search* only for summary documents or final reports, not *every* draft or back and forth email about the subject" (emphasis added), for an estimated search cost of \$3,880.00. Option C would cover a "*search* for all potentially responsive documents including all correspondence," (emphasis added) for an estimated search cost of \$9,700.00

Meanwhile, Option B would involve "*all EPA staff* who worked on these issues no matter how briefly or marginally, and would, like Option A, cover a "search only for summary documents or final reports, not *every* draft back and forth email about the subject" (emphasis added), for an estimated search cost of \$9,076.00. Does this mean that Options B and A would entail a search for *some* draft back and forth email[s] about the subject"? How would EPA determine which emails to search? What categories of EPA staffers would undertake such a search? ITSSD seeks your clarification on these points.

Notwithstanding EPA-OAR's willingness to provide these options, your correspondence's discussion of them failed to comply with 40 C.F.R. Sections 2.107(e) and 2.107(c)(2)(i)(C). As noted above, said provisions require EPA-OAR to advise that these option estimates, as well, constitute "only a portion of the total fees" associated with said options. In other words, these estimates do not appear to cover "duplication costs" for searched items once located, "contractor costs" (e.g., for searches performed by staff of other federal agencies on EPA's behalf) or "computer usage costs" incurred by EPA and other federal agency staff, which, if included, would likely raise the amounts of these rough estimates. Consequently, your correspondence also should have advised us of the existence of such additional costs and attempted to provide us with estimates of them, if possible.

ITSSD appreciates the freedom to choose from among these options for purposes of assisting EPA to optimize its response to and satisfaction of ITSSD's FOIA request. ITSSD wishes to point out that, in furtherance of this objective, 40 C.F.R. Sec. 2.107(b)(8) requires the Agency and its offices to

"ensure that searches are done in the most efficient and least expensive manner reasonably possible. For example, offices will not search line-by-line where duplicating an entire document would be quicker and less expensive."

In order for our choice to be truly "fully informed", and to confirm the accuracy of EPA-OAR's estimates, however, we request, consistent with 40 C.F.R. Sections 2.107(c)(2)(i)(A)-(C) and 2.107(c)(2)(ii), that EPA-OAR provide us with an itemized breakdown of the estimated costs it has computed for each of the options discussed above: 1) The Full Cost Option - \$27,020.00; 2) Option A - \$3,880.00; 3) Option B - \$9,076.00; and 4) Option C - \$9,700.00.

In responding to our questions and providing an itemized breakdown for each of the four proposed options, EPA-OAR should address the following factors, computations and costs:

- the manual and computer (electronic) record search times estimated at the prescribed applicable rates for each estimated prescribed time increment;
- whether the “relevant staff” with whom you consulted to provide the comprehensive search estimate (“Full Cost Option”) and who will perform the comprehensive search mentioned will include “clerical”, “professional” and/or “management” staff (“clerical personnel”, “professional personnel” and/or “managerial personnel”), and the prescribed search charge rate applicable to each such category of EPA staff/personnel to be deployed for such purpose, applied against the estimated manual and/or computer (electronic) record search times estimated for each estimated prescribed time increment;
- whether the “5 or 6 key staffers” who will perform the searches mentioned in Options A and C will include “clerical” and/or “professional” staff (“clerical personnel” and/or “professional personnel”), and the prescribed search charge rate applicable to each such staff member by category, applied against the estimated manual and/or computer (electronic) record search times estimated for each estimated prescribed time increment;
- whether the reference to “all EPA staff who worked on these issues, no matter how briefly or marginally,” mentioned in Option B will include “clerical”, “professional” and/or “management” staff (“clerical personnel”, “professional personnel” and/or “managerial personnel”), and the prescribed search charge rate applicable to each such staff member by category, applied against the estimate manual and/or computer (electronic) record search times estimated for each prescribed time increment;
- estimated “duplication costs”, “contractor costs” (e.g., for searches performed by staff of other federal agencies on EPA’s behalf), and/or “computer resource usage costs” incurred by EPA and other federal agency staff.

As you are aware, such itemization should reflect, consistent with 40 C.F.R. Sections 2.107(c)(1)(iv) and 2.107(d)(3)(i)-(ii), that “the first two hours of search time and the first 100 pages of duplication will be furnished without charge.” Furthermore, such itemization should reflect, consistent with 40 C.F.R. Section 2.107(d)(2), that “[n]o search fee [...] will be charged for a quarter-hour period unless more than half of that period is required for search [...].”

Moreover, your correspondence requests satisfactory written “payment assurance for either the full amount, \$27,020.00, or [...] the option [we] would prefer.” Although your correspondence, presumably, suggests that no advance payment will be necessary if such assurance of payment is provided, this is not clear. Therefore, we request not only your confirmation of our understanding, but also a clarification regarding the type and form of written assurance EPA-OAR seeks.

Lastly, ITSSD would appreciate your identifying what provision(s) in EPA’s FOIA fee regulations authorize(s) you to “consider [our] request to be voluntarily withdrawn” if EPA does not “receive a response from [us]...within seven calendar days from the date of this letter.” We of course, by this letter, have responded within seven days of the date of your correspondence; but we have done so voluntarily and not because we believe EPA possesses the authority to deem our FOIA request as

having been withdrawn if we had not met this arbitrarily imposed deadline. In this regard, ITSSD notes that, “an agency may not impose any additional requirements on a requester beyond those prescribed in its regulations.”¹

ITSSD looks forward to receiving your informative and prompt response.

Very truly yours,

Lawrence A. Kogan

Lawrence A. Kogan
CEO
ITSSD

¹ See United States Department of Justice, *Freedom of Information Act Guide* (May 2004), available at: http://www.justice.gov/oip/procereq.htm#N_79, quoting *Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985).