



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

OCT 16 2014

OFFICE OF
GENERAL COUNSEL

Mr. Lawrence Kogan
Institute for Trade, Standards, and Sustainable Development
P.O. Box 223
Princeton Junction, NJ 08550

Re: Freedom of Information Act Fee Waiver Appeal EPA-HQ-2014-008026 (APP-2014-009523)

Dear Mr. Kogan:

I am responding to the Institute for Trade, Standards, and Sustainable Development's ("ITSSD") August 14, 2014 fee waiver appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. You appealed the July 15, 2014, decision of Larry Gottesman, National FOIA Officer of the U.S. Environmental Protection Agency ("EPA" or "Agency"), to deny your June 30, 2014 request for a fee waiver ("initial fee waiver denial"). You seek a waiver of all fees associated with your June 30, 2014 FOIA request for documents pertaining to climate science-related peer review files from January 1, 2005 through December 31, 2011, substantiating the specific measures EPA had taken to ensure the quality, integrity, and reliability of all EPA and third-party-developed assessments, reports, and other information, which were relied upon in reaching the 2009 Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act ("Endangerment Finding"). In addition, the June 30 fee waiver request indicated that if EPA denies ITSSD's fee waiver request, then ITSSD requests EPA treats ITSSD as an "educational institution" as contemplated by the FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

In your August 15 letter, you appealed the denial of ITSSD's fee waiver request because: (1) the denial was not reasonably calculated to put ITSSD on notice of the deficiencies of its case; (2) the denial contravenes the intent of Congress' FOIA Amendments; and (3) EPA's basis for denial fails on the merits. See August 15, 2014 Letter. In the August 15 letter, you did not appeal the Agency's dismissal of ITSSD's request to consider itself as an "educational institution." However, because the July 15 decision did not specifically address this issue, I will also evaluate your request to consider ITSSD as an "educational institution."

On September 12, 2014, you informed EPA that ITSSD will file a new FOIA request with the National FOIA Office of the National Oceanic and Atmospheric Administration ("NOAA"), and this FOIA request is "material and relevant" to the fee waiver determination because "it provides further support for ITSSD's discussion of how its EPA FOIA Request

satisfies factors 1, 2, and 4 of the six-factor fee waiver test. *See* 40 C.F.R. § 2.107(l)(2)(i)-(iii). You submitted a 247-page FOIA request to NOAA on September 22, 2014.

I have carefully considered the June 30 FOIA request, your request for a fee waiver, EPA's July 15 fee waiver denial, your August 15 appeal, and the September 12 NOAA FOIA request. For the reasons set forth below, I have concluded that your appeal of your request for a complete waiver of fees and the request to consider ITSSD as an "educational institution" should be, and are, denied.

Fee Category Placement

Criteria have been established for reducing or waiving fees for processing and copying requested documents under the FOIA at 5 U.S.C. § 552(a)(4)(A); the Office of Management and Budget's ("OMB") Uniform FOIA Fee Schedule and Guidelines ("OMB Guidelines"), 52 Fed. Reg. 10012 (March 27, 1987)¹; and EPA regulations at 40 C.F.R. § 2.107. Under 40 C.F.R. § 2.107(c)(1)(ii) and (iii), a requester who falls into any of the following fee categories is entitled to free search and review time and 100 pages of free copying: a requester from an "educational institution" or from a "non-commercial scientific institution" or a requester who is a "representative of the news media." A requester in the "other" fee category is entitled to two free hours of search time and 100 pages of free copying. 40 C.F.R. § 2.107(c)(1)(iv). Commercial use requesters are charged for all search and review time and for all copying. 40 C.F.R. § 2.107(c)(1)(i). *See also* 5 U.S.C. § 552(a)(4)(A)(ii) and (iv); OMB Guidelines, 52 Fed. Reg. 10012 at 10017-19. Consequently, the categories that are deemed to be accorded favored fee treatment are requesters from an educational institution or from a noncommercial scientific institution, requesters who are representatives of the news media, and requesters in the "other" fee category.

An "educational institution" is defined as:

...[A]n institution of graduate higher education, an institution of professional education, or an institution of vocational education that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by, and is made under the auspices of, a *qualifying institution* and that the records are not sought for a commercial use but are sought to further scholarly research." *See* 40 C.F.R. § 2.107(b)(4). *See also* OMB Guidelines, 52 Fed. Reg. 10012, 10018; *Nat'l Sec. Archive v. DOD*, 880 F.2d 1381, 1383-85 (D.C. Cir. 1989), *cert denied sub nom. DOD v. Nat'l Sec. Archive*, 494 U.S. 1029 (1990).

In your June 30 letter, you asked EPA to consider ITSSD as an "educational institution" if the Agency denies your fee waiver request. You argued that your request should have been placed in the requester from an "educational institution" fee category because ITSSD is organized and operated to conduct and publish science, law and policy-related research, analysis,

¹ The OMB Guidelines define fee categories and set forth a fee schedule, but explicitly do not address the issue of fee waivers. 52 Fed. Reg. 10012, 10016.

and commentary on domestic and international environment and trade issues. See June 30, 2014 ITSSD Fee Waiver Request at footnote 3. In your letter, you state that “ITSSD’s scholarly approach examines ostensibly impartial, unbiased and objective scientific methodologies used as the basis for regulation...” and “ITSSD has published a number of peer-review analyses,” which include book chapter and law review articles. Id. ITSSD’s website states that its mission is the following:

Our mission is to promote and help implement a positive global paradigm of sustainable development that affords future generations from all sovereign nations greater opportunities for a higher quality of life. To achieve this positive paradigm we emphasize the importance of free trade, economic growth, free markets, the rule of law, strong tangible and intangible private property rights, scientific discovery, and technological innovation. We also emphasize the need to ensure governments' open and transparent establishment, maintenance and oversight of balanced, risk-based science, and economic cost-benefit analysis-driven national regulatory and standards schemes, and the quality and integrity of scientific & technical data/information that government entities rely upon, adopt as their own and disseminate to the public as a basis for agency actions, including rulemakings. See <http://www.itssd.org/home.html>.

ITSSD’s website also states that the organization advocates for a positive paradigm of sustainable development; questions the sustainability of certain trade and development assistance programs; and makes findings on regulations based on their justifications and transparency of the regulatory development process. See <http://www.itssd.org/about-us.html>.

You have not demonstrated that ITSSD, the organization with which you are affiliated, is an “educational institution” and the underlying records are sought to further scholarly research. Specifically, you have not demonstrated that ITSSD is a “qualifying institution” as required by 40 C.F.R. § 2.107(b)(4). ITSSD’s website indicates that it is an advocacy organization with a mission to promote a specific objective by emphasizing various principles and beliefs. While you argue that your organization has a “scholarly approach” to achieving your programmatic objectives, this does not clearly demonstrate that ITSSD is an “institution of graduate higher education, an institution of professional education, or an institution of vocational education that operates a program of scholarly research.” For these reasons, ITSSD is appropriately placed in the “other” fee category.

Fee Waiver

The statutory standard for evaluating fee waiver requests is whether “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government; and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

EPA’s regulations at 40 C.F.R. § 2.107(l)(2) and (3) establish the same standard. EPA must consider four conditions to determine whether a request is in the public interest: (1)

whether the subject of the requested records concerns the operations or activities of the Federal government; (2) whether the disclosure is likely to contribute to an understanding of government operations or activities; (3) whether the disclosure is likely to contribute to understanding of the public – a reasonably broad audience of persons interested in the subject matter; and (4) whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2). EPA must consider two conditions to determine whether a request is primarily in the commercial interest of the requester: (1) whether the requester has a commercial interest that would be furthered by the requested documents; and (2) whether any such commercial interest outweighs the public interest in disclosure. 40 C.F.R. § 2.107(l)(3).

A requester seeking a fee waiver bears the burden of showing that the disclosure of the responsive documents is (1) in the public interest; and (2) not primarily in the requester's commercial interest. See Judicial Watch, Inc. v. DOJ, 185 F. Supp. 2d 54, 60 (D.D.C. 2002); Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988). The requester must therefore explain with reasonable specificity how disclosure of the requested information is in the public interest by demonstrating how such disclosure is likely to contribute significantly to public understanding of government operations or activities. See Judicial Watch v. Rossotti, 326 F.3d 1309, 1312-15 (D.C. Cir. 2003); Larson, 843 F.2d at 1483. Furthermore, if the circumstances surrounding this request (e.g., the content of the request, the type of requester, the purpose for which the request is made, and the requester's ability to disseminate the information to the public) clarify the point of the request, the requester must set forth these circumstances. See Larson, 843 F.2d at 1483; McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1285 (9th Cir. 1987)). Conclusory statements or mere allegations that the disclosure of the requested documents will serve the public interest are not sufficient to meet the burden. See McClellan Ecological Seepage Situation, 835 F.2d at 1285; Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003).

Initial Consideration: request to consider ITSSD's September 22, 2014 FOIA request to NOAA

In your September 12, 2014 correspondence, you informed EPA Office of General Counsel that ITSSD will submit a new FOIA request to NOAA ("NOAA FOIA request"), and this new material will provide further support to ITSSD's EPA June 30, 2014 FOIA request, specifically to further support its burden of meeting factors 1, 2, and 4 of the six factor test. I have considered your request to further supplement your fee waiver appeal through the NOAA FOIA request and fee waiver application, and I have determined the NOAA FOIA requests' fee waiver justifications do not apply to EPA's June 30, 2014 FOIA request.

Requests for fee waivers or reduction of fees must be considered on a case-by-case basis inasmuch as the information sought varies from request to request. Judicial Watch, Inc., 185 F. Supp. 2d at 60; see also Judicial Watch, Inc. v. DOJ, No. 99-2315, 2000WL 33724693, at *5 (D.D.C. Aug. 17, 2000) ("Under the FOIA, the analysis focuses on the subject and impact of the particular disclosure, not the record of the requesting party."). Although ITSSD's FOIA requests to NOAA and EPA may seek similar information, EPA evaluates a fee waiver request's merits

on an individual basis of the specific FOIA request and not collective FOIA requests submitted to multiple agencies and at various time periods. For this reason, EPA will only evaluate the merits of the FOIA request submitted to EPA, and the fee waiver determination does not incorporate the merits of the NOAA FOIA request.

Public Interest Prong of the Fee Waiver Test

Element 1

The first condition is whether the subject of the requested records concerns “identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.” 40 C.F.R. § 2.107(l)(2)(i). You have demonstrated that the following information do concern the operations or activities of the Federal government: documents pertaining to climate science-related peer review files from January 1, 2005 through December 31, 2011, substantiating the specific measures EPA had taken to ensure the quality, integrity, and reliability of all EPA and third-party-developed assessments or reports which were relied upon in reaching the Endangerment Findings. The information in the documents sheds light on EPA activities since the information pertains to Endangerment Findings. Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1313 (D.C. Cir. 2003).

Elements 2 and 4

I will consider the second and fourth factors of the public interest prong at the same time. The second factor to consider is the informative value of the documents to be disclosed. 40 C.F.R. § 2.107(l)(2)(ii). The requested documents must be “meaningfully informative about the government operations or activities in order to be ‘likely to contribute’ to an increased public understanding of those operations or activities.” Id. The disclosure of information already in the public domain would have no informative value since it would not add to the public’s understanding of government operations or activities. Id. The fourth factor to consider is how the disclosure of the requested records is likely to contribute “significantly” to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2)(iv). Disclosure of the information should significantly enhance the public’s understanding of the subject in question as compared to the level of public understanding prior to disclosure. Id.

In your June 30 fee waiver request, you assert that disclosing the requested records is likely to contribute to the public understanding of how EPA’s scientific peer review operations and activities ensure the “quality, integrity, and reliability” of the highly influential scientific assessments (“HISAs”) supporting the Endangerment Finding. See June 30, 2014 Fee Waiver at 7. You also assert that disclosing the requested records would indicate how EPA fulfilled the Agency’s four levels of legal obligations imposed by the Information Quality Act (“IQA”) and OMB and EPA’s IQA-implementing guidelines. Id. Specifically, you state:

- (1) EPA still needs to disclose records that would reveal whether EPA satisfied its level one [IQA] obligations in supporting the Endangerment Finding by responding to

- Sections II.1 and III.4 of the June 30 FOIA Request. You state that level one obligations require validating IQA compliance of EPA-developed and reviewed [HISA] supporting the Endangerment Finding. See June 30 Fee Waiver Request at 8.
- (2) EPA still needs to disclose records that would reveal whether EPA satisfied its level two IQA obligations. You state that level two obligations require validating IQA compliance of the third-party's peer review of third parties' HISAs that were relied upon to support the Endangerment Finding. See June 30 Fee Waiver Request at 8-9.
 - (3) EPA still needs to disclose records that would reveal whether EPA satisfied its level three IQA obligations. You state that level three IQA obligations require validating IQA compliance of an inter-agency panel's peer review of the Endangerment Finding's Technical Support Document ("TSD"). See June 30 Fee Waiver Request at 11-12.
 - (4) EPA still needs to disclose records that would reveal whether EPA satisfied its level four IQA obligations. You state that level four IQA obligations require validating the IQA compliance of the administrative mechanisms EPA and third parties had employed to ensure affected persons may seek and obtain correction or reconsideration of the scientific information EPA and third parties had disseminated. See June 30 Fee Waiver Request at 12-13.

In your August 14 fee waiver appeal, you state EPA merely summarily accounted for how it complied with each of the four levels of the IQA obligations and restated the reasons expressed in your June 30 fee waiver request. See August 14, 2014 Fee Waiver Appeal at 17-18.

With respect to Factor 4, your June 30 fee waiver request stated that the disclosure of the four categories of information would "contribute significantly to public understanding" of the following: (1) "peer review practices and procedures actually engaged in by EPA to ensure the quality, integrity and reliability of EPA and third-party developed and peer-reviewed climate science-related [HISAs]" and (2) "...of scientific and statistical data and modelling information and testing thereof that underlies each climate-related HISA." See June 30 Fee Waiver Request at 20.

In your August 14 fee waiver appeal, you further stated that the "broad public" continues to be uncertain about the scientific evidence underlying the Endangerment Finding. See August 14, 2014 Fee Waiver Appeal at 19. You then refer to two, unnamed DOC-NOAA assessments, both of which are not considered a "core reference document." Based on unsupported reasons, you conclude that these assessments are not consistent with NOAA or EPA peer review standards. Id. at 20. You also state that EPA has, thus far, "disclosed no information in any publicly available and accessible source or medium capable of clarifying whether the climate science-related peer review process the Agency had employed led to Administrator Findings that were based on science-based policy rather than policy-based science." Id. at 20.

After considering your reasons, I have determined that you have failed to demonstrate how disclosure of the information requested in ITSSD's June 30 FOIA request is likely to, or "substantially", contribute to the public's understanding of how EPA's scientific peer review

operations and activities ensure the “quality, integrity, and reliability” of EPA-developed or internal or external HISAs supporting the Endangerment Finding and how EPA fulfilled the alleged four levels of legal obligations imposed by the IQA and OMB and EPA’s IQA-implementing guidelines.

First, ITSSD’s broad FOIA request seeks information beyond those that demonstrate how EPA’s scientific peer review operations and activities ensured the “quality, integrity, and reliability” of the HISAs supporting the Endangerment Finding and how EPA fulfilled the IQA and OMB and EPA’s IQA-implementing guidelines in developing the Endangerment Finding.

For example, you broadly define “EPA climate science-related files” as “All EPA climate science-related records, data, statistics and models..., judgments relating thereto, correspondences and communications...and including final, drafts and notes...during the period spanning from January 1, 2005, through December 31, 2011...[in the listed locations in all of EPA locations and offices and with third parties]. See June 30, 2014 FOIA Request at 39-40. “EPA climate science-related files” is then incorporated in your definition of “EPA climate science-related peer review files,” which is defined to include: “[A]ll EPA science related files focusing on peer reviews conducted by EPA or EPA-hired contractors, or peer reviews conducted by third parties that EPA subsequently adopted, embraced and disseminated (used as its own) of”: 28 HISAs as “core reference documents” in the Endangerment Finding; all HISAs and influential scientific information (“ISI”) referenced in the Technical Support Document (“TSD”) that did not qualify as a “core reference document”; and all HISAs or ISIs not referenced in the TSD, the conclusions of which relied upon in the TSD. See June 30, 2014 FOIA Request at 40-41. These two broad definitions are used pervasively in Categories 1, 2, 3, and 4, which should have provided specific contexts for the records you are seeking. However, Categories 1 to 4 are so broad that you fail to provide a sufficient nexus between the voluminous amount of information you requested and how it will increase the public’s understanding of essentially how EPA’s scientific peer review operations met the IQA and OMB and EPA’s IQA-implementing guidelines. The following examples illustrate this point:

- *Category 1 Records (all EPA climate science peer-reviewed records focusing on EPA-developed and reviewed HISAs, studies, reports, computer models, related datasets, and specified applications supporting the Endangerment Finding),* such files include, but are not limited to:
 - Peer review charges, instructions, disclosures;
 - Peer reviewer, contractor and any federal agency comments concerning the methods and approaches EPA or other federal agency could use to address scientific uncertainties and discuss the precautionary principle or precautionary approach;
 - All EPA responses to peer reviewer comments;
 - All peer review reports, in summary or full version;
 - Public comments received in response to federal register notices that DOC-NOAA had issued on EPA’s behalf on EPA-developed HISAs;
 - Records describing EPA interim and final conclusions concerning the IQA compliance of EPA HISAs consistent with reviewer comments;

- Records related to evaluating conflict of interest of peer reviewers; and
- Records focusing on the IQA compliance of EPA website plans and EPA website use to provide the public with an opportunity to participate in EPA's peer review process.

As you already know, the "core reference documents" comprise 28 HISAs. In addition to the 36 subparts of Category 1, your chapeau description of Category 1 records is overly broad and includes every single reference in the Endangerment Finding, and not only EPA's four HISAs or even just the 28 HISAs, which are the "core reference documents." Next, you seek comments from multiple sources of commenters and not only peer reviews pertaining to methods and approaches, but also how EPA and other federal agencies apply the precautionary principle or precautionary approach. Further, you seek public comments regarding a non-EPA federal register notice. You also request interim conclusions concerning the IQA of EPA's four HISAs in the "core reference documents" of the TSD. Seeking records on interim conclusions does not directly demonstrate how EPA complied with the IQA in developing the Endangerment Finding's TSD. With respect to records pertaining to EPA's website plans and EPA's website, the public had an opportunity to review and comment on the proposed Endangerment Finding and TSD during the 60-day comment period, which ended on June 23, 2009; earlier versions of these materials during an advanced notice of proposed rulemaking (a 120-day comment period); and two public hearings. All public comments received during the comment period and two hearings were made available on the Docket ID No. EPA-HQ-OAR-2009-0171. Given the reasons explained above, you have failed to explain how the records of Category 1 contribute to the public understanding how EPA complied with the IQA in developing the Endangerment Finding and its TSD.

- *Category 2 Records (records focusing on third-parties' peer review of third-party developed HISAs, computer models, related datasets, and specific applications, which were relied upon in the Endangerment Finding)*

The 36 sub-parts of Category 2 pertain to third-parties peer review process of third-party developed HISAs and other information. You fail to explain how the records pertaining to third-party peer review process for third-party HISAs and other information would contribute or significantly contribute to the public's understanding of how EPA complied with the IQA in developing the Endangerment Finding and its TSD.

- *Category 3 Records (records focusing on an interagency climate panel's summary and synthesis of 28 individual HISAs supporting the Endangerment Finding)*

As you already know, EPA and OMB found the Endangerment Finding's TSD to be "influential scientific information" ("ISI") and not a HISA. See *Procedural Review of EPA's Greenhouse Gases Endangerment Finding Data Quality Processes*, Report No. 11-P-0702, September 26, 2011 at 54, 84. The 41 sub-parts of Category 3 reflects a level of review required for a document greater than an ISI. All of the reviewer comments were maintained, multiple versions of the draft TSD were archived, all peer reviewers were disclosed, and EPA submitted a memo to the record (see Docket EPA-HQ-OAR-2009-0171-11639) documenting all changes to

the TSD that were made in response to all levels of comments. These measures are consistent with the required review of an ISI document.

In addition, many of Category 3 sub-parts focus on records related to what your request refers to as “an interagency climate panel.” The outcome of this federal expert review process has been publicly available in the Docket (EPA-HQ-OAR-2009-0171) since December 2009. With respect to records pertaining to EPA’s website plans and EPA’s website, the public had an opportunity to review and comment on the proposed Endangerment Finding and its TSD during the 60-day comment period, which ended on June 23, 2009; previous versions of these materials during an advanced notice of proposed rulemaking (a 120-day comment period); and two public hearings. All public comments received during the comment period and two hearings were made available on the Docket ID No. EPA-HQ-OAR-2009-0171. Further, with respect to sub-part (h), you request records arising from international climate science-related agreements entered into between the United States and various international entities pertaining to issues unrelated to the Endangerment Finding’s TSD. This includes information that assisted numerous non-EPA international entities, an EPA-UNEP Memorandum of Understanding executed two years after the Endangerment Finding and related to the Intergovernmental Panel on Climate Change’s Fifth Assessment, which was published four years after the Endangerment Finding. Given the reasons explained above, you have failed to explain how the records of Category 3 contribute to the public understanding how EPA complied with the IQA in developing the Endangerment Finding and its TSD.

- *Category 4 Records*

Category 4 records pertain to EPA’s IQA compliance measures during the development of the Endangerment Finding’s TSD. EPA addressed comments related to the IQA in Volume 1 of the Response to Comments document, available at: <http://www.epa.gov/climatechange/endangerment/comments/volume1.html#5>. Each request for correction submitted during the comment period is publicly available in the Docket (EPA-HQ-OAR-2009-0171), and was responded to in the Response to Comments document. In addition, EPA explains its process regarding the information to maximize quality, utility, objectivity, and integrity of the information used at: http://www.epa.gov/climatechange/Downloads/endangerment/Federal_Register-EPA-HQ-OAR-2009-0171-Dec.15-09.pdf#page=16. For these reasons, you have failed to explain how the records of Category 4 contribute to the public understanding how EPA complied with the IQA in developing the Endangerment Finding’s TSD.

Given these reasons, I find that your failure demonstrate how your requested records will inform the public about this specific government operation or activity, which makes it impossible to determine that disclosing the requested information will significantly contribute to public understanding of that activity or operation. See *Judicial Watch, Inc. v. DOJ*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000). You have therefore not met your burden to establish how disclosure of your requested information will contribute, let alone “significantly” contribute, to the public understanding of government operations.

Element 3

A requester seeking a fee waiver must demonstrate that the disclosure of the requested documents will likely contribute to the public understanding, *i.e.*, the understanding of “a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.” 40 C.F.R. § 107(1)(2)(iii). The requester’s expertise in the subject area and his/her/its “ability and intention to effectively convey information to the public will be considered.” Id.

You have stated that you have the intent and the ability to understand and disseminate the information at issue. You have argued that the various methods you use to disseminate information demonstrate your ability to contribute to the public understanding of governmental activities or operations. See Judicial Watch, Inc. v. DOJ, 122 F. Supp. 2d 5, 10 (D.D.C. 2000). Accordingly, you have met the test for the third condition.

You have failed to meet your burden with respect to two conditions in the public interest prong of the fee waiver test. You have failed to demonstrate how disclosure of the responsive records meaningfully contributes to the public’s understanding of how EPA complied with the IQA in developing the Endangerment Finding’s TSD beyond the information already in the public record. Moreover, you failed to demonstrate that any contribution to the public understanding of government operations or activities will be significant. Accordingly, I conclude that you have not satisfied your burden of showing that the release of the requested documents will serve the public interest. I therefore need not decide whether you have met your burden with respect to the commercial interest prong of the fee-waiver test, *i.e.*, whether or not the requested information is “primarily in the commercial interest of the requester” (5 U.S.C. § 552(a)(4)(A)(iii)), since the statute requires that both prongs of the test must be satisfied for a fee to be waived or reduced. See Judicial Watch, Inc. v. DOJ, 122 F. Supp. 2d 5, 11 (D.D.C. 2000). Accordingly, I am denying your fee waiver appeal.

Conclusion

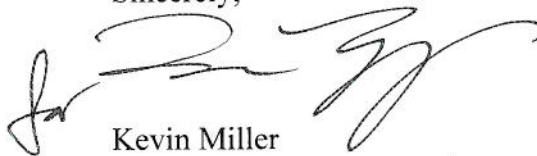
This letter constitutes EPA’s final determination on this matter. Pursuant to 5 U.S.C. § 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have principal place of business, the district in which the records are situated, or in the District of Columbia. As part of the 2007 FOIA Amendments, the Office of Government Information Services (“OGIS”) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 301-837-1996 or 1-877-684-6448; and facsimile, 1-301-837-0348. To the extent you wish to use the OGIS mediation services, EPA will hold any bill in abeyance pending the outcome of the mediation.

Mr. Lawrence Kogan
Institute for Trade, Standards, and Sustainable
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Lastly, in accordance with 5 U.S.C. § 552(a)(4)(B), you have the right to seek judicial review of this determination by instituting an action in the district court of the United States in the district in which you reside, or have your principal place of business, or in which the Agency records are situated, or in the District of Columbia.

Please contact me at 202-564-2691 if you have any questions on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin Miller", written over a horizontal line.

Kevin Miller
Assistant General Counsel
General Law Office
Office of General Counsel

cc: Rona Birnbaum, Climate Change Division, Office of Air and Radiation
Dana Hyland, Climate Change Division, Office of Air and Radiation