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**From:** Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov>  
**Sent:** Thursday, February 2, 2017 11:21 AM  
**To:** Samuel Dixon - NOAA Affiliate; Jennifer Pralgo - NOAA Federal  
**Cc:** Stacey Nathanson - NOAA Federal; Mark Graff - NOAA Federal  
**Subject:** RE: PEER FOIA request - threats and violence against employees in calendar year 2016

Sam/Jenn,

(b)(5)  
[Redacted]

Just a suggestion.

Thanks.

Arlyn

**From:** Samuel Dixon [mailto:[samuel.dixon@noaa.gov](mailto:samuel.dixon@noaa.gov)]  
**Sent:** Wednesday, February 01, 2017 10:05 AM  
**To:** Arlyn Penaranda - NOAA Federal <[arlyn.penaranda@noaa.gov](mailto:arlyn.penaranda@noaa.gov)>; Jennifer Pralgo - NOAA Federal <[jennifer.pralgo@noaa.gov](mailto:jennifer.pralgo@noaa.gov)>  
**Subject:** Fwd: PEER FOIA request - threats and violence against employees in calendar year 2016

FYI, this is coming down the pipe soon...

Sam

Samuel Dixon  
Contractor - IBSS Corp  
NMFS Assistant FOIA Liaison  
(301) 427 8739  
[samuel.dixon@noaa.gov](mailto:samuel.dixon@noaa.gov)

----- Forwarded message -----

**From:** Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)>  
**Date:** Wed, Feb 1, 2017 at 9:53 AM  
**Subject:** Fwd: PEER FOIA request - threats and violence against employees in calendar year 2016  
**To:** John Almeida - NOAA Federal <[john.almeida@noaa.gov](mailto:john.almeida@noaa.gov)>, Samuel Dixon - NOAA Affiliate <[samuel.dixon@noaa.gov](mailto:samuel.dixon@noaa.gov)>, Robert Moller - NOAA Federal <[robert.moller@noaa.gov](mailto:robert.moller@noaa.gov)>

FYI, this request just received from PEER, one of our current litigants. It likely won't be in this week's report, so I wanted to send it separately to you folks.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
[\(301\) 628-5658](tel:3016285658) (O)  
**(b)(6)** (C)

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From: **Laura Dumais** <[ldumais@peer.org](mailto:ldumais@peer.org)>  
Date: Wed, Feb 1, 2017 at 9:43 AM  
Subject: PEER FOIA request - threats and violence against employees in calendar year 2016  
To: "[FOIA@noaa.gov](mailto:FOIA@noaa.gov)" <[FOIA@noaa.gov](mailto:FOIA@noaa.gov)>, "[Mark.Graff@noaa.gov](mailto:Mark.Graff@noaa.gov)" <[Mark.Graff@noaa.gov](mailto:Mark.Graff@noaa.gov)>

Dear NOAA and DOC FOIA Officers:

Each year, my organization submits requests under the Freedom of Information Act (5 U.S.C. 552, as amended) seeking information from major federal agencies about the incidence of violence and threats against their employees.

Accordingly, Public Employees for Environmental Responsibility (PEER) now asks that, as you have done in years past, you provide information for **calendar year 2016**. Specifically, we request the following records and/or documents concerning acts of violence or threats against National Oceanic and Atmospheric Administration (NOAA) employees and professional observer contractor employees as follows:

A summary of all incidents of violence, threats, or harassment against **NOAA employees** that occurred in **calendar year 2016**. The summary should include the date, location, and nature of the incident or threat together with a summary of what, if any, outcomes stemmed from the incident or threat (e.g., arrest, conviction, ongoing investigation).

A summary of all incidents of violence, threats, or harassment against **professional observers**, including government contractors, that occurred in **calendar year 2015**. The summary should include incidents against observers aboard NOAA vessels or while otherwise carrying out their duties as NOAA contractors, and include the date, location, and nature of the incident or threat together with a summary of what, if any, outcomes stemmed from the incident or threat (e.g., arrest, conviction, ongoing investigation).

In the past, there was some confusion over whether NOAA or the Department of Commerce should handle our request as to *professional observers*. Thus, I am sending this request to both NOAA and DOC, and I trust that the respective FOIA officers will work out amongst themselves the most expeditious way of responding, involving NMFS if necessary.

**Please note** that your past responses have indicated severe inaccuracies. For example, for our calendar year 2013 request pertaining to violence against professional observers, DOC's Office of Security reported only once responsive incident, yet a report by the NMFS Office for Law Enforcement's Alaska Enforcement Division stated that observers had reported 38 incidents of violence, threats, or harassment in the first two quarters of 2013 in *Alaska alone*. We do not know who within NOAA or DOC keeps track of these numbers, but we ask your assistance and cooperation in ensuring that the appropriate people respond to our request to provide a **complete and accurate response**.

We greatly appreciate your efforts in providing this important information, which will contribute to our ongoing study of the extent of violence and intimidation directed against public resource employees. Release of the requested information is in the interest of the general public, in order for the public to understand the true dimensions of, and motivations for, confrontations with public resource agencies.

For any documents or portions of documents that you claim specific FOIA exemption(s), please provide an index itemizing and describing the documents or portions of documents withheld. The index should, pursuant to the holding of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), provide a detailed justification for claiming a particular exemption explaining why each such exemption applies to the document or portion of a document withheld.

PEER requests that all fees be waived because "disclosure of the information is in the public interest . . . and is not primarily in the commercial interest of the requestor" (5 U.S.C. 552 (a) (4)(A)). Disclosure of the above requested information is in the public interest because disclosure would contribute significantly to public understanding of the difficulties encountered by NOAA employees working to manage public resources.

Disclosure is in no way connected with any commercial interest of the requestor. PEER is a nonprofit, nonpartisan public interest organization concerned with upholding the public trust through responsible management of our nation's resources and with supporting professional integrity within public land management and pollution control agencies. To that end, PEER is designated as a tax-exempt organization under section 501(c)(3) of the Internal Revenue code.

If you have any questions about this FOIA request, please contact me at [\(202\) 265-7337](tel:(202)265-7337). I look forward to receiving the agency's final response within twenty working days.

Cordially,

Laura Dumais, Staff Counsel

Public Employees for Environmental Responsibility (PEER)

962 Wayne Ave, Suite 610

Silver Spring, MD 20910

Direct: [\(202\) 265-4189](tel:(202)265-4189) / PEER: [\(202\) 265-7337](tel:(202)265-7337)

[www.peer.org](http://www.peer.org)

“To combat authoritarianism, to call out lies, to struggle honorably and fiercely in the name of American ideals—that is what is left to do. That is all there is to do.” - David Remnick

**CAUTION:** If you attempt to send an email with a total attachment size exceeding 8 MB, it will not come through, and neither of us will receive a "failed delivery" message. Please contact me directly for alternate instructions for sending large files.

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**From:** Arlyn Penaranda - NOAA Federal <arlyn.penaranda@noaa.gov>  
**Sent:** Thursday, February 2, 2017 12:09 PM  
**To:** Samuel Dixon - NOAA Affiliate; Jennifer Pralgo - NOAA Federal  
**Cc:** Stacey Nathanson - NOAA Federal; Mark Graff - NOAA Federal  
**Subject:** RE: PEER FOIA request - threats and violence against employees in calendar year 2016

Sam/Jenn,

(b) (5)

(b) (5)

Thanks,

Arlyn

---

**From:** Arlyn Penaranda - NOAA Federal [mailto:[arlyn.penaranda@noaa.gov](mailto:arlyn.penaranda@noaa.gov)]  
**Sent:** Thursday, February 02, 2017 11:21 AM  
**To:** Samuel Dixon - NOAA Affiliate <[samuel.dixon@noaa.gov](mailto:samuel.dixon@noaa.gov)>; Jennifer Pralgo - NOAA Federal <[jennifer.pralgo@noaa.gov](mailto:jennifer.pralgo@noaa.gov)>  
**Cc:** Stacey Nathanson - NOAA Federal <[stacey.nathanson@noaa.gov](mailto:stacey.nathanson@noaa.gov)>; Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)>  
**Subject:** RE: PEER FOIA request - threats and violence against employees in calendar year 2016

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Just a suggestion.

Thanks.

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**From:** Samuel Dixon [<mailto:samuel.dixon@noaa.gov>]  
**Sent:** Wednesday, February 01, 2017 10:05 AM  
**To:** Arlyn Penaranda - NOAA Federal <[arlyn.penaranda@noaa.gov](mailto:arlyn.penaranda@noaa.gov)>; Jennifer Pralgo - NOAA Federal <[jennifer.pralgo@noaa.gov](mailto:jennifer.pralgo@noaa.gov)>  
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Samuel Dixon  
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*NMFS Assistant FOIA Liaison*  
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**From:** **Mark Graff - NOAA Federal** <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)>  
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National Oceanic and Atmospheric Administration  
[\(301\) 628-5658](tel:(301)628-5658) (O)  
**(b)(6)** (C)

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**From:** **Laura Dumais** <[ldumais@peer.org](mailto:ldumais@peer.org)>  
**Date:** Wed, Feb 1, 2017 at 9:43 AM  
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Cordially,

Laura Dumais, Staff Counsel

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(b)(5)

---

**From:** David Skiffington - NOAA Affiliate <david.j.skiffington@noaa.gov>  
**Sent:** Tuesday, February 14, 2017 9:23 AM  
**To:** Mark Graff - NOAA Federal  
**Subject:** Signature for completeness  
**Attachments:** NOAA0201 PTA 120616 v3 DP (1).pdf

Mark,

In a NOAA0201 FISMA documentation audit, they requested that I **obtain your signature** on our PTA, which you recently reviewed (and we successfully expedited the PIA, including DOC signatures.)

Thank you for your time.

David

--

David J. Skiffington (Actionet Contractor)  
NOAA Web Operations Center NOAA0201 ISSO  
Phone: 301.628.5662  
Cell: [703.405.7900](tel:703.405.7900)

(b) (5)



(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Tuesday, February 14, 2017 9:59 AM  
**To:** David Skiffington - NOAA Affiliate  
**Cc:** Sarah Brabson - NOAA Federal  
**Subject:** Re: Signature for completeness  
**Attachments:** NOAA0201 PTA 120616 v3 DP mhg.pdf

Hi David--

No problem. I actually completed my review and signed this PTA back in December. Copying Sarah for awareness.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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David J. Skiffington (Actionet Contractor)  
NOAA Web Operations Center NOAA0201 ISSO  
Phone: 301.628.5662  
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**U.S. Department of Commerce  
National Oceanic and Atmospheric Administration  
(NOAA)**



**Privacy Threshold Analysis  
for the  
Web Operations Center (NOAA0201)**

## U.S. Department of Commerce Privacy Threshold Analysis

### NOAA/Web Operations Center

**Unique Project Identifier:** 006-000351100 00-48-03-17-01-00

**Introduction:** This Privacy Threshold Analysis (PTA) is a questionnaire to assist with determining if a Privacy Impact Assessment (PIA) is necessary for this IT system. This PTA is primarily based from the Office of Management and Budget (OMB) privacy guidance and the Department of Commerce (DOC) IT security/privacy policy. If questions arise or further guidance is needed in order to complete this PTA, please contact your Bureau Chief Privacy Officer (BCPO).

**Description of the information system and its purpose:** *Provide a general description of the information system and its purpose in a way that a non-technical person can understand.*

The E-Government Act of 2002 defines “information system” by reference to the definition section of Title 44 of the United States Code. The following is a summary of the definition: “Information system” means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information. See: 44. U.S.C. § 3502(8).

The Web Operations Center (WOC) is a diverse information technology services provider to Line and Staff Offices within NOAA. The WOC provide a wide range of information technology services and functions which include high availability, scalability, redundancy, clustering, and high performance computing to replicate and distributed general information as well as critical time sensitive life and property information to the general public and meteorology community.

The services and functions of the information system technology have been broken down into four (4) core services and functions: WOC Domain Name System Services (WOCDNSS), WOC Information Sharing Services (WOCISS), WOC Adoptive System Framework (WOCASF), and WOC Collaboration Services. These services and functions make up the subsystems within NOAA0201. Each subsystem has a different FIPS 199 security categorization as described in the NOAA0201 FIPS 199 Security Categorization document. NIST SP 300-37 rev1 describes how various independent subsystems could be grouped together for purpose of risk management into more comprehensive system (system of systems).

The WOC systems are physically located at 8 NOAA datacenters (W1: Silver Spring, Maryland W2: Largo, Maryland W3: Norman, Oklahoma W4: Boulder, Colorado W5: Fort Worth, Texas and W6: Seattle, Washington, W7 Ashville, NC, W8 Fairmont, WVA).

Note: NOAA0201 has been assessed on 1/12/2016 using NIST 800-53 Rev 4.



**Questionnaire:**

1. What is the status of this information system?

This is a new information system. *Continue to answer questions and complete certification.*

This is an existing information system with changes that create new privacy risks. *Complete chart below, continue to answer questions, and complete certification.*

Changes That Create New Privacy Risks (CTCNPR)					
a. Conversions		d. Significant Merging	x	g. New Interagency Uses	
b. Anonymous to Non-Anonymous		e. New Public Access		h. Internal Flow or Collection	
c. Significant System Management Changes		f. Commercial Sources		i. Alteration in Character of Data	
j. Other changes that create new privacy risks (specify):					

In 2016, the Message Operations Center (NOAA0300) was decommissioned and was combined into NOAA0201.

This is an existing information system in which changes do not create new privacy risks. *Continue to answer questions, and complete certification.*

Is the IT system or its information used to support any activity which may raise privacy concerns?

NIST Special Publication 800-53 Revision 4, Appendix J, states “Organizations may also engage in activities that do not involve the collection and use of PII, but may nevertheless raise privacy concerns and associated risk. The privacy controls are equally applicable to those activities and can be used to analyze the privacy risk and mitigate such risk when necessary.” Examples include, but are not limited to, audio recordings, video surveillance, building entry readers, and electronic purchase transactions.

Yes. *Please describe the activities which may raise privacy concerns.*

No

2. Does the IT system collect, maintain, or disseminate business identifiable information (BII)?

As per DOC Privacy Policy: “For the purpose of this policy, business identifiable information consists of (a) information that is defined in the Freedom of Information Act (FOIA) as “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” (5 U.S.C.552(b)(4)). This information is exempt from automatic release under the (b)(4) FOIA exemption. “Commercial” is not confined to records that reveal basic commercial operations” but includes any records [or information] in which the

submitter has a commercial interest" and can include information submitted by a nonprofit entity, or (b) commercial or other information that, although it may not be exempt from release under FOIA, is exempt from disclosure by law (e.g., 13 U.S.C.)."

\_\_\_  Yes, the IT system collects, maintains, or disseminates BII about: *(Check all that apply.)*

\_\_\_  Companies

\_\_\_  Other business entities

x   No, this IT system does not collect any BII.

### 3. Personally Identifiable Information

4a. Does the IT system collect, maintain, or disseminate personally identifiable information (PII)?

As per OMB 07-16, Footnote 1: "The term 'personally identifiable information' refers to information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc... alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc..."

\_\_\_ Yes, the IT system collects, maintains, or disseminates PII about: *(Check all that apply.)*

x   DOC employees

x   Contractors working on behalf of DOC

\_\_\_  Members of the public

\_\_\_  No, this IT system does not collect any PII.

***If the answer is "yes" to question 4a, please respond to the following questions.***

4b. Does the IT system collect, maintain, or disseminate PII other than user ID?

x  Yes, the IT system collects, maintains, or disseminates PII other than user ID.

No, the user ID is the only PII collected, maintained, or disseminated by the IT system.

4c. Will the purpose for which the PII is collected, stored, used, processed, disclosed, or disseminated (context of use) cause the assignment of a higher PII confidentiality impact level?

Examples of context of use include, but are not limited to, law enforcement investigations, administration of benefits, contagious disease treatments, etc.

Yes, the context of use will cause the assignment of a higher PII confidentiality impact level.

No, the context of use will not cause the assignment of a higher PII confidentiality impact level.

***If any of the answers to questions 2, 3, 4b, and/or 4c are “Yes,” a Privacy Impact Assessment (PIA) must be completed for the IT system. This PTA and the approved PIA must be a part of the IT system’s Assessment and Authorization Package.***

### CERTIFICATION

X  I certify the criteria implied by one or more of the questions above **apply** to the [IT SYSTEM NAME] and as a consequence of this applicability, I will perform and document a PIA for this IT system.

I certify the criteria implied by the questions above **do not apply** to the [IT SYSTEM NAME] and as a consequence of this non-applicability, a PIA for this IT system is not necessary.

Name of Information System Security Officer (ISSO) or System Owner (SO):

David J. Skiffington

Signature of ISSO or SO: SKIFFINGTON.DAVID.1374262730 Digitally signed by SKIFFINGTON.DAVID.1374262730  
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=CONTRACTOR  
cn=SKIFFINGTON.DAVID.1374262730  
Date: 2016.12.07 08:01:42 -05'00' Date: \_\_\_\_\_

Name of Information Technology Security Officer (ITSO): Jean Apedo

Signature of ITSO: APEDO.JEAN.1188076064 Digitally signed by APEDO.JEAN.1188076064  
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=APEDO.JEAN.1188076064  
Date: 2016.12.08 13:07:33 -05'00' Date: \_\_\_\_\_

Name of Authorizing Official (AO): Douglas Perry

Signature of AO: PERRY.DOUGLAS.A.1365847270 Digitally signed by PERRY.DOUGLAS.A.1365847270  
Date: 2016.12.09 15:43:09 -05'00'

Name of Bureau Chief Privacy Officer (BCPO): MARK GRAFF

Signature of BCPO: GRAFF.MARK.HYRU.M.1514447892 Digitally signed by GRAFF.MARK.HYRU.M.1514447892  
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=GRAFF.MARK.HYRU.M.1514447892  
Date: 2016.12.12 09:01:44 -05'00' Date: \_\_\_\_\_

---

**From:** Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>  
**Sent:** Thursday, February 2, 2017 2:17 PM  
**To:** Mark Graff - NOAA Federal  
**Subject:** Re: DOC Will Take Lead on Administration Transition-related FOIAs  
**Attachments:** NOAA Trump Administration FOIAs.xls

Hi Mark - I searched FO and I've also polled the NOAA FOIA team. We received 5 direct FOIA requests regarding Trump and/or his administration.(See attachment for breakdown)

NOTE: We did receive 3 tasks from DOC for search action in response to DOC FOIA requests regarding Trump and/or his administration.

Lola

On Thu, Feb 2, 2017 at 9:44 AM, Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)> wrote:  
Good Morning,

NOAA FOIA just had a conference call with DOC, as well as all FOIA Officers from the Bureaus within the Department. (b)(5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Thanks everyone,

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
[\(301\) 628-5658](tel:3016285658) (O)  
(b)(6) (C)

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--  
Lola Stith  
Contractor - The Ambit Group, LLC  
NOAA Office of the Chief Information Officer (OCIO)  
(c (b)(6)

[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)

Tracking Number	Type	Status	Requester
DOC-NOAA-2017-000331	Request	Assignment Determination	Adam J. Rappaport
DOC-NOAA-2017-000346	Request	Research Records	Anthony V. Schick
DOC-NOAA-2017-000362	Request	Assignment Determination	Jaclyn Prange
DOC-NOAA-2017-000497	Request	Assignment Determination	Rachel Clattenburg
DOC-NOAA-2017-000351	Request		Yogin Kothari

Requester Organization	Submitted	Assigned To	Due
Citizens for Responsibility and Ethics in Washington	12/16/2016	LA	01/24/2017
Oregon Public Broadcasting	12/19/2016	Ana Liza Malabanan	02/23/2017
	12/22/2016	USEC	02/09/2017
Public Citizen	01/25/2017	USEC	03/02/2017
UCS	12/20/2016	USEC	



Status

(b) (5)

### Description

CREW requests copies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump's transition team, including representatives of Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect.

I request copies of any communications from regional staff in Oregon, Washington or Idaho since July 2016 involving both of the following keywords: 'Trump', 'President'. Scope modified to limit search by NMFS West Coast Region "Supervisory" staff located in Oregon, Washington or Idaho.

Please produce records in possession, custody, or control that are, include, or reflect communications between National Oceanic and Atmospheric Administration's (NOAA's) staff and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Wilbur Ross, Ray Washburne, David Bohigian, Joan Maginnis, George Sifakis, William Gaynor, A. Mark Neuman, and Tom Leppert.

On behalf of Public Citizen, Inc., and pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. s. 552, I request:

1. All records of communications from or on behalf of the Trump Administration and/or the Trump Transition Team to the National Oceanic and Atmospheric Administration (NOAA) providing guidance on which agency matters NOAA employees may or may not publicly discuss and/or regulating how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request. Background discussion of the concerns motivating

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and on behalf of the Union of Concerned Scientists, I write to request access to and copies of all communications and attachments between National Oceanic and Atmospheric Administration staff and the following individuals from November 14, 2016 to present:

1. Anyone with the following email domain: @ptt.gov
2. Anyone with the following email domain: @donaldjtrump.com

---

**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Tuesday, February 14, 2017 11:39 AM  
**To:** Ruth Ann Lowery - NOAA Federal  
**Subject:** Re: DOC-NOAA-2017-000580-Thomas.Karl thomas.r.karl@noaa.gov 0.mbox  
**Attachments:** New Judicial Watch Request.pdf

(b)(5)

. I wanted to loop you in for awareness because of the overlap with the current lawsuit.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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On Tue, Feb 14, 2017 at 10:47 AM, Ruth Ann Lowery - NOAA Federal <[ruthann.lowery@noaa.gov](mailto:ruthann.lowery@noaa.gov)> wrote:

Mark,

What is this?

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor

NOAA Office of General Counsel

Fisheries & Protected Resources Section

1315 East-West Highway, SSMC III, Room 15114

Silver Spring, MD 20910

[\(301\)713-9671](tel:(301)713-9671)

Fax: [\(301\) 713-0658](tel:3017130658)

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><(((('>`.,.,.~.,.,.,><(((('>.,.,.~.,.,.,><(((('>

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**From:** Mark Graff - NOAA Federal (via Google Drive) [mailto:[drive-shares-noreply@google.com](mailto:drive-shares-noreply@google.com)]  
**Sent:** Tuesday, February 14, 2017 10:20 AM  
**To:** [ruthann.lowery@noaa.gov](mailto:ruthann.lowery@noaa.gov)  
**Subject:** DOC-NOAA-2017-000580-Thomas.Karl thomas.r.karl@noaa.gov 0.mbox

Mark Graff - NOAA Federal has shared the following file:



**(b)(5)**

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**Judicial  
Watch**<sup>®</sup>  
*Because no one  
is above the law!*

February 6, 2017

**VIA CERTIFIED MAIL**

National Oceanographic and  
Atmospheric Administration  
Public Reference Facility (SOU1000)  
1315 East-West Highway (SSMC3)  
Room 9719  
Silver Spring, Maryland 20910

**Re: Freedom of Information Act Request**

Dear Freedom of Information Officer:

Judicial Watch, Inc. (“Judicial Watch”) hereby requests that the National Oceanographic and Atmospheric Administration (“NOAA”) produce the following records pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”):

Any and all records of communication between NOAA scientist Thomas Karl and Director of the Office of Science and Technology Policy John Holdren.

The time frame for the requested records is January 20, 2009 through January 20, 2017.

Please determine whether to comply with this request within the time period required by FOIA and notify us immediately of your determination, the reasons therefor, and the right to appeal any adverse determination to the head of the agency or his or her designee. 5 U.S.C. § 552(a)(6)(i). Please also produce all responsive records in an electronic format (“pdf” is preferred), if convenient. We also are willing to accept a “rolling production” of responsive records if it will facilitate a more timely production.

Judicial Watch also hereby requests a waiver of both search and duplication fees. We are entitled to a waiver of search fees because we are a “representative of the news media.” See 5 U.S.C. § 552(a)(4)(A)(ii)(II); see also *Cause of Action v. Federal Trade Comm.*, 799 F.3d 1108 (D.C. Cir. 2015); *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381 (D.C. Cir. 1989). For more than twenty years, Judicial Watch has used FOIA and other investigative tools to gather information about the operations and activities of government, a subject of undisputed public interest. We submit over 400 FOIA requests annually. Our personnel, which includes experienced journalists and professional writers on staff and under contract, use their editorial skills to turn this raw information into

## NOAA FOIA Request

February 6, 2017

Page 2 of 3

distinct works that are disseminated to the public via our monthly newsletter, which has a circulation of over 300,000, weekly email update, which has over 600,000 subscribers, investigative bulletins, special reports, [www.judicialwatch.org](http://www.judicialwatch.org) website, *Corruption Chronicles* blog, and social media, including Facebook and Twitter, among other distribution channels. We have authored several books, including *Corruption Chronicles* by Tom Fitton (Threshold Editions, July 24, 2012), and another book, *Clean House* by Tom Fitton (Threshold Editions, Aug. 30, 2016), is forthcoming. In 2012, we produced a documentary film, "District of Corruption," directed by Stephen K. Bannon. Our "news media" status has been confirmed in court rulings. See, e.g., *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 2006 U.S. Dist. LEXIS 44003, \*1 (D.D.C. June 28, 2006); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000). As a tax exempt, 501(c)(3) non-profit corporation, we have no commercial interests and do not seek the requested records for any commercial use. Rather, we intend to use the requested records as part of our on-going investigative journalism and public education efforts to promote integrity, transparency, and accountability in government and fidelity to the rule of law.

Judicial Watch also is entitled to a waiver of both search fees and duplication fees because "disclosure of the information is in the public interest." 5 U.S.C. § 552(a)(4)(A)(iii). Disclosure of the requested records undoubtedly will shed light on "the operations or activities of the government." *Cause of Action*, 799 F.3d at 1115 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). Disclosure also is "likely to contribute significantly to the public understanding" of those operations or activities because, among other reasons, Judicial Watch intends to disseminate both the records and its findings to "a reasonably broad audience of persons interested in the subject" via its newsletter, email updates, investigative bulletins, website, blog, and its other, regular distribution channels. *Cause of Action*, 799 F.3d at 1116 (quoting *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994)). Again, Judicial Watch does not seek the requested records for any commercial benefit or for its own "primary" benefit, but instead seeks them as part of its ongoing investigative journalism and public education efforts to promote integrity, transparency, and accountability in government and fidelity to the rule of law.

In the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch agrees to pay up to \$300.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at 202-646-5172 or [bmarshall@judicialwatch.org](mailto:bmarshall@judicialwatch.org).

Thank you for your cooperation.

**NOAA FOIA Request**  
**February 6, 2017**  
**Page 3 of 3**

Very respectfully,

A handwritten signature in black ink, appearing to read "William F. Marshall". The signature is written in a cursive style with a large initial "W".

William F. Marshall  
Judicial Watch, Inc.

---

**From:** Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>  
**Sent:** Thursday, February 2, 2017 3:37 PM  
**To:** Mark Graff - NOAA Federal  
**Subject:** Re: Current list of open FOIAs  
**Attachments:** FOIA Listing 2017-02-02 (1).xls

Hi Mark - First..THANK YOU for the compliment! :-)

Second, I've transferred our information onto the DOC spreadsheet. I miscounted -- we have two Trump-related FOIA tasks for search from DOC. Our overall total for Trump-related open FOIA requests/tasks is seven (7).

Please let me know if edits are needed.

Lola

On Thu, Feb 2, 2017 at 2:53 PM, Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)> wrote:  
Grrr...of course. I knew that--only direct recipients. Here you go. Btw, love the new profile photo.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
[\(301\) 628-5658](tel:3016285658) (O)  
**(b)(6)** (C)

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On Thu, Feb 2, 2017 at 2:51 PM, Lola Stith - NOAA Affiliate <[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)> wrote:  
Mark,

I do not have access to the document.

Lola

On Thu, Feb 2, 2017 at 2:27 PM, Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)> wrote:  
Hi Lola--

It looks like they have their own spreadsheet they want populated.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration



(301) 628-5658 (O)

(b)(6) (C)

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----- Forwarded message -----

From: <[jdavis@doc.gov](mailto:jdavis@doc.gov)>

Date: Thu, Feb 2, 2017 at 2:18 PM

Subject: Current list of open FOIAs

To: [mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)

Cc: [mtoland@doc.gov](mailto:mtoland@doc.gov)

**You have received 1 secure file from [jdavis@doc.gov](mailto:jdavis@doc.gov).**

Use the secure link below to download.

---

Per Michael Toland, please provide a list of open FOIAs in the attached chart with a short concise description. Please return by COB today to Michael via accellion . Thank you in advance.

Sincerely,

James H. Davis  
FOIA Analyst

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--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6)

[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)

BOU	Tracking Number	Type	Requester
	DOC-NOAA-2017-000331	Request	Adam J. Rappaport
	DOC-NOAA-2017-000346	Request	Anthony V. Schick
	DOC-NOAA-2017-000362	Request	Jaclyn Prange
	DOC-NOAA-2017-000497	Request	Rachel Clattenburg
	DOC-NOAA-2017-000351	Request	Yogin Kothari
<b>DOC REQUESTS - ASSIGNED TASKS TO NOAA</b>			

	DOC-OS-2017-000267	TASK	Stephen S. Braun
	DOC-OS-2017-000308	TASK	Michael Best

Requester Organization	Submitted	Assigned To	Perfected	Due
Citizens for Responsibility and Ethics in Washington	12/16/2016	LA	YES	01/24/2017
Oregon Public Broadcasting	12/19/2016	Ana Liza Malabanan	YES	02/23/2017
	12/22/2016	USEC	YES	02/09/2017
Public Citizen	01/25/2017	USEC	YES	03/02/2017
UCS	12/20/2016	USEC	YES	

Associated Press	12/19/2016	NOAA/USEC	YES	01/11/2017
	01/26/2017	NOAA/USEC	YES	02/27/2017

Closed Dat

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Dispositions

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**(b)(5)**

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TBD



**Detail**

CREW requests copies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump's transition team, including representatives of Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect.

I request copies of any communications from regional staff in Oregon, Washington or Idaho since July 2016 involving both of the following keywords: 'Trump', 'President'. Scope modified to limit search by NMFS West Coast Region "Supervisory" staff located in Oregon, Washington or Idaho.

Please produce records in possession, custody, or control that are, include, or reflect communications between National Oceanic and Atmospheric Administration's (NOAA's) staff and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Wilbur Ross, Ray Washburne, David Bohigian, Joan Maginnis, George Sifakis, William Gaynor, A. Mark Neuman, and Tom Leppert.

On behalf of Public Citizen, Inc., and pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. s. 552, I request:

1. All records of communications from or on behalf of the Trump Administration and/or the Trump Transition Team to the National Oceanic and Atmospheric Administration (NOAA) providing guidance on which agency matters NOAA employees may or may not publicly discuss and/or regulating how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request. Background discussion of the concerns motivating this request is provided in the January 24, 2017, article in Politico by Andrew Restuccia, Alex Guill&eacute;n, and Nancy Cook, entitled Information lockdown hits Trump's federal agencies, available at <http://www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122>.
2. All records of communications disseminated internally to NOAA employees to provide guidance on which agency matters NOAA employees may or may not publicly discuss and/or to regulate how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and on behalf of the Union of Concerned Scientists, I write to request access to and copies of all communications and attachments between National Oceanic and Atmospheric Administration staff and the following individuals from November 14, 2016 to present:

1. Anyone with the following email domain: @ptt.gov
2. Anyone with the following email domain: @donaldjtrump.com

copies of All emails sent to or sent from your agency employees in which the Internet domains "trump.com", "trumporg.com", "ptt.gov", "donaldjtrump.com" or "donaldtrump.com" are in email addresses in the To, From, CC,BCC, Subject or Body fields of the message. The time frame for this request is June 3, 2016 through December 5, 2016. for the following Officials: Secretary of Commerce Penny Pritzker Deputy Secretary Bruce H. Andrews Chief of Staff Jim Hock General Counsel Kelly R. Welsh Undersecretary for National Oceanic and Atmospheric Administration Dr Kathryn Sullivan Acting Undersecretary for International Trade Kenneth E. Hyatt Undersecretary for Industry and Security Eric L. Hirschhorn Director of the U.S. Census Bureau John Thompson Assistant Secretary for Economic Development Jay Williams

Under the Freedom of Information Act, I hereby request any emails produced or received by your agency to or from any member or part of the transition team, as well as any emails which include any or all of the following terms or phrases: • Trump • Transition • President-Elect • New administration • New boss

---

**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Thursday, February 2, 2017 3:42 PM  
**To:** Davis, James  
**Cc:** Toland, Michael  
**Subject:** Re: Current list of open FOIAs  
**Attachments:** FOIA Listing 2017-02-02 (1).xls

Hello James,

Please see attached.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
[\(301\) 628-5658](tel:3016285658) (O)  
(b)(6) (C)

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---

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Sincerely,

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FOIA Analyst

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BOU	Tracking Number	Type	Requester
	DOC-NOAA-2017-000331	Request	Adam J. Rappaport
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	DOC-NOAA-2017-000362	Request	Jaclyn Prange
	DOC-NOAA-2017-000497	Request	Rachel Clattenburg
	DOC-NOAA-2017-000351	Request	Yogin Kothari
<b>DOC REQUESTS - ASSIGNED TASKS TO NOAA</b>			

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	DOC-OS-2017-000308	TASK	Michael Best

Requester Organization	Submitted	Assigned To	Perfected	Due
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Public Citizen	01/25/2017	USEC	YES	03/02/2017
UCS	12/20/2016	USEC	YES	

Associated Press	12/19/2016	NOAA/USEC	YES	01/11/2017
	01/26/2017	NOAA/USEC	YES	02/27/2017



Closed Dat	(b)(5)	Dispositions
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TBD		TBD

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**Detail**

CREW requests copies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump's transition team, including representatives of Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect.

I request copies of any communications from regional staff in Oregon, Washington or Idaho since July 2016 involving both of the following keywords: 'Trump', 'President'. Scope modified to limit search by NMFS West Coast Region "Supervisory" staff located in Oregon, Washington or Idaho.

Please produce records in possession, custody, or control that are, include, or reflect communications between National Oceanic and Atmospheric Administration's (NOAA's) staff and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Wilbur Ross, Ray Washburne, David Bohigian, Joan Maginnis, George Sifakis, William Gaynor, A. Mark Neuman, and Tom Leppert.

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2. All records of communications disseminated internally to NOAA employees to provide guidance on which agency matters NOAA employees may or may not publicly discuss and/or to regulate how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request.

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1. Anyone with the following email domain: @ptt.gov
2. Anyone with the following email domain: @donaldjtrump.com

copies of All emails sent to or sent from your agency employees in which the Internet domains "trump.com", "trumporg.com", "ptt.gov", "donaldjtrump.com" or "donaldtrump.com" are in email addresses in the To, From, CC,BCC, Subject or Body fields of the message. The time frame for this request is June 3, 2016 through December 5, 2016. for the following Officials: Secretary of Commerce Penny Pritzker Deputy Secretary Bruce H. Andrews Chief of Staff Jim Hock General Counsel Kelly R. Welsh Undersecretary for National Oceanic and Atmospheric Administration Dr Kathryn Sullivan Acting Undersecretary for International Trade Kenneth E. Hyatt Undersecretary for Industry and Security Eric L. Hirschhorn Director of the U.S. Census Bureau John Thompson Assistant Secretary for Economic Development Jay Williams

Under the Freedom of Information Act, I hereby request any emails produced or received by your agency to or from any member or part of the transition team, as well as any emails which include any or all of the following terms or phrases: • Trump • Transition • President-Elect • New administration • New boss

---

**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Thursday, February 2, 2017 4:58 PM  
**To:** Stephen Lipps - NOAA Federal; John Almeida - NOAA Federal; Holmes, Colin; Robert Moller - NOAA Federal; Scott Smullen - NOAA Federal; Jeff Dillen - NOAA Federal; Kristen Gustafson - NOAA Federal  
**Cc:** Tom Taylor; Kimberly Katzenbarger - NOAA FEDERAL; Charles; Dennis Morgan - NOAA Federal; Stacey Nathanson - NOAA Federal; Robert Swisher - NOAA Federal; Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate; Lola Stith - NOAA Affiliate; Zachary Goldstein - NOAA Federal; Douglas Perry - NOAA Federal; Nkolika Ndubisi - NOAA Federal; Jeri Dockett - NOAA Affiliate  
**Subject:** Weekly FOIA Incoming and High Visibility Requests  
**Attachments:** Weekly FOIA Incoming and High Visibility Requests Report 01252017-02012017.xls; FOIA Request - DOC-NOAA-2017-000331.pdf; CREW v DOC - Complaint.PDF

Good Afternoon,

Attached is this week's report. Please note one request received from Public Citizen, Inc., seeking all records regarding restrictions from the Trump Administration, or internally, on what NOAA employees can or cannot discuss external to the bureau. (DOC-2017-000497). Additionally, a request was received from the Center for Biological Diversity seeking records regarding the ACOE Nationwide Permits Program. (DOC-NOAA-2017-000539).

(b)(5)

In litigation, NOAA was served with a new FOIA litigation, *CREW v. DOC*. The original request was seeking copies of questionnaires submitted to NOAA by any representative of President-elect Donald Trump's transition team. A copy of CREW's original request as well as the complaint are attached.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

Confidentiality Notice: This e mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.

Rec'd in LEO on  
FOIA Summons  
1/13  
1-31-17

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

Citizens for Responsibility and Ethics in Washing<sup>t</sup>

*Plaintiff*

v.

Department of Commerce

*Defendant*

Civil Action No. 17-cv-00135

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant's name and address)*

Department of Commerce  
1401 Constitution Ave., N.W.  
Washington, D.C. 20230

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Adam J. Rappaport  
Citizens for Responsibility and Ethics in Washington  
455 Massachusetts Ave., N.W., Sixth Floor  
Washington, D.C. 20001

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*ANGELA D. CAESAR, CLERK OF COURT*

Date: 01/25/2017

Jacqueline M. Francis

*Signature of Clerk or Deputy Clerk*

Digitally signed by Jacqueline M. Francis  
DN: cn=Jacqueline M. Francis, o=United States District Court for  
the District of Columbia, ou,  
email=jacqueline\_m\_francis@usdc.uscourts.gov, c=US  
Date: 2017.01.25 08:49:11 -0500

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>CITIZENS FOR RESPONSIBILITY AND</b>	)	
<b>ETHICS IN WASHINGTON</b>	)	
455 Massachusetts Ave., N.W., Sixth Floor	)	
Washington, D.C. 20001	)	
	)	Civil Action No.
Plaintiff,	)	
	)	
v.	)	
	)	
<b>U.S. DEPARTMENT OF COMMERCE</b>	)	
1401 Constitution Avenue, N.W.	)	
Washington, D.C. 20230,	)	
	)	
Defendant.	)	
_____	)	

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, for injunctive, declaratory, and other appropriate relief. Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) challenges the failure of the National Oceanic and Atmospheric Administration (“NOAA”), a component agency of the U.S. Department of Commerce (“DOC”) to disclose to CREW records related to questionnaires submitted to NOAA by representatives of President-elect Donald Trump’s transition team.

2. This case seeks declaratory relief that DOC is in violation of the FOIA, 5. U.S.C. § 552(a)(6)(E)(i), by failing to provide CREW with all responsive records, and injunctive relief ordering the defendant DOC and its component agency NOAA to process and release to CREW immediately the requested records in their entirety.

**Jurisdiction and Venue**

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331, and 28 U.S.C. §§ 2201(a) and 2202. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

**Parties**

4. Plaintiff CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the tax code. CREW is committed to protecting the rights of citizens to be informed about the activities of government officials and agencies, and to ensuring the integrity of government officials and agencies. CREW seeks to empower citizens to have an influential voice in government decisions and in the governmental decision-making process through the dissemination of information about public officials and their actions. To advance its mission, CREW uses a combination of research, litigation, and advocacy. As part of its research, CREW uses government records made available to it under the FOIA.

5. Defendant DOC is an agency within the meaning of 5 U.S.C. § 552(f) and 5 U.S.C. § 701. NOAA is a component agency within DOC. DOC is the federal agency with possession and control of the requested records and is responsible for fulfilling plaintiff's FOIA requests.

**FACTUAL BACKGROUND**

6. In early December 2016, news outlets reported that President-elect Donald J. Trump's transition team had sent an extensive questionnaire to the Department of Energy that included a request for the names of all agency employees or contractors who have attended conferences related to climate change policy as well as e-mails and documents associated with



the conferences. Coral Davenport, Climate Change Conversations are Targeted in Questionnaire, *New York Times*, Dec. 9, 2016, available at <http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html>.

7. The questionnaire raised concerns about potential retaliation against Department of Energy staff by the incoming administration. Brakkton Booker, Trump Questionnaire Raises Concerns About Retaliation Against Energy Department Staff, *NPR*, Dec. 10, 2016, available at <http://www.npr.org/sections/thetwo-way/2016/12/10/505105258/trump-questionnaire-raises-concerns-about-retaliation-against-energy-department>. The Department of Energy declined to provide individual names to transition team while acknowledging that some of the questions “left many in our workforce unsettled.” Joe Davidson, Energy Dept. Rejects Trump’s Request to Name Climate-Change Workers, Who Remain Worried, *Washington Post*, Dec. 13, 2016, available at [https://www.washingtonpost.com/news/powerpost/wp/2016/12/13/energy-dept-rejects-trumps-request-to-name-climate-change-workers-who-remain-worried/?utm\\_term=.9f1b05b29d6f](https://www.washingtonpost.com/news/powerpost/wp/2016/12/13/energy-dept-rejects-trumps-request-to-name-climate-change-workers-who-remain-worried/?utm_term=.9f1b05b29d6f).

8. It is unknown if President-elect Trump’s transition team sent similar questionnaires to other departments and agencies, including NOAA, seeking the names of employees or contractors worked on climate change policy and/or documents and correspondence related to climate change.

**Plaintiff’s FOIA Request and Request for Expedited Processing**

9. By letter dated on December 16, 2016 and delivered by the FOIAonline system, plaintiff requested under the FOIA copies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump’s transition team, including representatives of

Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect.

10. On that same day, NOAA acknowledged receiving the request.

11. By form letter dated January 4, 2017, NOAA granted CREW's request for a fee waiver.

12. To date, NOAA has not otherwise responded to CREW request.

13. NOAA has not provided CREW with a determination on its request, including an identification of what documents the agency plans to release, what documents the agency plans to withhold, and why – the determination the FOIA requires agencies to make of non-expedited requests with 20 business days of receiving a FOIA request.

14. Because NOAA has failed to make a determination under the FOIA on CREW's request, CREW has now exhausted all applicable administrative remedies.

**PLAINTIFF'S CLAIMS FOR RELIEF**

**CLAIM ONE  
(Wrongful Withholding Of Non-Exempt Records)**

15. Plaintiff repeats and re-alleges paragraphs 1-15.

16. Plaintiff properly asked for records within the custody and control of DOC and its component agency NOAA.

17. Defendant DOC and its component agency NOAA wrongfully withheld agency records requested by plaintiff by failing to comply with the statutory time limit for making a determination on non-expedited FOIA requests, and by withholding from disclosure records responsive to plaintiff's FOIA request.

18. Therefore, by failing to release the records as plaintiff specifically requested, defendant violated the FOIA.

19. Plaintiff is therefore entitled to injunctive and declaratory relief with respect to the expedited processing and disclosure of the requested records.

**Requested Relief**

WHEREFORE, plaintiff respectfully requests that this Court:

- (1) Order defendant DOC and its component agency NOAA to complete the processing of plaintiff's December 16, 2016 FOIA request and disclose all non-exempt documents immediately to plaintiff;
- (2) Issue a declaration that plaintiff is entitled to expedited processing and disclosure of the requested records;
- (3) Provide for expeditious proceedings in this action;
- (4) Retain jurisdiction of this action to ensure no agency records are wrongfully withheld;
- (5) Award plaintiff its cost and reasonable attorneys' fees in this action; and
- (6) Grant such other relief as the Court may deem just and proper.

Respectfully submitted,



Adam J. Rappaport  
arappaport@citizensforethics.org  
(D.C. Bar No. 479866)  
Stuart C. McPhail  
smcphail@citizensforethics.org  
(D.C. Bar No. 1032529)  
Citizens for Responsibility and Ethics  
in Washington  
455 Massachusetts Ave. N.W., Sixth Floor  
Washington, D.C. 20001  
Phone: (202) 408-5565  
Facsimile: (202) 588-5020

January 20, 2017

*Attorneys for Plaintiff*



<input type="radio"/> <b>G. Habeas Corpus/ 2255</b>  <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> <b>H. Employment Discrimination</b>  <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation)  *(If pro se, select this deck)*	<input checked="" type="radio"/> <b>I. FOIA/Privacy Act</b>  <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act)  *(If pro se, select this deck)*	<input type="radio"/> <b>J. Student Loan</b>  <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> <b>K. Labor/ERISA (non-employment)</b>  <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> <b>L. Other Civil Rights (non-employment)</b>  <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input type="radio"/> <b>M. Contract</b>  <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> <b>N. Three-Judge Court</b>  <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

**V. ORIGIN**  
 1 Original Proceeding  
  2 Removed from State Court  
  3 Remanded from Appellate Court  
  4 Reinstated or Reopened  
  5 Transferred from another district (specify)  
  6 Multi-district Litigation  
  7 Appeal to District Judge from Mag. Judge  
  8 Multi-district Litigation – Direct File

**VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)**  
 5 U.S.C. Section 552 - DOC has failed to produce records in response to plaintiff's FOIA request.

<b>VII. REQUESTED IN COMPLAINT</b>	CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/>	DEMAND \$ _____	JURY DEMAND: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
<b>VIII. RELATED CASE(S) IF ANY</b>	(See instruction)	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	If yes, please complete related case form

DATE: 1/20/2017	SIGNATURE OF ATTORNEY OF RECORD:
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**INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44**  
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence Use 11001 to indicate plaintiff if resident of Washington, DC. 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

December 16, 2016

**BY FOIAonline**

National Oceanic and Atmospheric Administration  
Public Reference Facility (SOU1000)  
1315 East-West Highway (SSMC3)  
Room 9719  
Silver Spring, Maryland 20910

**Re: Freedom of Information Act Request**

Dear Freedom of Information Officer:

Citizens for Responsibility and Ethics in Washington (“CREW”) makes this request for records pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and National Oceanic and Atmospheric Administration (“NOAA”) regulations.

CREW requests copies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump’s transition team, including representatives of Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect.

Please search for responsive records regardless of format, medium, or physical characteristics. We seek records of any kind, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical material. Our request includes without limitation all correspondence, letters, emails, text messages, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request also includes any attachments to emails and other records.

If it is your position any portion of the requested records is exempt from disclosure, CREW requests that you provide it with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. See 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. See *Mead Data Central v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

**Fee Waiver Request**

In accordance with 5 U.S.C. § 552(a)(4)(A) and NOAA regulations, CREW requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a



better understanding of relevant government procedures by CREW and the general public in a significant way. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Moreover, the request primarily and fundamentally is for non-commercial purposes. *See, e.g., McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

In early December, news outlets reported that President-elect Trump's transition team had sent an extensive questionnaire to the Department of Energy that included a request for the names of all agency employees or contractors who have attended conferences related to climate change policy as well as e-mails and documents associated with the conferences.<sup>1</sup> The questionnaire raised concerns about potential retaliation against Energy Department staff by the incoming administration.<sup>2</sup> The Energy Department declined to provide individual names to transition team while acknowledging that some of the questions "left many in our workforce unsettled."<sup>3</sup>

The requested records would shed light on whether the Trump transition team has sought similar information at other government agencies that have worked on climate change policy.

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the public's right to be aware of the activities of government officials, to ensuring the integrity of those officials, and to highlighting and working to reduce the influence of money on politics. CREW uses a combination of research, litigation, and advocacy to advance its mission. CREW intends to analyze the information responsive to this request and to share its analysis with the public through reports, press releases, or other means. In addition, CREW will disseminate any documents it acquires from this request to the public through its website, [www.citizensforethics.org](http://www.citizensforethics.org), and through [www.scribd.com](http://www.scribd.com). The release of information obtained through this request is not in CREW's financial interest.

CREW further requests that it not be charged search or review fees for this request pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) because CREW qualifies as a member of the news media. *See Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (holding non-profit a "representative of the news media" and broadly interpreting the term to include "any person or organization which regularly publishes or disseminates information to the public").

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<sup>1</sup> Coral Davenport, *Climate Change Conversations are Targeted in Questionnaire*, *New York Times*, Dec. 9, 2016, available at <http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html>.

<sup>2</sup> Braktkon Booker, *Trump Questionnaire Raises Concerns About Retaliation Against Energy Department Staff*, *NPR*, Dec. 10, 2016, available at <http://www.npr.org/sections/thetwo-way/2016/12/10/505105258/trump-questionnaire-raises-concerns-about-retaliation-against-energy-department>.

<sup>3</sup> Joe Davidson, *Energy Dept. Rejects Trump's Request to Name Climate Change Workers, Who Remain Worried*, *Washington Post*, Dec. 13, 2016, available at [https://www.washingtonpost.com/news/powerpost/wp/2016/12/13/energy-dept-rejects-trumps-request-to-name-climate-change-workers-who-remain-worried/?utm\\_term=.ade20de7da3e](https://www.washingtonpost.com/news/powerpost/wp/2016/12/13/energy-dept-rejects-trumps-request-to-name-climate-change-workers-who-remain-worried/?utm_term=.ade20de7da3e).

CREW routinely and systematically disseminates information to the public in several ways. CREW's website receives tens of thousands of page views every month. The website includes a blog that reports on and analyzes newsworthy developments regarding government ethics, corruption, and money in politics, as well as numerous reports CREW has published to educate the public about these issues. In addition, CREW posts all of the documents it receives under the FOIA at [www.scribd.com](http://www.scribd.com), and those documents have been visited hundreds of thousands of times.

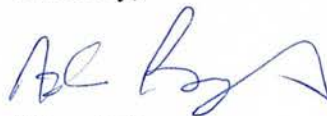
Under these circumstances, CREW satisfies fully the criteria for a fee waiver.

### **Conclusion**

If you have any questions about this request or foresee any problems in fully releasing the requested records, please contact me at (202) 408-5565 or [arappaport@citizensforethics.org](mailto:arappaport@citizensforethics.org). CREW also welcomes the opportunity to discuss with you whether and to what extent this request can be narrowed or modified to better enable NOAA to process it within the FOIA's deadlines. In addition, if CREW's request for a fee waiver is not granted in full, please contact our office immediately upon making such a determination.

Where possible, please produce records in electronic format. Please send the requested records to me either at [arappaport@citizensforethics.org](mailto:arappaport@citizensforethics.org) or at Adam J. Rappaport, Citizens for Responsibility and Ethics in Washington, 455 Massachusetts Ave., N.W., 6th Floor, Washington, D.C. 20001. Thank you for your assistance in this matter.

Sincerely,



Adam J. Rappaport  
Chief Counsel



Tracking Number	Type	Requester
DOC-NOAA-2017-000539	Referral	Jamie Pang
DOC-NOAA-2017-000492	Request	Michael Ravnitzky
DOC-NOAA-2017-000536	Request	Peter R. Ehrhardt
DOC-NOAA-2017-000530	Request	Raymond Tubb
DOC-NOAA-2017-000534	Request	Robert C. Stober
DOC-NOAA-2017-000533	Request	Lynn Manolopoulos
DOC-NOAA-2017-000532	Request	Corin Hoggard
DOC-NOAA-2017-000510	Request	Russ Rector
DOC-NOAA-2017-000497	Request	Rachel Clattenburg

DOC-NOAA-2017-000499	Request	Zeenat Mian
DOC-OS-2017-000428	Other	Robert Faturechi
DOC-OS-2017-000308	Other	Michael Best
DOC-OS-2017-000489	Search Pending	Jimmy Metcalf

Requester Organization	Submitted	Assigned To
CENTER FOR BIOLOGICAL DIVERSITY	01/30/2017	Tawand Hodge Tonic
	01/24/2017	Lola Stith
Atty at Law	01/30/2017	NMFS
WGXA ABC16/FOX24	01/27/2017	NWS
Hershoff, Lupino & Yagel, LLP	01/27/2017	NOS
Davis Wr.ght Tremain LLP	01/27/2017	NOS
ABC30 Action News	01/27/2017	NWS
	01/26/2017	Tawand Hodge Tonic
Public Citizen	01/25/2017	USEC

	01/25/2017	Kehaupuaokal Kamaka
ProPublica	01/25/2017	NOAA
	01/26/2017	NOAA
The Humane Society of the United States	02/01/2017	NOAA

Case File Assigned To	Perfected?	Due	Closed Date	Status
Tawand Hodge Tonic	Yes	03/01/2017	TBD	<b>(b)(5)</b>
Lola Stith	No	TBD	01/31/2017	
NMFS	Yes	03/02/2017	TBD	
NWS	Yes	03/02/2017	TBD	
NOS	Yes	02/27/2017	TBD	
NOS	Yes	02/28/2017	TBD	
NWS	Yes	03/02/2017	TBD	
Tawand Hodge Tonic	Yes	02/28/2017	TBD	
USEC	Yes	03/02/2017	TBD	

Kehaupuaokal Kamaka	Yes	02/23/2017	TBD
James Davis	Yes	02/27/2017	TBD
James Davis	Yes	02/27/2017	TBD
Harriette Boyd	Yes	02/10/2017	TBD

(b)(5)

**Dispositions**

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Not an agency record

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**Detail**

the

Clean Water Act, 33 U.S.C. § 1344, is/was sought pursuant to nationwide permits ("NWP"), generated since February 21, 2012 through the date of the agency's search for responsive records, in the following divisions of the U.S. Army Corps of Engineers ("ACOE"): North Atlantic; South Atlantic; South Pacific; Northwestern, Pacific Ocean; Headquarters;

2. All verification letters for NWPs, generated since February 21, 2012 through the date of the agency's search for responsive records, in the following divisions of the ACOE: North Atlantic; South Atlantic; South Pacific; Northwestern; Pacific Ocean; Headquarters;

3. All NWPs issued, approved, authorized, verified, and/or relied upon for specific activities or discharges by the North Atlantic, South Atlantic, South Pacific, Pacific Ocean; and Northwestern ACOE Divisions, and/or by ACOE Headquarters, in calendar years 2011 and 2012 through the date of the agency's search for responsive records;

4. All notices of intent to sue ACOE, dated within four years of the date of the agency's search for records, alleging violations of the Endangered Species Act and/or Clean Water Act in connection with the ACOE's NWP program;

5. All requests for reauthorization of activities pursuant to 2007 NWP 21 received by any ACOE division from Feb. 21, 2012 through the date of the agency's search for responsive records1

;

6. All biological opinions, biological assessments, letters of concurrence, and letters reflecting determinations of "no effect", pursuant to Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), for any projects covered under any NWPs, dated from February 21, 2012 through the date of the agency's search for responsive records;

**\*\*SEE SUPPORTING FILE FOR ADDTL DETAIL\*\***

A copy of the home page for <http://intranet.mcmurdo.usap.gov> A copy of each page connected to that home page

All documents in the possession or control of NOAA related or pertaining in any way to Charter Halibut Permit CHP permit No.4751C issued to Tom Floyd et al and Crooked Creek Guide and RV Park

to me: We would like a list of documents reflecting or showing the days that the Department of Defense Doppler Radar sites operated by the WFO at Atlanta/Peachtree City, GA and located in Jeffersonville, Georgia and covering Robins Air Force Base, and the site operated by the WFO at Jacksonville, FL, located in South

UTV LITTLE BULLY. A copy of the Captain of the Port Order 15-002 is attached. The undersigned attorney has been retained by SeaTow Islamorada SeaTow Islamorada was contracted to provide services to LITTLE BULLY

Information Act (FOIA) for copies of any documents relevant to the natural resource damages assessment referenced in paragraph 116 (concerning Quendall Terminals, located at 4503 Lake Washington Boulevard North, Renton, WA (&quot;Quendall Site&quot;)) of the enclosed Proof of Claim of the United States of America.

request includes but is not limited to a request for the habitat equivalency analysis (HEA) referenced in

Service from a whitehouse.gov email address between Jan. 20, 2017, and Jan. 23, 2017. I prefer to receive records in electronic form both for convenience and cost concerns.

Provide all MMIR transfer information (shared/unshared) available to the present. Also, I would like the record(s) in Excel format and correlate the information by date

request:

<br />

<br /> 1. All records of communications from or on behalf of the Trump Administration and/or the Trump Transition Team to the National Oceanic and Atmospheric Administration (NOAA) providing guidance on which agency matters NOAA employees may or may not publicly discuss and/or regulating how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request. Background discussion of the concerns motivating this request is provided in the January 24, 2017, article in Politico by Andrew Restuccia, Alex

Please provide information of HMMA's Hawaiian monk seal duties as specified on the cooperative grant with NOAA.

All correspondence between employees at the under secretary level or above and Todd Ricketts from Jan. 1, from any member or part of the transition team, as well as any emails which include any or all of the following terms or phrases: • Trump • Transition • President-Elect • New administration • New boss

any and all records received from, sent to, or that otherwise reference Scott Falk, Nominee of the Administrator, since November 9, 2016; and any and all FOIA request responses related to the request in

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**From:** Deanna Harwood - NOAA Federal <deanna.harwood@noaa.gov>  
**Sent:** Thursday, March 2, 2017 1:25 PM  
**To:** Ana Liza Malabanan; Barry Thom; Celeste Leroux - NOAA Federal; Gary Stern; Jerry Hornof; John Almeida - NOAA Federal; Judson Feder; Kathryn Kempton; Kimberly Katzenbarger - NOAA FEDERAL; Kristen Gustafson - NOAA Federal; Mark Graff - NOAA Federal; Nicolle Hill - NOAA Federal; Samuel Rauch - NOAA Federal; Shelby L Mendez; Vanatta Alecia; Scott Rumsey  
**Subject:** Court Order - OCE FOIA case Attorneys Fees  
**Attachments:** 90-8-6-07677 DN 103.pdf

(b)(5)  
[Redacted text block]

[Redacted text block]

[Redacted text block]

-Deanna

[Deanna Harwood](#)  
Deputy Chief, Southwest Section  
NOAA, Office of General Counsel  
U.S. Department of Commerce  
501 W. Ocean Blvd., Suite 4470  
Long Beach, CA 90802  
(562) 980-4068

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OUR CHILDREN’S EARTH  
FOUNDATION, et al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES  
SERVICE, et al.,

Defendants.

Case No. [14-cv-01130-WHO](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION FOR  
ATTORNEY’S FEES**

Re: Dkt. No. 82

Plaintiffs seek an award of \$723,202.74 in attorney’s fees and \$3,190.39 in costs for succeeding in part on their consolidated lawsuits filed under the Freedom of Information Act (FOIA) against the federal agency defendants. Dkt. 94. I conclude that plaintiffs are eligible and entitled to an award of attorney’s fees, but at a significantly reduced amount in light of requested hourly rates that are not adequately supported and unnecessary or excessive time billed.

**BACKGROUND**

Plaintiffs Our Children’s Earth Foundation and Ecological Rights Foundation are Bay Area non-profits dedicated to protecting the environment.<sup>1</sup> Plaintiffs sent a series of nine FOIA requests to National Marine Fisheries Service (NMFS) starting in May 2013. The requests concerned NMFS’s oversight of activities by Stanford University and the impact of those activities on the Central California Coast steelhead. Plaintiffs were concerned with Stanford University’s operation of Searsville Lake and Dam, which were built in 1892, and other related water diversions and infrastructure that Stanford uses to provide non-potable water for its campus. Plaintiffs believe that “Lake Water System” adversely affects the steelhead by reducing water

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<sup>1</sup> See Declaration of Annaliese Beaman (Dkt. No. 83) ¶ 2. Plaintiffs are referred to collectively as OCE.

1 flows in San Francisquito Creek and its tributaries and cutting the steelhead off from access to  
 2 upstream spawning habitat. *See* Judge Conti’s March 30, 2015 Order [Dkt. No. 59] at 3-4.  
 3 Plaintiffs attempted to enjoin Stanford’s activities in a separate lawsuit, *Our Children’s Earth*  
 4 *Foundation v. Stanford Univ.*, No. 13-cv-00402-JSW (N.D. Cal.).<sup>2</sup>

5 In response to what OCE contends were deficient responses to its first four FOIA requests,  
 6 plaintiffs filed their first lawsuit (*OCE I*) in April 2014. In that lawsuit, OCE challenged whether  
 7 NMFS’s responses to plaintiffs’ FOIA requests were adequate, whether NMFS had a pattern and  
 8 practice of tardy and incomplete responses, and whether FWS failed to meet its internal deadline  
 9 to respond to NMFS.<sup>3</sup> Plaintiffs filed their second lawsuit (*OCE II*) in September 2014, based on  
 10 the tardy or otherwise deficient responses to their second set of FOIA Requests (FOIA requests 5 -  
 11 8). In *OCE II* plaintiffs alleged that NMFS failed to adequately respond to their additional FOIA  
 12 requests, and reiterated their argument that NMFS had a pattern and practice of tardy and  
 13 incomplete responses to FOIA requests.<sup>4</sup> The lawsuits were related by Judge Conti.<sup>5</sup>

14 In *OCE I*, the parties moved for summary judgment. Plaintiffs argued that: (1) NMFS  
 15 failed to adequately describe its searches or conducted an inadequate search and withheld  
 16 documents without sufficient justification; (ii) they were entitled to a declaratory judgment that  
 17 NMFS violated FOIA’s deadlines in responding to their four requests and in three related internal  
 18 appeals, and FWS violated FOIA’s deadlines in responding to a referral of documents from  
 19 NMFS; and (iii) the alleged violations of the FOIA are a part of a pattern and practice of non-

20 \_\_\_\_\_  
 21 <sup>2</sup> The government contends that plaintiffs’ first FOIA request was filed “as discovery” for the  
 22 Stanford lawsuit. *Oppo*. 6.

23 <sup>3</sup> A second defendant in *OCE I*, Fisheries and Wildlife Service (FWS) was alleged to have failed  
 24 to respond to NMFS’s request that FWS review and release under the FOIA portions of FWS’s  
 25 documents that NMFS had in its possession.

26 <sup>4</sup> The Army Corps of Engineers (Corps) was also named as a defendant in *OCE II*, as having failed  
 27 to appropriately respond to plaintiffs’ FOIA requests.

28 <sup>5</sup> Plaintiffs filed a third lawsuit (*OCE III*) in June 2015, which was also related to 14-1130. In  
*OCE III*, plaintiffs asserted that NMFS had failed to provide a timely final decision in response to  
 OCE’s ninth FOIA request (from April 2015) regarding more “up-to-date information” on the  
 same subject matter. Judge Conti, on plaintiffs’ request and without opposition from NMFS,  
 dismissed *OCE III* as “prudentially moot.” October 2015 SJ Order at 17-18. Plaintiffs are not  
 seeking fees or costs related to that lawsuit. *Mot.* 4, n.1.

1 compliance with the FOIA's mandates, so the Court should enjoin NMFS and order it to comply  
 2 with its FOIA obligations. March 30, 2015 Order at 6-7. The government opposed those  
 3 arguments.

4 In an Order dated March 30, 2015 [Dkt. No. 59, Case No. 14-1130], Judge Conti: (i) ruled  
 5 that NMFS failed to conduct adequate searches in response to OCE's first and third FOIA  
 6 requests;<sup>6</sup> (ii) held in abeyance the determination as to whether NMFS adequately invoked FOIA  
 7 Exemption (b)(6) to withhold names and contact information from responsive documents pending  
 8 further supplementation of the factual record by NMFS (concerning the privacy concerns that  
 9 would be implicated by release of that information); (iii) affirmed in part the withholding of some  
 10 attorney-client documents, but concluded that NMFS had not met its burden to explain why  
 11 certain portions of documents did not contain segregable and releasable information or why one  
 12 specific document was withheld as attorney-client privileged and, therefore, held in abeyance the  
 13 determination as to NMFS's withholding of those documents was appropriate; and (iv) granted  
 14 plaintiffs' request for a declaratory judgment that NMFS failed to comply with the statutorily  
 15 mandated response and appeal deadlines with respect to the four FOIA requests at issue. *Id.* at 8-  
 16 26.<sup>7</sup> Judge Conti denied plaintiffs' motion and granted defendants' motion regarding  
 17 withholdings, redactions, and timeliness. *Id.* at 28.<sup>8</sup>

18 NMFS then provided additional information to the Court concerning its withholdings and  
 19 redactions, and plaintiffs submitted responses regarding the same.<sup>9</sup> In an Order dated July 20,

20 \_\_\_\_\_  
 21 <sup>6</sup> Judge Conti granted plaintiffs' motion on the adequacy of the search as to the first and third  
 22 FOIA requests, and granted defendants' motion as to the adequacy of the searches in response to  
 the second and fourth requests. *Id.* at 12.

23 <sup>7</sup> Judge Conti, however, expressly did not reach the question of whether plaintiffs had proven that  
 24 NMFS had a pattern and practice of untimely responses, because "[t]he pattern and practice and  
 25 cutoff date allegations are repeated, with a fuller evidentiary record, in cross-motions for  
 summary judgment pending in" *OCE II*, and the Judge intended to address them in a subsequent  
 order. *Id.* at 22.

26 <sup>8</sup> Plaintiffs point out that in preparing its cross-motion for summary judgment in *OCE I*, NMFS  
 27 uncovered two additional responsive documents and disclosed them in full. *See* Declaration of  
 Gary Stern [Dkt. No. 41, 14-1130] ¶ 17.

28 <sup>9</sup> As part of its supplemental briefing, NMFS decided to release two previously withheld in full  
 documents and to release three redacted documents that had previously been withheld in full. It

1 2015, Judge Conti addressed the issues remaining from *OCE I*, as well as the cross-motions filed  
 2 in *OCE II*. Judge Conti characterized the remaining arguments made by plaintiffs as: (i) NMFS  
 3 failed to adequately search for records responsive to two of its requests; (ii) NMFS improperly  
 4 withheld or overly redacted responsive records under two FOIA exemptions; (iii) NMFS was  
 5 defying Department of Commerce (of which NMFS is a part) regulations by cutting off their  
 6 search for responsive records at the date the FOIA request is received rather than the date the  
 7 search begins; and (iv) the request for a declaratory judgment that NMFS's and the Corps'  
 8 responses to plaintiffs' requests were untimely, and grant declaratory and injunctive relief to  
 9 remedy NMFS's alleged pattern and practice of FOIA violations. July 20, 2015 Order [Dkt. No.  
 10 70, Case No. 14-1130] at 3-4. NMFS and the Corps cross-moved for summary judgment, arguing  
 11 that their responses were adequate and declaratory and injunctive relief were unwarranted. *Id.* at  
 12 4.<sup>10</sup>

13 As to the substance of the adequacy of NMFS's responses, Judge Conti found that: (i)  
 14 NMFS had failed to provide sufficient information for the court to determine whether NMFS  
 15 conducted an adequate search, ordered NMFS to supplement the factual record, and held in  
 16 abeyance the issue of summary judgment on NMFS's search; (ii) NMFS had properly withheld  
 17 draft biological opinions under FOIA Exemption (b)(5), but did not adequately justify its  
 18 withholding or non-redaction of an email under (b)(5), and as such NMFS was required to  
 19 supplement the factual record to justify its withholding and non-redaction, and the court held in  
 20 abeyance summary judgment on the withholding of that document; and (iii) granted summary  
 21 judgment to NMFS withholding under FOIA Exemption (b)(7) of names in a report. *Id.* 5-17.

22 As to the issue of untimely responses and pattern and practice of delay and improper cutoff  
 23 dates, Judge Conti: (i) granted plaintiffs' request for declaratory relief that NMFS violated its  
 24 statutory duties with respect to the timeliness of its responses and appeals, but declined to enter

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 26 also stated it was conducting a supplemental search for documents responsive to OCE's first and  
 27 third FOIA requests. Dkt. No. 60 at 4-5; *see also* Dkt. No. 59 at 19, 21.

28 <sup>10</sup> In its cross-motion pleadings in *OCE II*, NMFS decided "upon additional review" to release an  
 additional eleven documents in part and one in full. Dkt. No. 19 (14-4365) ¶ 28; Dkt. No. 18-1  
 (14-4365) ¶ 5.

1 declaratory relief against the Corps; (ii) determined that further facts were needed to address  
 2 plaintiffs' contention that NMFS was using an improper cutoff date when beginning its search for  
 3 documents and ordered supplemental briefing; and (iii) ordered plaintiffs to submit supplemental  
 4 briefing on the status of their pending FOIA requests as to the pattern and practice of delay claim.  
 5 *Id.* at 17-25. Finally, as to plaintiffs' request for injunctive relief, the Judge ordered NMFS "to  
 6 comply with FOIA and its deadlines, due to the Court's finding that the Fisheries Service has  
 7 failed to do so previously and the potential that these offenses might continue. Yet the Court,  
 8 having so ordered and having GRANTED declaratory relief, DENIES WITHOUT PREJUDICE  
 9 further injunctive relief at this time," in part because of "the fact that Plaintiffs appear to be  
 10 repeatedly making large requests in sufficiently rapid succession that the Fisheries Service is  
 11 unable to complete its response to one request before receiving a second" and recognizing  
 12 evidence of good faith and efforts on the part of NMFS to comply with its deadlines and  
 13 significantly improve its future performance. *Id.* at 26-27. The Court held in abeyance the  
 14 motions regarding NMFS's exemption claims, adequacy challenge, cutoff dates, and pattern and  
 15 practice allegations pending the supplementation of the record. *Id.* at 29-30.<sup>11</sup>

16 Following that round of supplementation, in an October 21, 2015 Order, Judge Conti  
 17 addressed the remaining issues and ruled that: (i) NMFS's declarants had addressed the concerns  
 18 over the adequacy of the search and granted NMFS summary judgment on that issue; (ii)  
 19 determined that one record had been appropriately withheld under (b)(5) based on a supplemental  
 20 *Vaughn* index and granted NMFS summary judgment on its withholdings under (b)(5); (iii) found  
 21 that NMFS cured its showing of non-segregability of withheld information based on its  
 22 supplemental *Vaughn* index, except as to one document,<sup>12</sup> and granted NMFS summary judgment  
 23 on segregability as to all documents except that one; and (iv) granted summary judgment to NMFS

24  
 25 <sup>11</sup> As part of its supplemental briefing, NMFS decided to release a redacted document that had  
 26 been withheld in full. Dkt. No. 27 (14-4365) at 2. NMFS also explained its search cut-off policy  
 27 (which OCE contends was "new"), requiring that if one or more subject-matter expert are required  
 28 to search for documents, the date each expert starts his/her search establishes the cut-off date.  
 Dkt. No. 27-4 (14-4365), ¶18(b).

<sup>12</sup> The Court ordered NMFS to produce the document at issue, or explain further why it should be  
 withheld. October 21 2015 Order at 15. NMFS decided to produce the document.



1 based on additional information as to the cutoff dates used for searches. October 21, 2015 Order  
2 [Dkt. No 72, 14-1130] at 4-17.

3 As to the pattern and practice of delay claim, Judge Conti reviewed the evidence and found  
4 that NMFS was curing its processing and response problems and backlog, and therefore denied  
5 injunctive relief. However, in light of the “unmistakable history” of untimeliness and delay, Judge  
6 Conti granted declaratory relief to plaintiffs, concluding that: “(1) that the Fisheries Service has  
7 previously been engaged in a pattern-and-practice of failure to meet FOIA deadlines; (2) that the  
8 Fisheries Service has previously provided responses that were frequently and unreasonably  
9 delayed; (3) that due to these delays the Fisheries Service effectively provided no ability to FOIA  
10 requestors to anticipate when data might be provided; and (4) that due to these delays information  
11 was often provided after a long enough period of time that the data could be out-of-date,  
12 effectively negating its value and effectuating a complete denial of information.” *Id.* at 20-21. He  
13 also granted “limited” injunctive relief to plaintiffs, requiring NMFS to provide any outstanding  
14 production in response to certain of plaintiffs’ requests within 30 days. *Id.* at 21. Any further  
15 injunctive relief was denied without prejudice, but he required NMFS to show cause as to how it  
16 was curing its prior violations and intended to continue its response-time improvements going  
17 forward. *Id.* at 22.

18 After the case was reassigned to me in November 2015, I addressed whether any issues  
19 remained to be decided following Judge Conti’s October and November 2015 Orders as well as  
20 the supplemental briefing filed by the parties regarding NMFS’s efforts to cure its past timeliness  
21 violations and ensure those would not occur in the future. In an order dated January 20, 2016, I  
22 determined that Judge Conti had resolved all pending issues, and concluded that the evidence  
23 regarding NMFS’s substantial reduction of its FOIA-response backlog and the “technical,  
24 administrative, and staffing improvements” NMFS had implemented to ensure timely processing  
25 of FOIA requests on a forward-going basis meant that continuing injunctive relief was not  
26 warranted. January 20, 2016 Order [Dkt. No. 75]. A stipulated judgment was entered on February  
27 16, 2016. Plaintiffs now seek over \$700,000 in attorney’s fees for the hours they spent litigating  
28 *OCE I* and *OCE II*, as well as costs. Defendants oppose plaintiffs’ entitlement to any fees, and

1 challenge the reasonableness of the amount sought.

## 2 LEGAL STANDARD

3 FOIA authorizes courts to “assess against the United States reasonable attorney fees and  
4 other litigation costs reasonably incurred in any case under this section in which the complainant  
5 has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E). This provision “has as its fundamental  
6 purpose the facilitation of citizen access to the courts to vindicate the public’s statutory rights,” as  
7 the fees and costs of bringing suit could otherwise “present a virtually insurmountable barrier  
8 which [would] ba[r] the average person from forcing governmental compliance with the law.”  
9 *Exner v. F.B.I.*, 443 F. Supp. 1349, 1352 (S.D. Cal. 1978).

10 A court may grant an award of attorney’s fees under 5 U.S.C. § 552(a)(4)(E) where the  
11 plaintiff establishes that it is both eligible for and entitled to an award. *See Church of Scientology*  
12 *of California v. U.S. Postal Serv.*, 700 F.2d 486, 489 (9th Cir. 1983); *Rosenfeld v. U.S. Dep’t of*  
13 *Justice*, 903 F. Supp. 2d 859, 865 (N.D. Cal. 2012). To be eligible for an award, the plaintiff must  
14 show that “(1) the filing of the action could reasonably have been regarded as *necessary* to obtain  
15 the information; and (2) the filing of the action had a *substantial causative* effect on the delivery  
16 of the information.” *Church of Scientology*, 700 F.2d at 489 (emphasis in original).

17 If the court determines that the plaintiff is eligible for attorney’s fees, the court may then,  
18 “in the exercise of its discretion, determine that [it] is *entitled* to an award of attorney’s fees.” *Id.*  
19 at 492 (emphasis in original). In making this determination, courts consider “(1) the benefit to the  
20 public, if any, deriving from the case; (2) the commercial benefit to the complainant; (3) the nature  
21 of the complainant’s interest in the records sought; and (4) whether the government’s withholding  
22 of the records sought had a reasonable basis in law.” *Id.*; *accord Long v. U.S. I.R.S.*, 932 F.2d  
23 1309, 1313 (9th Cir. 1991). “These four criteria are not exhaustive, however, and the court may  
24 take into consideration whatever factors it deems relevant in determining whether an award of  
25 attorney’s fees is appropriate.” *Long*, 932 F.2d at 1313 (internal quotation marks omitted). Once  
26 eligibility is established, “[t]he decision to award attorney’s fees is left to the sound discretion of  
27 the trial court.” *Church of Scientology*, 700 F.2d at 492.

**DISCUSSION**

**I. WHETHER PLAINTIFFS SUBSTANTIALLY PREVAILED AND ARE ELIGIBLE FOR ATTORNEY'S FEES**

The government does not contest that plaintiffs substantially prevailed in *OCE I*, but argues that plaintiffs were not successful in *OCE II*, and therefore are not eligible for fees for that portion of the litigation. As noted above, in his July and October 2015 orders, Judge Conti addressed the claims asserted in *OCE II* (as well as issues asserted in *OCE I*). In the July Order, Judge Conti granted plaintiffs' request for a declaratory judgment that NMFS's responses to plaintiffs' FOIA requests 5-8 were untimely. July 2015 Order at 20-21. That by itself constitutes "success," albeit on a discrete issue. *See Hajro v. United States Citizenship & Immigration Servs.*, 900 F. Supp. 2d 1034, 1045 (N.D. Cal. 2012) (prevailing on summary judgment and obtaining injunctive relief on claim that defendant's responses were untimely constitutes substantial success), *reversed on other grounds* by 811 F.3d 1086, 1092 (9th Cir. 2016); *Or. Nat. Desert Ass'n v. Gutierrez*, 442 F. Supp. 2d 1096, 1098 (D. Or. 2006) (determination that agency failed to provide a timely response sufficient to create entitlement to fees), *aff'd in pertinent part, rev'd in part on other grounds* by *Or. Nat. Desert Ass'n v. Locke*, 572 F.3d 610 (9th Cir. 2009).

After initially finding that NMFS provided insufficient information in its declarations and *Vaughn* index to demonstrate the adequacy of some of its searches and withholdings, when NMFS provided supplemental briefing and declarations Judge Conti concluded that the searches were adequate and the withholdings justified (except as to one document under Exemption (b)(5), which NMFS decided to release). In addition, after receiving plaintiffs' summary judgment motion and while preparing its cross-motion pleadings in *OCE II*, NMFS decided "upon additional review" to release an additional eleven documents in part and one in full. Dkt. No. 19 (14-4365) ¶ 28; Dkt. No. 18-1 (14-4365) ¶ 5. Following the next round of supplemental briefing, NMFS decided to release in part yet another document that had been withheld. Dkt. No. 27 (14-4365) at 2. The evidentiary record supports plaintiffs' contention that these documents were produced as a result of *OCE II*.<sup>13</sup> Plaintiffs, therefore, prevailed, on another discrete portion of their litigation in

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<sup>13</sup> NMFS argues that its responses to Requests 5 through 8 were not produced as a result of the

1 securing these supplemental productions under a catalyst theory. *See, e.g., Dorsen v. United States*  
 2 *SEC*, 15 F. Supp. 3d 112, 120 (D.D.C. 2014) (plaintiff prevailed where FOIA suit prompted  
 3 additional or speedier release of documents); *Judicial Watch, Inc. v. United States DOJ*, 878 F.  
 4 Supp. 2d 225, 232 (D.D.C. 2012) (catalyst theory satisfied where after a final agency response and  
 5 commencement of lawsuit, additional documents were produced).

6 More importantly, in light of the “unmistakable history” of “unreasonable” untimeliness  
 7 and delay, Judge Conti granted plaintiffs’ request for a declaratory judgment that NMFS failed to  
 8 provide them with timely responses and had a past pattern and practice of untimely responses.  
 9 That judgment, along with the limited injunctive relief (requiring NMFS to respond to plaintiffs’  
 10 then-pending FOIA requests by a date certain), confers prevailing party status on plaintiffs as well.  
 11 The government in an attempt to avoid fees for *OCE II* argues that plaintiffs did not secure any  
 12 relief in *OCE II* beyond what they would have been entitled to given the claims asserted in *OCE I*.  
 13 *Oppo*. 7-8. However, Judge Conti specifically held the pattern and practice claim in abeyance in  
 14 *OCE I* to determine it on the more complete evidentiary record presented in *OCE II*. *OCE II*,  
 15 therefore, was a necessary part to the Court’s eventual determination.

16 Similarly, the fact that further, more wide-spread injunctive relief was not granted in  
 17 response to the allegations raised in both *OCE I* and *OCE II* in the October 2015 or January 2016  
 18 Orders was due to the strong showing NMFS made on the steps the agency had taken and was  
 19 continuing to take to extinguish its backlog and implement policies and practices to ensure timely  
 20 responses in the future. The government spends much time in its brief and declarations attempting  
 21 to show that the new policies and practices NMFS implemented in order to reduce the backlog  
 22 discussed by Judge Conti and myself in the October 2015 and January 2016 Orders were not  
 23 conceived in order to respond to, or spurred on by, plaintiffs’ litigation but were underway prior to  
 24 the filing of *OCE I* and *OCE II*. *See, e.g., Oppo*. 9-10. Plaintiffs counter that argument by citing  
 25 to notes and other documents produced by NMFS staff showing that efforts to reduce the backlog

26  
 27 litigation, and cites testimony showing that NMFS began work processing and responding to these  
 28 requests before the *OCE II* complaint was filed. *See Hornof Decl.* ¶ 7. NMFS also argues that the  
 three FOIA requests subject to Judge Conti’s limited order of injunctive relief, were also being  
 processed and responses “underway” before the October 21, 2015 Order. *Id.* ¶¶ 10-11.

1 were just being formulated in June 2015 and were implemented in part to avoid litigation, like the  
2 suits at issue which were the only ones pending at the relevant time. *See, e.g.*, Reply 3-4.

3 However, in order to determine that plaintiffs are eligible for an award of attorney's fees, I  
4 need not resolve this factual dispute. That plaintiffs secured additional documents from NMFS  
5 after *OCE II* was filed and after NMFS took a closer look at its searches and withholdings and,  
6 more importantly, secured another declaratory judgment recognizing that the agency failed to  
7 provide timely responses, had engaged in a pattern and practice of tardy responses, and secured  
8 limited injunctive relief as to then-pending but not sued upon FOIA requests, is success significant  
9 enough to establish plaintiffs' eligibility for fees.<sup>14</sup>

10 In sum, plaintiffs were the prevailing parties on significant portions of both *OCE I* and  
11 *OCE II* and are eligible for an award of attorney's fees and costs.<sup>15</sup> The next step is to determine  
12 if they are entitled to them.

## 13 **II. WHETHER PLAINTIFFS ARE ENTITLED TO ATTORNEY'S FEES**

14 The factors courts consider in determining whether a plaintiff is entitled to attorney's fees  
15 include "(1) the benefit to the public, if any, deriving from the case; (2) the commercial benefit to  
16 the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether  
17 the government's withholding of the records sought had a reasonable basis in law." *Church of*

18 \_\_\_\_\_  
19 <sup>14</sup> That said, the evidence on the whole indicates that NMFS took more concrete, specific, and  
20 immediate steps following Judge Conti's Orders to extinguish its backlog and commit additional  
21 resources to speeding up its response times than the agency might have taken but-for plaintiffs'  
22 suits.

23 <sup>15</sup> Plaintiffs repeatedly imply that they were successful on their improper cut-off date challenges,  
24 arguing that their lawsuits were the catalyst for NMFS's new cut-off date policy. Mot. at 8, 10.  
25 The improper cut-off date issue was raised but not decided by Judge Conti in his March 30 Order,  
26 because the issue was also raised but supported by a fuller factual record in the *OCE II* summary  
27 judgment briefing that was pending. In his July Order, Judge Conti determined that, at most, a  
28 factual dispute existed, and again held the issue in abeyance for supplemental responses. In his  
October Order, Judge Conti found that plaintiffs had not established that NMFS used improper  
cut-off dates, and instead granted summary judgment to NMFS on plaintiffs' improper search cut-  
off date claim as to plaintiffs' *own* FOIA requests. October Order at 17. Later in the October  
Order, Judge Conti recognized that the "NMFS West Coast Region appears to have an updated  
process in place, using modern software, additional personnel, and policy changes (e.g., how the  
cut-off date changes where there are multiple SMEs assigned) to speed up its process. *See* Supp.  
Malabanian Decl. ¶¶ 15-18." *Id.* at 18. Judge Conti, however, never reached the issue of whether  
these lawsuits were the catalyst for NMFS's new, updated, or clarified policy with respect to  
search cut-off dates.

1 *Scientology*, 700 F.2d at 489. I will discuss each in turn.

2 **A. Benefit to the Public**

3 In considering the public benefit factor, courts consider “the degree of dissemination and  
4 the likely public impact that might result from disclosure.” *Church of Scientology*, 700 F.2d at  
5 493. The factor generally weighs in favor of an award where the information is broadly  
6 disseminated to the public. *See, e.g., Electronic Frontier Foundation v. Office of Dir. of Nat.*  
7 *Intelligence*, No. 07-cv-05278-SI, 2008 WL 2331959, at \*3 (N.D. Cal. June 4, 2008) (finding that  
8 the public benefit factor was satisfied where the plaintiff “immediately posted the requested  
9 information on its website” and “created press releases for public access”). Even where the degree  
10 of dissemination is limited, or where the level of public interest in the requested information itself  
11 is minimal, the public benefit factor may still favor an award “as long as there is a public benefit  
12 from the fact of . . . disclosure.” *O’Neill, Lysaght & Sun v. D.E.A.*, 951 F. Supp. 1413, 1423 (C.D.  
13 Cal. 1996).

14 Courts in this circuit have found a public benefit favoring an award, despite an absence of  
15 broad dissemination or a significant level of public interest in the requested information, where (1)  
16 the case “establishe[d] that the government may not withhold certain information pursuant to a  
17 particular FOIA exemption,” *Church of Scientology*, 700 F.2d at 493; (2) the plaintiffs were  
18 environmental nonprofits whose purpose was “to oversee and enforce compliance with the [Clean  
19 Air Act]” and the requested information was “being used to inform [the plaintiffs’] ongoing  
20 oversight and enforcement efforts,” *The Sierra Club v. United States Env’tl. Prot. Agency*, 75 F.  
21 Supp. 3d 1125, 1143-44 (N.D. Cal. 2014); and (3) the requested documents revealed a “long  
22 history of abuse” by a paid DEA informant and “expos[ed] the implications of the government  
23 dealing with untrustworthy paid informants.” *O’Neill*, 951 F. Supp. at 1423-24.

24 Plaintiffs argue that just like the plaintiffs in *Sierra Club* they “utilized the documents  
25 to advance their efforts to promote compliance with environmental laws intended to broadly  
26 benefit the public interest environmental protection. Specifically, they utilized the documents to  
27 organize public support for measures designed to persuade Stanford and NMFS to do more to  
28 protect a threatened fish species and to develop ESA citizen suits claims aiming to help the



1 survival and recovery of this threatened species.” Beaman Decl. ¶¶ 6-8; Mot. 15. Plaintiffs also  
2 disseminated the information they secured to their members, the press, and the public through  
3 messages, website postings, press releases, and interviews. Beaman Decl. ¶¶ 6-8.

4 As NMFS points out, it is unclear what role in that public outreach (if any) the information  
5 actually secured by OCE as a direct result of the filing of these lawsuits or Judge Conti’s Orders  
6 played. Beaman’s declaration is not specific on that point. *See, e.g., Cotton v. Heyman*, 63 F.3d  
7 1115, 1120 (when evaluating the public benefit prong, the court must “evaluate the specific  
8 documents at issue in the case at hand”). NMFS does not argue (or show by declaration) that the  
9 information produced to OCE after the inception of the suits or Judge Conti’s Orders issued was  
10 so ministerial or obscure that it could not have supported plaintiffs’ public interest and public  
11 disclosure goals. The Beaman declaration, while not specifically focused on documents produced  
12 as a result of this litigation, persuasively explains how the documents OCE received through its  
13 FOIA requests and its litigation play a significant role in OCE’s mission to inform the public  
14 about the activities of Stanford and the Central California Coast steelhead. Dkt. Nos. 83, 96.

15 In addition, this lawsuit effectively and publicly disclosed NMFS’s history of untimely  
16 responses and significant backlog as well as the steps NMFS was undertaking to cure those  
17 issues. That shed important light about the agency’s non-compliance with its duty under FOIA, a  
18 situation Judge Conti repeatedly referred to as “clear, undisputed, and troubling.” March 30, 2015  
19 Order at 24; *see also* July 20, 2015 Order at 19 (“In short, even though the Fisheries Service does  
20 not take the FOIA’s deadlines seriously, ‘[t]here can be no doubt that Congress [did]’”). Finally,  
21 plaintiffs secured a significant, contested legal ruling from Judge Conti: that FOIA allows both  
22 declaratory judgment and injunctive relief as remedies for untimely responses. NMFS vigorously  
23 argued that the only available remedy for a violation under FOIA was an order requiring  
24 production of withheld documents; a position that was soundly rejected by Judge Conti. March  
25 30, 2015 Order at 24-26; July 20, 2015 Order at 19-21.

26 On this record, plaintiffs have shown that this litigation through the information released  
27 and the legal principles established conferred a significant benefit on the public.  
28

**B. Commercial Benefit to the Complainant/Nature of Plaintiffs' Interests**

1 The second and third factors are “the commercial benefit to the complainant” and “the  
2 nature of the complainant’s interest in the records sought.” *Church of Scientology*, 700 F.2d at  
3 492. Courts regularly consider these factors together. *See, e.g., id.* at 494; *Am. Small Bus. League*  
4 *v. U.S. Small Bus. Admin.*, No. 08-cv-00829-MHP, 2009 WL 1011632, at \*3 (N.D. Cal. Apr. 15,  
5 2009); *Electronic Frontier Foundation*, 2008 WL 2331959, at \*3.

6 As a general matter, if a “commercial benefit will inure to the plaintiff from the  
7 information,” or if the plaintiff “intends to protect a private interest” through the FOIA litigation,  
8 then “an award of attorney’s fees is not recoverable.” *Church of Scientology*, 700 F.2d at 494. On  
9 the other hand, where the plaintiff “is indigent or a nonprofit public interest group, an award of  
10 attorney’s fees furthers the FOIA policy of expanding access to government information.” *Id.*  
11 The Ninth Circuit has instructed that, pursuant to the second and third factors, a court “should  
12 generally award fees if the complainant’s interest in the information sought was scholarly or  
13 journalistic or public-oriented,” but should not do so “if his interest was of a frivolous or purely  
14 commercial nature.” *Long*, 932 F.2d at 1316.

15 Plaintiffs argue that their non-profit status combined with the lack of any private  
16 commercial interest in the information they secured, strongly favors an award under these factors.  
17 *See* Beaman Decl. ¶¶ 1, 6-8. The government counters that contrary to plaintiffs’ current assertion  
18 that their goal in *OCE I* and *OCE II* was to force NMFS to provide more timely and fulsome  
19 responses to their and others’ FOIA requests, the real purpose of these lawsuits was to force  
20 NMFS to produce documents that plaintiffs could and did use in their suit against Stanford  
21 University. Declaration of Robin M. Wall [Dkt. No. 92-1], Ex. L (“Stanford Summary Judgment  
22 Papers,” noting that some of the FOIA production was used on a motion to compel and on a  
23 motion for summary judgment in the Stanford case). That purpose, according to the government,  
24 is a private one that does not make plaintiffs entitled to fees. *Oppo*. 11-13.

25 The cases relied on by NMFS considered private litigants who used FOIA to secure  
26 evidence in support of their private lawsuits. *See Hersh & Hersh v. U.S. Dept. of Health and*  
27 *Human Services*, No. 06-04234-PJH, 2008 U.S. Dist. LEXIS 110977, at \*7 (N.D. Cal. July 9,  
28



1 2008) (denying an award of attorney’s fees where “plaintiff undertook this FOIA request for  
 2 decidedly commercial purposes” when plaintiff was litigating private lawsuit against a defendant  
 3 regarding defective medical devices and plaintiff failed to secure disclosure of the “vast majority”  
 4 of documents it sought); *Ellis v. United States*, 941 F. Supp. 1068, 1078 (D. Utah 1996) (denying  
 5 fees where documents sought for assistance in private tort suit, because while documents produced  
 6 under FOIA created “some slight public benefit in bringing the government into compliance with  
 7 FOIA and providing information of general interest to the public, the disclosure of the records did  
 8 not add to the fund of information necessary to make important political choices”).<sup>16</sup> They do not  
 9 address the situation here, where non-profit environmental advocacy organizations bring suit  
 10 under FOIA as part of their ongoing efforts to shed light on how an agency is (or is not) protecting  
 11 the environment, albeit with respect to a specific project.

12 Moreover, while plaintiffs were undoubtedly motivated in some part to secure documents  
 13 from NMFS in order to assist their litigation against Stanford, there was a significant and separate  
 14 public benefit sought and secured by plaintiffs shedding light on the actions of NMFS (as  
 15 opposed to the actions of Stanford) in carrying out its agency duties and on its handling of  
 16 plaintiffs’ and others’ FOIA requests.<sup>17</sup>

17 These factors weigh in favor of plaintiffs’ entitlement to fees.  
 18

19  
 20 <sup>16</sup> I recognize that the court in *Sierra Club v. United States EPA*, 75 F. Supp. 3d 1125, 1144 (N.D.  
 21 Cal. 2014) rejected an agency’s argument that a non-profit environmental group plaintiff had a  
 22 commercial interest in the FOIA litigation because they intended to bring environmental litigation,  
 in part because “Plaintiffs were not pursuing a separate private lawsuit against Luminant at the  
 time they initiated the FOIA request.” The court, therefore, did not directly reach the issue raised  
 here.

23 <sup>17</sup> NMFS’s other cases are inapposite, as they do not address whether use of documents secured  
 24 through FOIA in other litigation equals a “commercial” interest in the FOIA litigation, but stand  
 25 for the proposition that having a personal interest in the records sought does not increase the  
 26 access to those records under FOIA. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143  
 27 n.10 (1975) (“Sears’ rights under the Act are neither increased nor decreased by reason of the fact  
 28 that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the  
 average member of the public. The Act is fundamentally designed to inform the public about  
 agency action and not to benefit private litigants.”); *Shannahan v. IRS*, 672 F.3d 1142, 1151 (9th  
 Cir. 2012) (requestors’ interest in IRS documents about themselves to use in their civil tax suit  
 does not negate applicability of FOIA exemptions preventing disclosure).

**C. Reasonable Basis in Law**

The fourth factor is “whether the government’s withholding had a reasonable basis in law”; in other words, whether the government’s actions appeared to have “a colorable basis in law” or instead appeared to be carried out “merely to avoid embarrassment or to frustrate the requester.” *Church of Scientology*, 700 F.2d at 492, 492 n.6; *see also Rosenfeld*, 903 F. Supp. 2d at 870; *Am. Small Bus. League*, 2009 WL 1011632, at \*4. This factor “is not dispositive” and can be outweighed where the other relevant factors favor an award. *Rosenfeld*, 903 F. Supp. 2d at 870 (internal quotation marks omitted); *see also O’Neill*, 951 F. Supp. at 1425 (noting that the reasonable basis in law factor “in particular should not be considered dispositive”). The burden is on the government to demonstrate that its withholding was reasonable. *Sierra Club*, 75 F. Supp. 3d at 1145.

Here, Judge Conti repeatedly found in no uncertain terms that NMFS failed to provide timely responses under FOIA. *See, e.g.*, March 30, 2015 Order at 24 (with respect to NMFS’s violation of FOIA deadlines “the record is clear, undisputed, and troubling .... In short, even though the Fisheries Service does not take the FOIA’s deadlines seriously, ‘[t]here can be no doubt that Congress [did].’”); July 20, 2015 Order at 19 (“The records in both this and the related case show a clear and undisputed breach of this [FOIA response deadline] requirement.”); October 21, 2015 Order at 18-19 (“the Court has received showing [of] an unmistakable history that the Fisheries Service fails to meet its statutory deadlines under FOIA and causes Plaintiffs (and likely others similarly situated) to suffer unpredictable, unreasonable delays.”).<sup>18</sup>

Judge Conti also found that in litigating this case, NMFS repeatedly failed to explain with sufficient detail the adequacy of its searches and the reasons for its withholdings thereby necessitating additional rounds of briefing by the parties and orders by the court.<sup>19</sup> As such, I

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<sup>18</sup> Judge Conti’s repeated use of strong adjectives like “troubling” and “unreasonable” separates this case from those relied on by NMFS where fees were denied because delayed responses were caused by confusion or “bureaucratic difficulty” in handling requests. *Oppo*. at 14.

<sup>19</sup> I recognize that Judge Conti ultimately found that NMFS had conducted adequate searches and appropriately withheld all documents except one. But those conclusions were reached only after multiple rounds of briefing and decision, necessitated by NMFS’s initially deficient declarations and *Vaughn* indexes.

1 conclude that neither NMFS's general responses to the FOIA requests nor its litigation position  
2 before this Court had a reasonable basis in law.

3 In sum, plaintiffs are entitled to an award of attorney's fees. The next step is to determine  
4 the amount owed.

### 5 **III. REASONABLE AMOUNT OF ATTORNEY'S FEES AND COSTS**

6 "[O]nce the court has determined that the plaintiff is both eligible for and entitled to  
7 recover fees, the award must be given and the only room for discretion concerns the  
8 reasonableness of the amount requested." *Long*, 932 F.2d at 1314. In making this determination,  
9 the court must scrutinize the reasonableness of (i) the hourly rates and (ii) the number of hours  
10 claimed. *Id.* at 1313-14. "If these two figures are reasonable, then there is a strong presumption  
11 that their product, the lodestar figure, represents a reasonable award." *Id.* at 1314 (internal  
12 quotation marks omitted). Nevertheless, a court "may authorize an upward or downward  
13 adjustment from the lodestar figure if certain factors relating to the nature and difficulty of the  
14 case overcome this strong presumption and indicate that such an adjustment is necessary." *Id.*

#### 15 **A. Hourly Rate**

16 NMFS argues plaintiffs' hourly rates are excessively high, and that the Court should apply  
17 the hourly rates set forth in the *Laffey* matrix plus locality adjustments, which would result in a  
18 decrease of 22.9% in the requested lodestar. *Oppo*. at 20-22. As I recognized in  
19 *Public.Resource.org v. United States Internal Revenue Serv.*, No. 13-CV-02789-WHO, 2015 WL  
20 9987018, at \*6 (N.D. Cal. Nov. 20, 2015), "[a]bsent some showing that the rates stated in the  
21 matrix are in line with those prevailing in this community . . . I agree [that] that the matrix is not  
22 persuasive evidence of the reasonableness of its requested rates." As in *Public.Resource.org*, I  
23 will not bind plaintiffs to the *Laffey* matrix, especially as statutory fee awards from this District do  
24 not establish that the *Laffey* matrix rates are in line with prevailing rates for statutory fee cases in  
25 the Bay Area legal community. *See, e.g., Public.Resource.org* (awarding rates from \$205 for  
26 paralegals up to \$645 for senior/lead counsel); *Sierra Club*, 75 F. Supp. 3d at 1152-53 (approving  
27 hourly rates of \$350 to \$650 in FOIA action); *Rosenfeld*, 904 F. Supp. 2d at 1001, 1004  
28 (approving hourly rates of \$460, \$550, and \$700 in FOIA action); *Hajro v. U.S. Citizenship &*

1 *Immigration Servs.*, 900 F. Supp. 2d 1034, 1054 (N.D. Cal. 2012) (approving hourly rates of \$450  
2 to \$625 in FOIA action) *vacated and remanded on other grounds*, 2015 WL 6405473 (9th Cir.  
3 Oct. 23, 2015); *see also Hiken v. Dep't of Def.*, 836 F.3d 1037, 1039 (9th Cir. 2016) (reversing  
4 district court order awarding fees at matrix rate).

5 The rates sought by counsel in this case are, generally, higher than the rates approved in  
6 other recent FOIA cases in this District. They are also, more importantly, significantly higher than  
7 rates that were requested and approved by these *same* counsel in recent cases in this District for  
8 environmental litigation. *See, e.g., OCE v. EPA*, 13-cv-02857 (Dkt. Nos. 82, 99) (awarding fees  
9 from \$435 to \$655/hr for work through early 2015); *San Francisco Baykeeper v. West Bay*  
10 *Sanitary Dist.*, No. 09-5676, 2011 WL 6012936 (N.D. Cal. Dec. 1, 2011) (approving \$585/hr for  
11 Sproul). Plaintiffs argue this upward departure is warranted because in the past they have relied  
12 on the *Laffey* matrix with locality adjustments, but recent cases confirm those rates under-  
13 compensate them. *See, e.g., Declaration of Christopher Sproul* [Dkt. No. 88] ¶ 15; *Declaration of*  
14 *Patricia Weisselberg* [Dkt. No. 86] ¶ 9.

15 Plaintiffs undertook a “market rate” analysis and seek compensation for that research from  
16 *this* case. The analysis was performed primarily by billing attorney Christopher Hudak. Hudak  
17 reviewed fee awards in a number of different types of cases from the Northern District, including  
18 class action litigation (antitrust, wage and hour, consumer protection, and securities) as well as one  
19 anti-SLAPP case and one FOIA case. *See, e.g., Declaration of Christopher Hudak* [Dkt. No. 84]  
20 ¶¶ 11-32. The market rate analysis did not consider more than one FOIA case (despite there being  
21 a number of cases on point) nor did it directly consider cases awarding statutory fees for  
22 environmental litigation.<sup>20</sup>

23 Plaintiffs have not demonstrated that the rates they seek here are reasonable for FOIA  
24

25 \_\_\_\_\_  
26 <sup>20</sup> The OCE attorneys did rely for “data points” on the Declaration of Richard M. Pearl from a  
27 state court case, *Citizens Committee To Complete The Refuge, Inc. v. City of Newark*, Case No.  
28 RG10530015, (CA Superior Ct. County of Alameda). The Pearl declaration focused on attorney’s  
fees rates through 2014, and did review some statutory fee-shifting awards, as opposed to the class  
action attorney’s fee awards focused on by the plaintiffs here. *See, e.g., Weisselberg Decl.* ¶¶ 11-  
16; *Sproul Decl., Ex. 32; Hudak Decl.* ¶ 34.

1 litigation (or environmental fee-shifting litigation). They seek to downplay the fact that in cases  
 2 from 2014 and 2015 *these same attorneys* requested significantly lower attorney’s fee rates. I do  
 3 not believe the case law supports limiting plaintiffs to their prior requested rates, but I do believe  
 4 that any *significant* upward departure should be justified, for example, by declarations explaining  
 5 the increases in light of increased expenses from doing business and practicing in certain markets  
 6 or other factors. I also do not find plaintiffs’ focus as support for their requested hourly rates in  
 7 these cases on large scale, complex class action cases to be persuasive. That is not to say that  
 8 FOIA cases cannot be complex. But the high rates awarded for complex class action cases can be  
 9 explained in large part by the necessity in those cases for plaintiffs’ counsel to incur significant  
 10 cost outlays (for experts, document review systems, travel, depositions, etc.) as well as attorney  
 11 time (to review hundreds of thousands of documents, numerous depositions, etc.) which are not  
 12 typically required in FOIA cases and were not required in these cases.

13 Accordingly, I find that the hourly rates plaintiffs request here are not adequately  
 14 supported and are not reasonable. This conclusion is consistent with *Hiken v. Dep’t of Def.*, 836  
 15 F.3d 1037, 1044–46 (9th Cir. 2016), where the Ninth Circuit confirmed that a “reasonable rate” is  
 16 the rate prevailing “in the community” for “similar work” performed by attorneys of comparable  
 17 skill and experience and based on record evidence of prevailing historical rates. I do not find that  
 18 plaintiffs’ survey is based on the performance of “similar work” by attorneys of comparable skill  
 19 and experience.

20 Plaintiffs shall recalculate their lodestar based on hourly rates that are consistent with the  
 21 rates they requested in prior FOIA or environmental cases for the same time periods. For  
 22 example, time spent on these cases in 2015 should be sought at the same rate previously sought  
 23 and/or awarded by a court for time spent in 2015. For time in 2016 as to which plaintiffs may  
 24 have not had an hourly rate approved by another court plaintiffs are entitled to a 10% increase  
 25 over their 2015 approved-rates, absent specific justification supported by a declaration explaining  
 26 why a particular attorney or paralegal should be granted a higher percentage increase.<sup>21</sup>

27 \_\_\_\_\_  
 28 <sup>21</sup> For any biller in these cases who has not had a prior-court-submitted or approved billing rate,  
 plaintiffs shall use a prior-court-approved billing rate for an attorney or paralegal of comparable

**B. Hours Expended**

NMFS also argues that the hours sought by plaintiffs cover time and tasks that were neither necessary nor reasonable for the prosecution of these suits and asks me to reduce the requested fee amount for the following:

- A \$188,381.47 reduction for plaintiffs’ work on the claims they lost;
- A \$26,686.22 reduction for work on pleadings and other papers that were never filed;
- A \$89,442.20 reduction for work performed at the administrative stage and review of documents produced;
- A reduction for work unrelated to *OCE I* and *OCE II*; and
- A 30-50% reduction generally for excessive, redundant, and unnecessary work.<sup>22</sup>

**1. Claims Lost**

NMFS argues that plaintiffs are not entitled to \$188,381.47 in fees (calculated at the hourly rates that NMFS objects to) for “distinct” claims they lost: (i) claims against FWS and the Corps; (ii) claims regarding the adequacy of the searches in *OCE II* (based on a frivolous argument that NMFS’s declarant’s testimony was “hearsay”); (iii) unsuccessful challenges to NMFS’s withholdings; (iv) claims regarding actual and pattern and practice search cut-off dates; and (v) plaintiffs’ response to the October 21 2015 Order to Show Cause as to whether further injunctive relief was necessary.<sup>23</sup>

With respect to the \$3,506.18 incurred with *OCE III*, plaintiffs admit they do not seek to recover for that time. So there is no longer a dispute as to that time/amount. The only other unsuccessful legal theory/claim NMFS “breaks out” time for is the \$23,032.40 plaintiffs charge

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experience.

<sup>22</sup> Plaintiffs explain that before submitting their request, most billers took 10% of the time billed “off the top” to account for any potential inefficiencies or redundancies in their work. Sproul Decl. ¶¶ 92, 97; Weisselberg Decl. ¶ 41; Isaacs Decl. ¶¶ 6-7; Costa Decl. ¶ 6; Hudak Decl. ¶ 35 (worked over 100 hours, but seeking payment for approximately 30 hours).

<sup>23</sup> NMFS breaks down the \$188,381.47 (or more accurately \$188,381.48) as follows: \$23,032.40 for 37.1 hours spent on the opposition to NMFS’s showing in response to Judge Conti’s OSC; \$161,842.90 as a 50% reduction from the \$323,685.79 plaintiffs billed for pleadings, summary judgment, supplemental briefing and the joint submission; and \$3,506.18 incurred with *OCE III*.



1 for 37.1 hours spent responding to NMFS's showing in response to Judge Conti's Order to Show  
2 Cause. Oppo. 17. However, I find that that time was reasonable and necessary. Judge Conti's  
3 OSC raised significant questions regarding the steps NMFS was taking to address its FOIA  
4 backlog, and NMFS filed a detailed response, supported by declarations. Plaintiffs filed a brief to  
5 contest some of the assertions made by NMFS, but that pleading was helpful and relied on by me  
6 in determining whether any live issues remained in the litigation, even though I denied plaintiffs'  
7 request for further injunctive relief as to the backlog.

8 NMFS does not break out the time spent on the other "unsuccessful" issues because  
9 plaintiffs' billing records do not allow them to. NMFS instead argues the 595.6  
10 hours/\$323,685.79 plaintiffs billed to pleadings for the summary judgment, supplemental briefing,  
11 and the joint submission required by the October 2015 Order should be reduced by 50% to  
12 account for plaintiffs' other losing claims/theories. Oppo. 17-18; Wall Decl., Ex. B (Summary  
13 Fee Analysis). I disagree.

14 As to claims against FWS and the Corps for their alleged part in causing repeated delays in  
15 NMFS's FOIA responses, while plaintiffs were not ultimately successful in their claims against  
16 those entities, the claims made were part and parcel of the impermissible and excessive delay  
17 claims against NMFS. This time is compensable.

18 As to claims regarding the adequacy of the searches in *OCE II* (based in part on the  
19 argument that NMFS's declarant's testimony was hearsay), while plaintiffs eventually lost this  
20 claim, Judge Conti forced NMFS to submit supplemental briefing explaining the adequacy of its  
21 searches. NMFS's initial explanations, therefore, were deficient and plaintiffs' successfully  
22 argued that deficiency to Judge Conti in their initial and supplemental briefing. This time is  
23 compensable.

24 As to the unsuccessful challenges to NMFS's withholdings, plaintiffs eventually lost all  
25 but one of these claims. But in the process of the initial and supplemental rounds of briefing,  
26 NMFS agreed to produce more documents and NMFS had to explain its actions in greater detail  
27 due to deficiencies in their initial briefing and declarations. This time is compensable.

28 And as to the eventually unsuccessful claim regarding NMFS's pattern and practice of

1 applying improper search cut-off dates, while plaintiffs did not secure an order from Judge Conti  
2 finding that NMFS had an illegal pattern or practice, the record supports at least an inference that  
3 during this litigation NMFS implemented a new or clarified policy. Even assuming it was simply  
4 a clarified policy, that clarification produced a public benefit for future FOIA requestors. This  
5 time is compensable.

## 6 **2. Pleadings and Papers Never Filed**

7 NMFS argues that plaintiffs should not be compensated for 49.1 hours/\$26,686.22 for  
8 work on pleadings that were never filed, including draft amended complaints in *OCE I* and *OCE*  
9 *II*, a motion for reconsideration, and a motion for relief. Wall Decl., Ex. G (Unfiled Papers).

10 In reply, Sproul explains: (i) the work done on the unfiled SAC in May 2014 in *OCE I* was  
11 used on the motion for summary judgment in *OCE I* and is therefore compensable (Sproul Reply  
12 Decl. ¶ 5); (ii) the 3.16 hours billed in February 2015 for a “motion for relief” was in fact work  
13 done for the Notice Regarding Submitted Matter and Request For Ruling filed on March 2, 2015  
14 (*id.* ¶ 6); (iii) 13.19 hours of work in October 2014 was for a pleading filed in *OCE II*, Dkt. 58 (*id.*  
15 ¶ 7); (iv) 1.32 hours of time billed in May 2015, was cut from the request on plaintiffs’ Reply (and  
16 not currently sought); and (iv) the remaining hours that were spent on the unfiled motion for  
17 reconsideration in January 2016 are compensable because that unfiled motion was used as  
18 leverage to get NMFS to agree to a form of judgment and produce additional documents. *Id.* ¶ 8.  
19 Weisselberg also, on review, cut 0.56 of time from her entries challenged in Wall’s Ex. G, because  
20 those entries represented work on what was to become *OCE III*. Weisselberg. Reply Decl. ¶ 11.

21 Considering the declarations, I find that all of the challenged time except the time spent on  
22 the unfiled motion for reconsideration is compensable. Plaintiffs have adequately identified how  
23 the time identified by NMFS was spent or used for pleadings actually filed in this action.  
24 However, the time spent on the unfiled motion for reconsideration in January 2016 was created  
25 voluntarily by plaintiffs and used for “leverage” but was never necessary or useful for any  
26 contested decision made by me.

## 27 **3. Administrative Efforts**

28 NMFS wants a further reduction for 157.7 hours/\$89,442.20 that plaintiffs spent drafting



1 FOIA requests, working on the agency administrative appeals, and reviewing the documents  
 2 produced. Wall Decl., Ex. I. Generally, “work performed during the pre-litigation administrative  
 3 phase of a FOIA request is not recoverable under FOIA.” *Elec. Privacy Info. Ctr. v. United States*  
 4 *Dep't of Homeland Sec.*, 811 F. Supp. 2d 216, 237 (D.D.C. 2011); *but see Public.Resource.org*,  
 5 2015 WL 9987018, at \*8 (allowing recovery for two time entries on letters seeking agency  
 6 reconsideration “given the clear overlap in subject matter between the letter and this litigation, the  
 7 letter’s explicit contemplation of a lawsuit, and the proximity in time between the letter and the  
 8 filing of” the complaint).

9 In their Reply and supporting declarations, plaintiffs cut some of the contested time for  
 10 work on the FOIA requests and administrative appeals, but kept the time spent on two specific  
 11 FOIA requests in. As explained by lead counsel Sproul:

12 I and my co-counsel have been mindful that we are not entitled to  
 13 recover for drafting all our FOIA requests and reviewing all the  
 14 documents obtained for the purpose of learning the substantive  
 15 content of those documents for the Plaintiffs’ citizen suit litigation  
 16 against Stanford or larger public advocacy campaign related to  
 17 Stanford and the San Francisquito Creek watershed. However, we  
 18 have concluded that we may recover for time spent drafting FOIA  
 19 requests specifically intended to garner information for use in this  
 20 litigation and reviewing documents for such litigation purposes. I  
 21 and my co-counsel have carefully segregated the time spent drafting  
 22 FOIA requests reviewing documents such that we are seeking  
 23 recovery only for the latter time. With respect to drafting FOIA  
 24 requests, we are seeking to recover for time spent drafting (or  
 25 appealing responses concerning) only two of the multiple FOIA  
 26 requests at issue in this proceeding that Plaintiffs specifically used to  
 27 gather information used as evidence against NMFS in this case:  
 28 FOIA requests sent on April 3, 2014 and November 24, 2015. (the  
 latter is Exhibit M to the Wall Declaration, (OCE I, Dkt. 92-1). The  
 April 3, 2014 FOIA sought documents concerning the searches done  
 by NMFS and the responses provided by NMFS to Plaintiffs in  
 response to their FOIA requests with the aim of developing evidence  
 that NMFS’s searches have not complied with FOIA. Plaintiffs’  
 November 24, 2015 FOIA request sought documents with the  
 specific intent of trying to garner evidence that Plaintiffs’ litigation  
 had catalyzed NMFS to respond more promptly to Plaintiffs’ FOIA  
 requests. The aim was to develop evidence in support of catalyst  
 theory arguments for purposes of attorney fees recovery in  
 settlement and, if necessary, a fees motion. Plaintiffs’ November 24,  
 2015 FOIA Request sought documents related to NMFS’s assertions  
 that it had instituted several FOIA reforms also with the specific  
 intent of trying to garner evidence that Plaintiffs’ litigation had  
 catalyzed NMFS to institute these reforms. Again, our aim was to  
 develop evidence in support of catalyst theory arguments for

1 purposes of attorney fees recovery in settlement and, if necessary, a  
 2 fees motion. As discussed in the Reply Declaration of Patricia  
 3 Weisselberg, Plaintiffs have in fact used documents obtained in  
 4 response to their FOIA requests as exhibits supporting the catalyst  
 theory arguments they are advancing in their Fees Motion and  
 plaintiffs agree to reduce some of their time spent on drafting the  
 FOIA requests and the administrative appeals.

5 Sproul Reply Decl. ¶ 10.

6 Accordingly, Michael Costa cut 11.91 hours/\$6,148.98 for drafting FOIA requests and  
 7 appeals, except for the work he did on the April 3, 2014 and November 24, 2015 FOIA requests  
 8 that were aimed at gathering information for this lawsuit. Costa Reply Decl. ¶ 3. Jodene Isaacs  
 9 cut 11.21 hours/\$5,599.40 for drafting FOIA requests and appeals. Isaacs Reply Decl. ¶ 2.  
 10 Weisselberg cut 8.74 hours spent on FOIA appeals, included in Wall's Ex. I. Weisselberg Reply  
 Decl. ¶ 13.

11 The bulk of the remaining time appears to be for document review conducted primarily by  
 12 Costa and Isaacs. NMFS argues that document review is simply not compensable. *See, e.g.,*  
 13 *Sierra Club v. United States EPA*, 75 F. Supp. 3d 1125, 1149 (N.D. Cal. 2014) ("As Plaintiffs  
 14 received, at least in part, the relief they sought when the EPA produced the documents, the time  
 15 they expended reviewing the documents was is properly characterized as post-relief activity,  
 16 separate from the litigation."); *Citizens for Responsibility & Ethics v. United States DOJ*, 825 F.  
 17 Supp. 2d 226, 231 (D.D.C. 2011) ("Plaintiff would have had to expend this time had DOJ timely  
 18 produced the documents without litigation; the cost of reviewing documents produced in response  
 19 to a FOIA request is simply the price of making such a request.").

20 Plaintiffs respond that in this case, where the adequacy of NMFS's searches and  
 21 withholdings were central claims, plaintiffs needed to spend significant amounts of time reviewing  
 22 the documents to support those claims in litigation. That might be true but plaintiffs'  
 23 withholding claims were almost totally rejected (except for one document) and plaintiffs'  
 24 inadequate search claims were likewise mostly unsuccessful (except for two narrow wins in *OCE*  
 25 *I*). Plaintiffs also do not cite any case law allowing for recovery of time spent reviewing document  
 26 productions where that review is necessary for a plaintiff to be able to challenge the adequacy of  
 27 an agency's search or the propriety of withholdings.  
 28

1 Based on the declarations, I find that the Costa time spent on the two identified FOIA  
2 requests is compensable, given the overlap in subject matter between requests and this litigation as  
3 well as the proximity in time between those requests and the filing of pleadings in this case. The  
4 time spent reviewing the documents produced is not compensable.

5 **4. Work Unrelated to *OCE I* and *OCE II***

6 NMFS argues that plaintiffs should not be compensated for 8.9 hours/\$4,461.23 billed by  
7 Sproul, Weisselberg, Isaacs, and Costa that it contends is unrelated to *OCE I* and *OCE II*,  
8 including litigation with Stanford and entries related to FWS and the Corps. Wall Decl., Ex. H  
9 (Unrelated Matters). In Reply, Weisselberg explains the relevance of her entries listed on Exhibit  
10 H to *OCE I* and *OCE II*. Weisselberg Reply Decl. ¶ 12. Sproul also addresses the 8.9 hours listed  
11 in Exhibit H, and other than two mistakes accounting for 0.35/hours (which were cut in the Reply)  
12 adequately explains that those hours billed were necessary for *OCE I* and *OCE II*. Sproul Reply  
13 Decl. ¶ 9; *see also* Costa Reply Decl. ¶ 16. This time is compensable.

14 NMFS also argues that plaintiffs have (perhaps inadvertently) claimed time for work on  
15 *OCE III*, despite their claim that they are not seeking that time. In its Opposition and supporting  
16 declaration, NMFS identified 5.9 hours/\$3,506.18 it contends was incurred on *OCE III*. *See* Wall  
17 Decl., Ex. D. As noted above, this time is not compensable.

18 **5. Reduction for Excessive or Redundant Work**

19 NMFS asks the Court to reduce by 30-50% any fee award to account for excessive,  
20 cumulative, and inefficient billing. *Oppo.* at 24. NMFS specifically challenges: (i) the 158 hours  
21 spent on the opening attorney's fees motion and declarations; (ii) 249 hours on summary judgment  
22 and supplemental briefing in *OCE I*; (iii) 263.8 hours on summary judgment and supplemental  
23 briefing in *OCE II*; (iv) 157.7 hours on the "administrative phase" including record review; and (v)  
24 the fact that five attorneys worked on the case, which NMFS contends is excessive given the  
25 nature of these cases and is demonstrated by the 173.7 hours/\$107,885.73 billed for telephone  
26 calls and email correspondence between counsel for "coordination" purposes. Wall Decl., Ex. F  
27 (Coordination Activities).

28 In their Reply declarations, two of the billing attorneys exercised "more" billing judgment

1 to cut hours in light of potential redundancy. *See* Costa Reply Decl. ¶ 4 (cutting 4.05  
2 hours/\$2,136.38); Isaacs Reply Decl. ¶ 3 (cutting just over 14 hours/\$7,087.91). No other  
3 reductions for excessive or redundant work appear to have been made, other than the 10%  
4 “off the top” that each of the billing attorneys took off their time initially.

5 The time spent on the opening attorney’s fees motion and declarations is excessive and  
6 unreasonable. In particular, plaintiffs should not be compensated for the time Hudak spent  
7 (unsuccessfully as addressed above) surveying cases in order to determine what billing rates  
8 should be used for plaintiffs in this fee motion. Moreover, the time spent in drafting the fee  
9 motion which itself does not raise any unique issues or issues of first impression is excessive.  
10 Plaintiffs purport to be experienced FOIA and environmental litigators; submission of fee petitions  
11 is a regular part of that work. I recognize that reviewing the time records, exercising billing  
12 judgment, and creating supporting declarations will take significant time in each case no matter  
13 how experienced counsel is. But the time spent on the *brief* appears to be excessive in and of  
14 itself. A 25% reduction in the time spent on the opening attorney’s fees motion is appropriate, as  
15 is elimination of the time Hudak spent on his inapposite attorney’s fees survey.

16 As to time spent on the Reply brief and declarations (which NMFS did not have the  
17 opportunity to attack), I conclude that the time spent on the brief itself is reasonable, but not the  
18 time spent reviewing the time slips and submitting supplemental declarations, because much of  
19 *that* time was spent accounting for errors pointed out by NMFS and then making additional  
20 reductions for improper or otherwise redundant billing. Only 50% of the time spent on the  
21 declarations in support of the Reply is compensable.

22 As to the 249 hours spent on summary judgment and supplemental briefing in *OCE I* as  
23 well as the 263.8 hours spent on summary judgment and supplemental briefing in *OCE II*, I find  
24 that the time is reasonable and compensable. The summary judgment briefing was extensive,  
25 detailed and addressed a number of issues where there was little precedent. In these circumstances  
26 I cannot say the time spent was unreasonable.

27 As to the 157.7 hours on the “administrative phase” including record review, as noted  
28 above, plaintiffs have voluntarily cut all time on drafting the FOIA requests, except for time Costa

1 spent on two, and I have already found that time spent reviewing the documents produced is not  
2 compensable.

3 Finally, as to the time spent on coordination between counsel, I find that 173.7 hours is  
4 excessive. While this case was complex in the sense that there were a large number of FOIA  
5 requests at issue, at least three lawsuits filed, and multiple rounds of summary judgment and  
6 additional briefing required, the sheer number of attorneys involved many of whom it appears  
7 were involved in part because of the Stanford litigation meant that there was an excessive  
8 amount of “coordination.” A 25% reduction in the amount of time spent on coordination is  
9 appropriate.

10 **C. Costs**

11 Plaintiffs seek \$3,190.39 in costs. Dkt. No. 94. NMFS does not oppose the amount of  
12 costs, but argues instead that in light of the limited nature of plaintiffs’ success and the agency’s  
13 good faith, costs are not warranted. Oppo. at 24-25. Having concluded that plaintiffs are  
14 substantially prevailing and that the agency’s defenses were without a reasonable basis in law, an  
15 award of costs is appropriate. Plaintiffs are awarded \$3,190.39 in costs.

16 **CONCLUSION**

17 For the foregoing reasons, plaintiffs will be awarded attorney’s fees, but at a significantly  
18 reduced amount, and are awarded \$3,190.39 in costs.

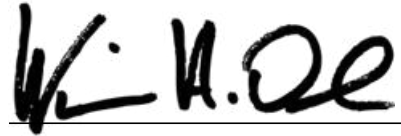
19 Within twenty days of the date of this Order, plaintiffs shall, after meeting and conferring  
20 with defense counsel, submit a *joint* supplemental brief and proposed judgment containing a  
21 revised request for attorney’s fees that excludes all of the time I have identified above as not being  
22 compensable. The parties shall make all reasonable efforts to reach agreement on the time to be  
23 included in light of the time that has been excluded by this Order. If the parties cannot agree, any  
24 remaining disputes shall be explained in no more than two pages.

25 Plaintiffs must also recalculate their lodestar, using hourly rates that were approved for  
26 them in past years and using a rate for 2016 that is no more than 10% above their 2015 rates,  
27 unless otherwise justified. At the time the joint supplemental brief and proposed judgment is filed,  
28 plaintiffs shall submit a declaration explaining and identifying: (i) the rates for each biller for each

1 year billed; (ii) the case(s) for which each biller's rates have been requested and approved; (iii) the  
2 basis for the 2016 hourly rates sought; and (iv) the basis for any hourly rate sought for a biller who  
3 has not had her or his time approved by a prior court order.

4 **IT IS SO ORDERED.**

5 Dated: March 1, 2017

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8 William H. Orrick  
9 United States District Judge  
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United States District Court  
Northern District of California

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**From:** Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>  
**Sent:** Thursday, March 2, 2017 2:44 PM  
**To:** Mark Graff - NOAA Affiliate  
**Subject:** February 2017 Monthly FOIA Report (DRAFT FOR REVIEW/APPROVAL)  
**Attachments:** Backlog 022017.xls; Closed 022017.xls; Incoming 022017.xls; FOIA Monthly Status Report 02-28-2017.pdf; FOIA Monthly Status Report 02-28-2017.xlsx

Hi Mark - Please find Excel/PDF copies of the monthly report attached for review/approval. I have also attached the supporting files as a reference for the data compiled in the monthly report.

Please let me know if you have questions.

--

Lola Stith  
Contractor - The Ambit Group, LLC  
NOAA Office of the Chief Information Officer (OCIO)  
(c (b)(6))  
[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)

Tracking Number	Type	Requester	Submitted	Assigned To
DOC-NOAA-2017-000025	Request	Rose Santos	10/06/2016	AGO
DOC-NOAA-2017-000374	Request	Tim Bergen	01/03/2017	AGO
DOC-NOAA-2017-000344	Request	Bob Kucharuk	12/19/2016	AGO
DOC-NOAA-2017-000298	Request	Charles Mouton	11/30/2016	AGO
DOC-NOAA-2016-001241	Request	Shomari B. Wade	05/18/2016	AGO
DOC-NOAA-2015-001484	Request	Richard Knudsen	06/29/2015	AGO
DOC-NOAA-2015-001485	Request	Richard Knudsen	06/29/2015	AGO
DOC-NOAA-2015-001487	Request	Richard Knudsen	06/29/2015	AGO
DOC-NOAA-2017-000331	Request	Adam J. Rappaport	12/16/2016	LA
DOC-NOAA-2017-000297	Request	Patsy Tyler	11/30/2016	LA
DOC-NOAA-2017-000169	Request	MICHAEL PEPSON	11/09/2016	LA
DOC-NOAA-2017-000101	Referral	John Fox	10/25/2016	NESDIS
DOC-NOAA-2016-001094	Request	Anthony Arguez	05/02/2016	NESDIS
DOC-NOAA-2016-000351	Request	Bill Marshall	10/30/2015	NESDIS
DOC-NOAA-2017-000342	Request	Ryan P. Mulvey	12/13/2016	NMFS
DOC-NOAA-2017-000332	Request	Thomas Knudson	12/16/2016	NMFS
DOC-NOAA-2017-000349	Referral	Amber Crooks	12/08/2016	NMFS
DOC-NOAA-2017-000170	Request	MICHAEL PEPSON	11/09/2016	NMFS
DOC-NOAA-2017-000195	Request	Thomas Knudson	11/17/2016	NMFS
DOC-NOAA-2017-000113	Request	Catherine Kilduff	10/24/2016	NMFS
DOC-NOAA-2016-001762	Request	Thomas Knudson	09/14/2016	NMFS
DOC-NOAA-2016-001833	Request	Margaret Townsend	09/29/2016	NMFS
DOC-NOAA-2016-001751	Request	Thomas Knudson	09/14/2016	NMFS
DOC-NOAA-2016-001763	Request	Thomas Knudson	09/14/2016	NMFS
DOC-NOAA-2016-001390	Request	Jennie Frost	07/05/2016	NMFS
DOC-NOAA-2016-001533	Request	J W August	07/27/2016	NMFS
DOC-NOAA-2016-001270	Request	scott A. doyle	06/08/2016	NMFS
DOC-NOAA-2016-001326	Request	Thomas Knudson	06/21/2016	NMFS
DOC-NOAA-2016-001215	Request	Cassie Burdyshaw	05/27/2016	NMFS
DOC-NOAA-2016-001299	Request	Thomas Knudson	06/15/2016	NMFS
DOC-NOAA-2016-001080	Request	Jeff Ruch	04/29/2016	NMFS
DOC-NOAA-2016-000959	Request	Office Administrator	04/12/2016	NMFS
DOC-NOAA-2016-000423	Request	Ryan P. Mulvey	12/21/2015	NMFS
DOC-NOAA-2016-000807	Request	Basil Scott	03/16/2016	NMFS
DOC-NOAA-2015-001860	Request	Delcianna Winders	09/04/2015	NMFS
DOC-NOAA-2016-000775	Request	Jason Domark	03/08/2016	NMFS
DOC-NOAA-2016-000603	Request	Margaret Townsend	02/10/2016	NMFS
DOC-NOAA-2016-000094	Request	Josh Schopf	10/14/2015	NMFS
DOC-NOAA-2015-000295	Request	Office Administrator	11/21/2014	NMFS
DOC-NOAA-2015-000190	Request	Miyo Sakashita	11/02/2014	NMFS
DOC-NOAA-2017-000438	Request	Claudia Lucio	01/11/2017	NOAA FOIA
DOC-NOAA-2017-000299	Request	Chris Hogan	11/30/2016	NOAA FOIA
DOC-NOAA-2017-000204	Request	Belinda Brannon	11/21/2016	NOAA FOIA
DOC-NOAA-2016-001775	Request	Ehsan Naranji	09/19/2016	NOAA FOIA
DOC-NOAA-2016-001743	Request	John Greenewald	09/12/2016	NOAA FOIA
DOC-NOAA-2017-000535	Request	John Ullom	01/18/2017	NOS
DOC-NOAA-2017-000384	Request	Marshall Morales	01/03/2017	NOS
DOC-NOAA-2017-000439	Request	Cody Elliott	01/05/2017	NOS
DOC-NOAA-2017-000320	Request	Lauren Daniel	12/12/2016	NOS
DOC-NOAA-2017-000118	Request	Michael L. Brown	10/27/2016	NOS
DOC-NOAA-2016-001795	Request	Michael L. Brown	09/22/2016	NOS



DOC-NOAA-2016-001599	Request Machel R. Hall	08/12/2016	NOS
DOC-NOAA-2016-001531	Request Stacy Hernandez	07/27/2016	NOS
DOC-NOAA-2016-000192	Request John Ferro	11/03/2015	NOS
DOC-NOAA-2015-000706	Request Megan R. Wilson	02/18/2015	NOS
DOC-NOAA-2017-000365	Request Peter J. Speicher	12/23/2016	NWS
DOC-NOAA-2017-000410	Request Jacob H. Pratt	01/07/2017	NWS
DOC-NOAA-2017-000364	Request Peter J. Speicher	12/23/2016	NWS
DOC-NOAA-2017-000186	Request Elizabeth Nowicki	11/16/2016	NWS
DOC-NOAA-2016-001403	Request Ivria Fried	07/07/2016	NWS
DOC-NOAA-2017-000058	Request Christopher T. Clack	10/13/2016	OAR
DOC-NOAA-2017-000408	Request Jeremy Singer-Vine	01/06/2017	USEC
DOC-NOAA-2017-000187	Request Elizabeth Nowicki	11/16/2016	WFMO
DOC-NOAA-2016-001346	Request Tammy Murphy	06/10/2016	WFMO

<b>Due</b>	<b>Days Backlogged</b>
02/24/2017	3
02/09/2017	13
01/24/2017	25
01/13/2017	31
06/30/2016	165
10/08/2015	347
10/08/2015	347
07/31/2015	395
01/24/2017	25
01/13/2017	31
01/05/2017	37
12/02/2016	59
07/20/2016	152
01/14/2016	282
02/03/2017	7
02/07/2017	15
01/20/2017	27
01/05/2017	37
12/30/2016	40
12/02/2016	59
11/10/2016	73
11/08/2016	75
10/28/2016	82
10/27/2016	83
10/14/2016	102
08/29/2016	124
08/03/2016	142
07/26/2016	148
07/20/2016	152
07/20/2016	152
06/08/2016	162
05/25/2016	183
02/04/2016	184
05/04/2016	192
10/23/2015	196
04/06/2016	200
03/15/2016	234
02/18/2016	268
12/24/2014	538
12/05/2014	551
02/24/2017	3
01/13/2017	31
12/30/2016	33
11/01/2016	80
10/13/2016	93
02/27/2017	2
02/24/2017	3
02/21/2017	5
01/30/2017	15
12/02/2016	21
11/04/2016	77

09/29/2016	78
08/29/2016	100
12/04/2015	309
10/13/2015	489
02/23/2017	4
02/21/2017	6
02/09/2017	13
12/15/2016	50
08/12/2016	135
11/25/2016	1
02/21/2017	6
12/15/2016	50
08/31/2016	122

Tracking Number	Type	Requester	Requester Organization	Submitted
DOC-NOAA-2017-000241	Request	Manuel B. Trujillo	Swain Online Inc dba Swain Techs	12/01/2016
DOC-NOAA-2017-000300	Request	Dina Ar&eacute;valo	Port Isabel-South Padre PRESS	11/30/2016
DOC-NOAA-2016-001760	Request	Thomas Knudson	Center for Investigative Reporting	09/14/2016
DOC-NOAA-2017-000499	Request	Zeenat Mian		01/25/2017
DOC-NOAA-2017-000467	Request	Shannon M. Cremeans		01/18/2017
DOC-NOAA-2017-000466	Request	Shannon M. Cremeans		01/18/2017
DOC-NOAA-2017-000411	Request	Sarah J. Edwards		01/08/2017
DOC-NOAA-2017-000440	Request	PAUL A. KAMPMEIER	Kampmeier & Knutsen, PLLC	01/04/2017
DOC-NOAA-2017-000363	Request	Alexis M. Thomas	Animal Rights Hawaii	12/23/2016
DOC-NOAA-2017-000360	Request	Dwayne Meadows		12/22/2016
DOC-NOAA-2017-000352	Request	Rose Odom		12/20/2016
DOC-NOAA-2017-000295	Request	Ilsa Perse	Stop the Dump Coalition	12/13/2016
DOC-NOAA-2017-000257	Request	Christopher Hudak	Environmental Advocates	12/06/2016
DOC-NOAA-2017-000244	Request	Jennie Frost	Trustees for Alaska	12/02/2016
DOC-NOAA-2017-000296	Request	Teresa Carey	Journalist	12/02/2016
DOC-NOAA-2017-000302	Request	Nicholas Whipps	Wittwer Parkin LLP	11/30/2016
DOC-NOAA-2017-000294	Request	Sukee Bennett	Science Journalist	11/30/2016
DOC-NOAA-2017-000240	Request	Alicia Chang	Associated Press	11/28/2016
DOC-NOAA-2017-000050	Request	Marie A. Alailima		10/12/2016
DOC-NOAA-2016-001824	Request	Lee Zurik	WVUE-TV	09/28/2016
DOC-NOAA-2016-001701	Request	Margaret Townsend		09/01/2016
DOC-NOAA-2016-001537	Request	Emily Yehle	Environment & Energy Publishing	07/28/2016
DOC-NOAA-2016-001053	Request	Thomas Knudson	Center for Investigative Reporting	04/26/2016
DOC-NOAA-2017-000343	Request	Gary Moses		12/14/2016
DOC-NOAA-2017-000292	Request	Evan D. Johns	Appalachian Mountain Advocates	12/13/2016
DOC-NOAA-2017-000263	Request	Richard Hall	SGC Engineering	12/08/2016
DOC-NOAA-2016-001840	Request	Brian D. Israel	ARNOLD & PORTER LLP	09/26/2016
DOC-NOAA-2016-001082	Request	Cameron Cole	Venable LLP	04/25/2016
DOC-NOAA-2017-000367	Request	Christian Alexander	Back Room Knox	12/27/2016
DOC-NOAA-2016-001043	Request	Steven McIntosh		04/24/2016

Assigned To	Perfected?	Due	Closed Date	Status	Dispositions
AGO	Yes	01/05/2017	02/16/2017	Closed	Partial grant/partial denial
AGO	Yes	01/13/2017	02/16/2017	Closed	Request withdrawn
AGO	Yes	10/28/2016	02/23/2017	Closed	Partial grant/partial denial
NMFS	Yes	02/23/2017	02/23/2017	Closed	Full grant
NMFS	Yes	03/01/2017	02/15/2017	Closed	Full grant
NMFS	Yes	03/01/2017	02/15/2017	Closed	Full grant
NMFS	Yes	02/21/2017	02/06/2017	Closed	Full grant
NMFS	Yes	03/07/2017	02/16/2017	Closed	Full grant
NMFS	Yes	02/09/2017	02/15/2017	Closed	No records
NMFS	Yes	02/09/2017	02/16/2017	Closed	No records
NMFS	Yes	02/09/2017	02/06/2017	Closed	Full grant
NMFS	Yes	01/31/2017	02/01/2017	Closed	Fee-related reason
NMFS	Yes	02/15/2017	02/13/2017	Closed	Partial grant/partial denial
NMFS	Yes	01/05/2017	02/16/2017	Closed	Partial grant/partial denial
NMFS	Yes	01/13/2017	02/08/2017	Closed	Fee-related reason
NMFS	Yes	01/31/2017	02/03/2017	Closed	Request withdrawn
NMFS	Yes	01/30/2017	02/16/2017	Closed	Full grant
NMFS	Yes	02/28/2017	02/27/2017	Closed	Full grant
NMFS	Yes	11/09/2016	02/28/2017	Closed	Partial grant/partial denial
NMFS	Yes	12/29/2016	02/15/2017	Closed	Partial grant/partial denial
NMFS	Yes	10/03/2016	02/27/2017	Closed	Partial grant/partial denial
NMFS	Yes	09/13/2016	02/28/2017	Closed	Partial grant/partial denial
NMFS	Yes	06/10/2016	02/16/2017	Closed	Partial grant/partial denial
NOS	Yes	01/24/2017	02/28/2017	Closed	Full grant
NOS	Yes	01/17/2017	02/28/2017	Closed	Full grant
NOS	Yes	01/11/2017	02/24/2017	Closed	Full grant
NOS	Yes	02/13/2017	02/28/2017	Closed	Full grant
NOS	Yes	06/03/2016	02/27/2017	Closed	Partial grant/partial denial
NWS	Yes	02/09/2017	02/16/2017	Closed	Full grant
WFMO	Yes	06/02/2016	02/28/2017	Closed	Partial grant/partial denial

## Detail

Would like to get a copy of the NOAA CLASS CONTRACT # DOCEA133E08CQ0020 for market research Award I  
Any information regarding a NOAA grant, through the Marine Debris Program or other funding avenues made avai  
Updated Scope 9/30/16 - A copy of the NMFS National Observer Program budget for the past three fiscal years. A  
Please provide information of HMMA's Hawaiian monk seal duties as specified on the cooperative grant with NOAA  
I am writing to request a list/table of all changes to the Marine Mammal Inventory Report / National Inventory of Ma  
I am writing to request a copy of the Marine Mammal Inventory Report (MMIR). I would like this copy to include all  
Marine Mammal Inventory Report on Orcinus orca at SeaWorld Parks at Orlando, San Diego, and San Antonio.  
Please provide copies of all documents and information that were received or generated by NOAA Fisheries or the  
All wild capture and import permits for cetaceans such as whales and dolphins issued to John Chalmers Sweeney,  
Any and all NMFS delegations of duties of the NMFS Deputy AA for Operations (or equivalent, depending on time  
I am looking to have an updated copy of the Marine Mammal Inventory Report (MMIR).  
Request the following documents regarding the application filed by Riverbend Landfill, application # NWP-2015-32.  
EcoRights requests that "You" please provide the following "documents": 1. Any and all "documents" "related to" th  
On behalf of Chuitna Citizens Coalition and Cook Inletkeeper (Chuitna Citizens), Trustees for Alaska requests cop  
Pursuant to the federal Freedom of Information Act, 5 U.S.C. &sect; 552, I request access to and copies of records  
Carmel River Lagoon Breaching Consultation and Permitting. (1) All documents, communications, and correspond  
Pursuant to the federal Freedom of Information Act, 5 U.S.C. &sect; 552, I request access to all NOAA records, inc  
Pursuant to the federal Freedom of Information Act, 5 U.S.C. &sect; 552, I request the following information: \*Annu  
On September 8, 2016 I attended a public scoping meeting for a proposed Aquaculture Management Program for  
1) Detailed invoices/receipts/expense reports for all transactions related to the following vendors/employees/memb  
The Center requests all correspondence regarding the 316(b) permit provisions under the Clean Water Act, 33 U.S.  
In response to a previous FOIA request (DOC-NOAA-2016-001292), I received a list of the different type of harass  
For calendar year 2012: A.) Copies of all closed National Marine Fisheries Service law enforcement investigations  
Please provide any satellite images for 44 Brockmeyer Drive Massapequa NY 11758 dated prior to August 20, 197  
2016 Sounding / Depth Data in the York River Watershed. Under the Freedom of Information Act, 5 U.S.C. &sect;  
Please provide the following information. The physical bounding area for this request is NW Corner: -69.3271, 43.5  
1. Work plans, quality assurance plans, and all other relevant documents related to the 2008 &quot;Sediment Toxi  
This records request is for documents related to the property and operations at the Lapis Sand Plant located on La  
I would like to request documents related to the wildfires in Gatlinburg Tennessee. Apparently the weather service  
I am requesting copies of the qualifications (resumes) of the successful applicants that were hired by NOAA Nator

Date: 06/20/2008 Expiration Date: 08/31/2017

able by NOAA, awarded to Sea Turtle Inc., a 501 (c)(3) non-profit organization located on South Padre  
Iso, copies of all observer provider contracts with the National Marine Fisheries Service National Observ  
A.

rine Mammals reported to OPR in the last six months. I would like this list to note all reported births, dea  
marine mammals (pinnipeds, cetaceans). I would like it to include all living and dead animals and includ

National Marine Fisheries Service after January 1, 2012. and that relate to Columbia River Carbonates'  
, for the period January 1, 1972 through present, December 23rd, 2016. In all cases, the source of the a  
period) with regard to NMFS Operating Personnel Management Board (OPMB) from NMFS Deputy AA

2: (1) Any comments or correspondence by NMFS, sent to any other agency or to the applicant, that rel  
e "Chris Yates email" concerning input he, and any NMFS West Coast Region staff provided to NOAA H  
ies of the following agency records in the possession of the National Oceanic and Atmospheric Adminis  
s generated or reviewed in drafting the Draft National Bycatch Reduction Strategy (<http://www.nmfs.noaa.gov>  
ence from the years 2010 to the present related to the National Marine Fisheries Service's ("NMFS"), th  
cluding but not limited to internal reports and memos, discussing UN Food and Agriculture Organization  
ial fire chemical misapplication reports provided to NOAA Fisheries by U.S. Forest Service, including En  
American Samoa which arose out of the Western Pacific Regional Fisheries Management Council inter  
ers of the Gulf of Mexico Fishery Management Council since January 1, 2013: 1) Marriott Key West Be  
S.C. &sect;&sect; 1251-1387 ("CWA"), for the Dominion Chesterfield Power Station's VPDES permit in \  
ment categories for fisheries observers and the number of cases for each type. I am now requesting the  
pertaining to harassment of fisheries observers, intimidation of fisheries observers, sexual harassment  
7. I prepare tidal wetland permits and trying to clarify an issue with the New York State Department of E  
552, I seek copies of the following documents: (1) Any records containing sounding or channel depth da  
402 NE Corner: -69.2538, 43.9402 SW Corner: -69.3271, 43.757 SE Corner: -69.2538, 43.757 Monheg  
city Pilot Study&quot; conducted by the Hudson River PCBs Superfund Site Natural Resource Damages  
pis Road in the City of Marina, Monterey County California, which is currently operated by CEMEX. This  
called the City of Gatlinburg letting them know to send out a warning to its residents. Apparently Gatlinb  
ial Marine Fisheries Service under the following USAJOBS announcements: NMFS-OLE-2014-0014 En





[REDACTED]

as the scope or purpose of the grants awarded.  
server contractors by NMFS for the past three fiscal years.

is preferred

all documents and information in whatever form or location it has been recorded or retained, including but not limited to electronic media.

possession of staff of NMFS HQ "front office" and NOAA Workforce Management Office (or

), that have been submitted to NMFS by the Corps or any other agency or by the applicant that relate to the "Stockdale Memo" that Chris Yates provided to NOAA HQ and the input on the impact of the "Stockdale Memo" of Information Act, 5 U.S.C. § 552: 1. All records analyzing, evaluating, reviewing, summarizing, and disseminating information received in February this year. Specifically, I request records including but not limited to correspondence (including e-mails), Endangered Species Act ("ESA") Section 7 consultation, Clean Water Act ("CWA") permitting, and any other permitting documents of their countries of origin (and how many tons can be attributed to each country, respectively). I would like to see records related to NOAA Fisheries by the Bureau of Land Management (BLM), Bureau of Indian Affairs, California Department of Fish and Game (CDFG), and the U.S. Fish and Wildlife Service (USFWS) to include, for the first time ever, an aquaculture management program for American Samoa (ASFE) 6) John Sanchez 7) Greg Stunz 8) Beau Rivage Resort 9) Doubletree New Orleans 10) Douglas County, Georgia -001389.

added 8/1 - Requesting full reports for all cases in the categories of Harassment, Sexual Harassment, and Hostile Work Environments for fisheries observers and hostile work environments for fisheries observers. B.) All attachments, photos and documents. The Army Corps of Engineers claims it is quoting your office and saying according to NOAA elevation data. I would like to see electronic versions of these records (preferably in .pdf format) by email, cloud storage, or physical media. 2. Current owner of the cable 3. - Water depth of cable - Type of seabed and depth of sediment (including maps and presentations) generated by or in relation to the 2008 Sediment Toxicity Pilot Study; 3. All work plans and reports for "RMC Materials," "RMC Lonestar," "Lone Star," "Lonestar," and "Lonestar" and release of evacuation orders or the weather service would go over Gatlinburg's head and release the w

[REDACTED]

not limited to: correspondence sent or received; memoranda; informal and formal policy guidance; and  
the equivalent name for other time periods). Whatever form the record is in. I request all such delegatio

Corps 404 permit application # NWP-2015-322 (3) Any ESA-related consultation letters or documents, including  
the NMFS West Coast Region staff provided to NOAA HQ and is not a broader request for other documents  
and/or discussing potential impacts of the proposed Chuitna coal strip mine and fish and/or fish habitat; and  
emails), meeting notes, reports, studies, and schedules. I also request subsequent records, from February  
consultation activities relating to the Corps' permitting activities of the Monterey County Resource Man  
I would like to receive the information in electronic format.

Department of Forestry and Fire Protection (CAL FIRE) and any U.S. state firefighting agency about fire  
in waters just beyond 3 miles. The proposed program contemplates future federal permitting and regulat  
Gregory 11) Marriott Hotels and Resorts 12) Astor Crowne Plaza - New Orleans 13) Hilton Placido Del F

and Safety for calendar year 2015 (Jan - Dec)

and video associated with above investigations.

is determined by measuring the height of the bulkhead from the Mean Low Water Mark. Please provide  
medium such as CD or DVD. I am also amenable to paper copies. However, please provide the documents  
s - Type of protections (burial or physical protections) and depth of burial - Cable cross section and prop  
s, quality assurance plans, and all other relevant documents in NOAA's possession related to the 2016 b  
&quot;Pacific Cement & Aggregate.&quot; This request also includes documents that relate to the  
weather alert. My request is to get this audio recording and any other documents related to it including em

merical data; telephone conversation notes; meeting attendance lists; meeting notes; maps; agreements;  
ns from January 20, 2009 through may 30, 2016 inclusive (specifically EXCLUDING the memo dated M:

ncluding but not limited to any NLAA letters or any Biological Opinion, that have been issued by NMFS c  
nents related to the "Stockdale memo." This request is only for "documents" generated on or prior to Jul  
l 2. All records analyzing, evaluating, reviewing, summarizing, and/or discussing the potential impacts of  
ry 2016 to present, relating to the continued development of the National Bycatch Reduction Strategy. F  
agement Agency's ("MCRMA") Carmel River Lagoon breaching and sandbar management activities.2 (;

hemical misapplications during the same time period. I am requesting this information in electronic form  
ory control of aquaculture activities in these marine waters which were ceded to the U.S. and over which  
rio 14) Gabby Stocks 15) Hilton Key Largo 2) A copy of all credit card statements (belonging to the Gulf

any written guidance you have to determine elevation at shoreline bulkhead.

nts by the lowest-cost means possible.

erties (in particular cable weight) 4. Existence, location and ownership of any other utilities in the cable v  
enthic invertebrates sampling in the Hudson River conducted or being conducted by the New York State  
Marina Coast Water District Outfall Structure in Marina, California and the Monterey Regional Water Pol  
ails, notes or other communication regarding this issue. The start of the Communications would have b



[REDACTED]

ments; recommendations; electronic data; and any other responsive documents. This request includes

urrence letter.” 3. Any and all NOAA Fisheries "documents" from January 1, 2000 to the present, in the p  
and studies, relating more generally to fisheries bycatch, sea turtle bycatch, and shrimp trawl regulations  
ing agencies: MCRMA, the Corps, NMFS, USFWS, and/or the California Coastal Commission—relating t

ecutions and their descendants. Request For Information. In light of my above recollection of discussior

owing the location of the power cable within the cable way 3. - Water depth of cable - Type of seabed an  
(including data, results, correspondence, reports, and presentations) discussing the Trustees' assessm  
s are collectively referred to herein as the "Lapis Sand Plant." The specific documents relate

[REDACTED]

all documents and information at any other office of NOAA Fisheries or the National Marine Fisheries Service

possession of any NOAA Fisheries Office, Department, and/or Division, including any NOAA law enforcement personnel, from January 2016 to present.

to MCRMA's Carmel River Lagoon breaching and sandbar management activities from the year 2010 to

is that transpired at the public scoping hearing held on September 8, 2016 (which maybe faulty as to what

depth of sediments - Type of protections (burial or physical protections) and depth of burial - Cable creation of benthic resources and/or potential impacts to benthic resources in the Hudson River, including in addition to the Lapis Sand Plant that I would like to inspect include: 1. All correspondence with the California Coastal



ervice.

ment division, "related to" whether any entities or individuals may have caused or did cause, or ma

the present, including without limitation (1) impacts to, and presence of, ESA-listed species and their ha

at was said due to delayed memory recall and only intended here as a general synopsis), I am following

oss section and properties (in particular cable weight) 4. Current owner of t  
formation discussing additional field investigations and/or laboratory studies related to benthic  
oastal Commission on or after January 1, 2000; 2. All aerial photographs, technical s

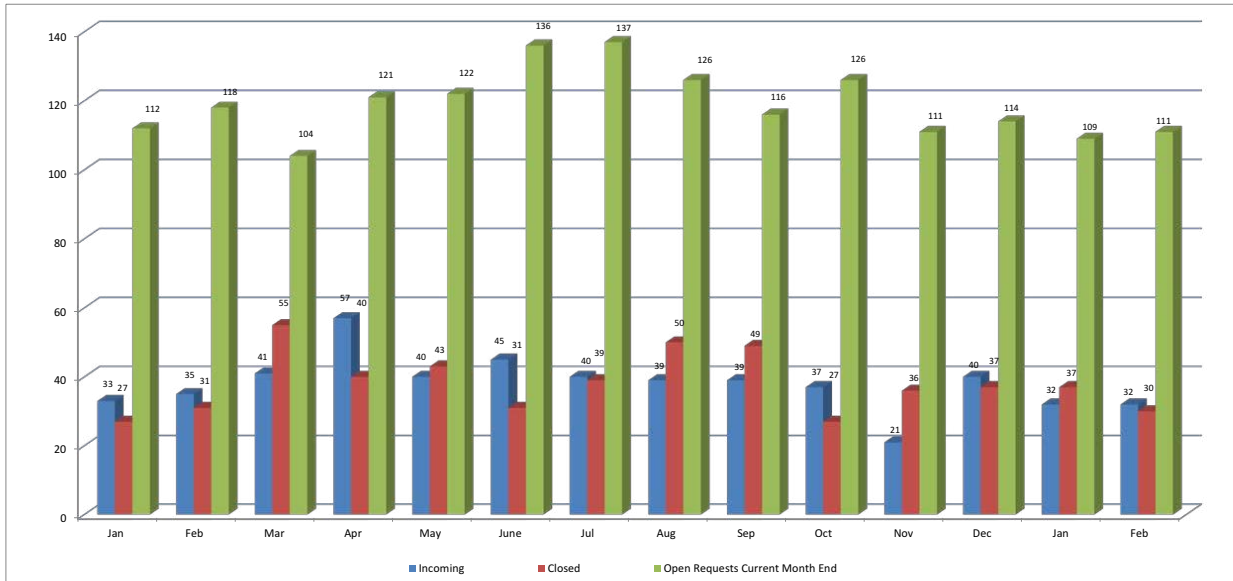


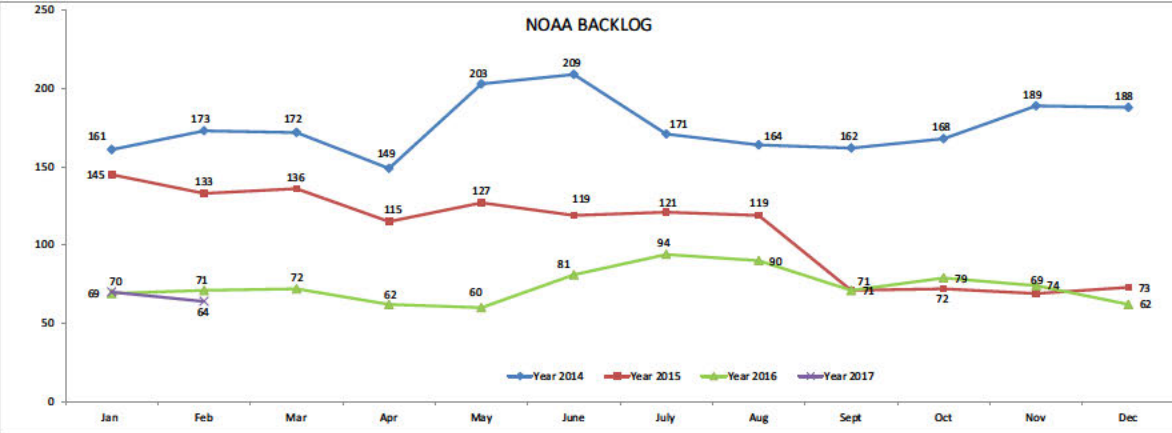
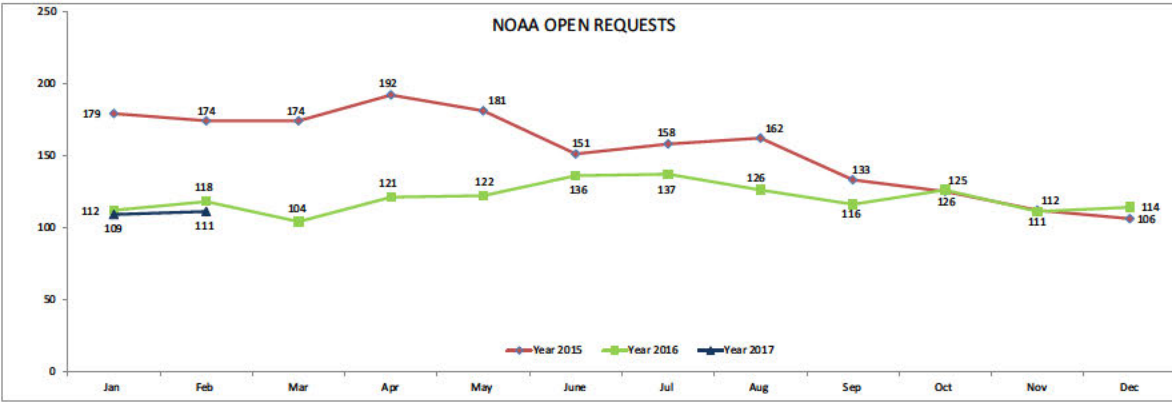
abitat; (2) sandba



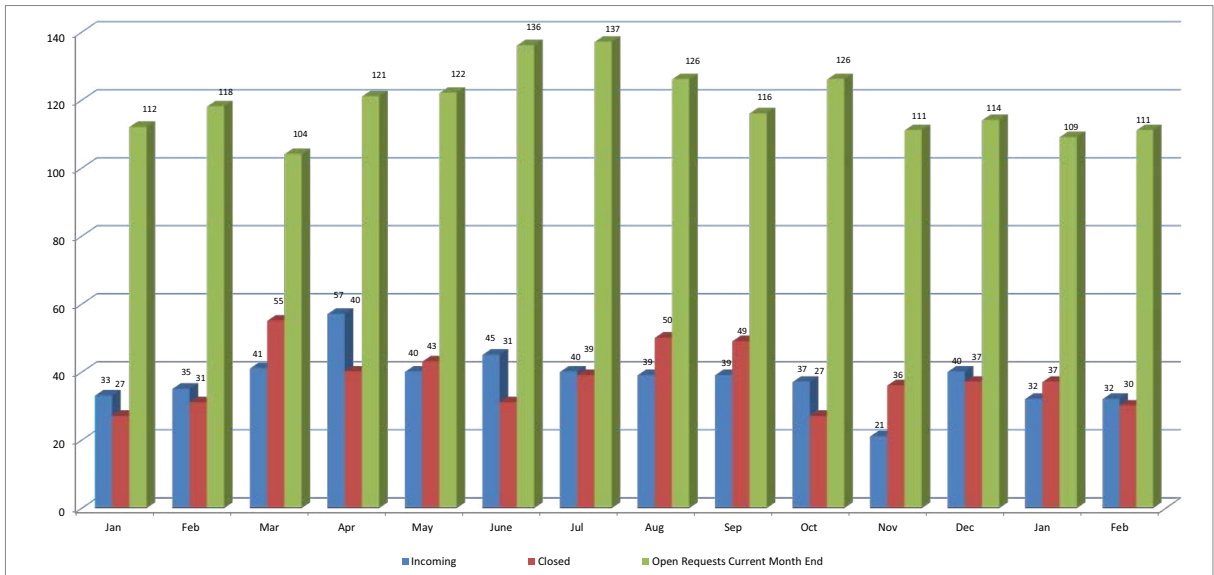
FOIA Monthly Status Report 02 28 2017

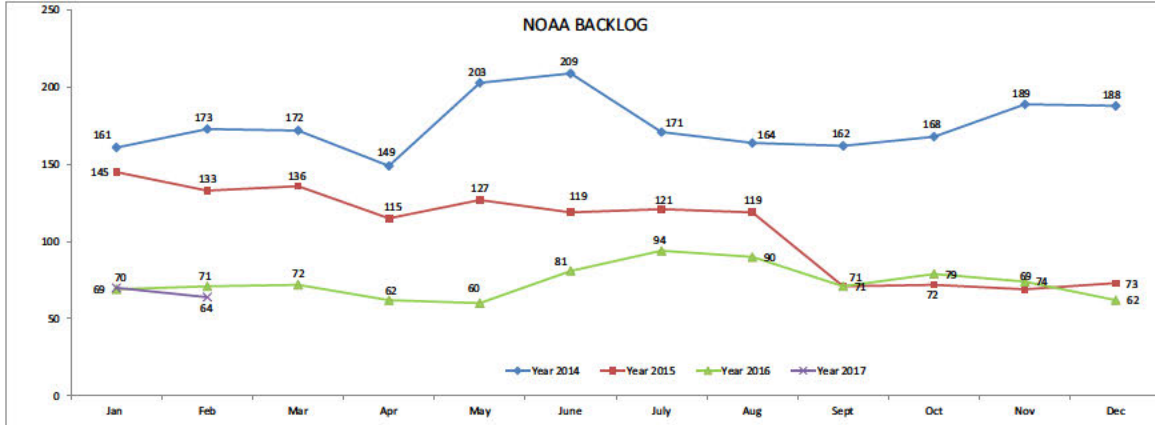
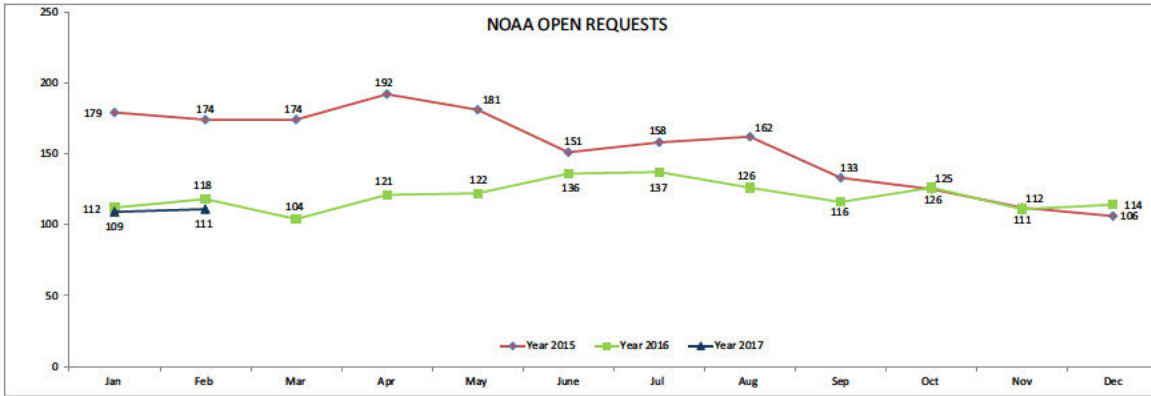
Organization	Open Requests Previous Month End	Incoming Requests	Closed Requests	Open Requests Current Month End	Backlog 21-120 days	Backlog 121-364 days	Backlog 365 or more days	Total Backlog
AGO	7	1	3	5	4	3	1	8
CAO	0	0	0	0	0	0	0	0
CFO	0	0	0	0	0	0	0	0
CIO	1	1	0	2	0	0	0	0
CIO/FOIA	24	3	0	27	5	0	0	5
GC	3	0	0	3	0	0	0	0
IA	0	0	0	0	0	0	0	0
LA	2	0	0	2	3	0	0	3
NESDIS	14	4	0	18	1	2	0	3
NMFS	16	12	20	8	11	13	2	26
NOS	21	6	5	22	8	1	1	10
NWS	10	3	1	12	4	1	0	5
OAR	3	0	0	3	1	0	0	1
OMAO	0	0	0	0	0	0	0	0
OC	0	0	0	0	0	0	0	0
PPI	0	0	0	0	0	0	0	0
USAO	2	1	0	3	1	0	0	1
WFMO	6	1	1	6	1	1	0	2
<b>NOAA Totals</b>	<b>109</b>	<b>32</b>	<b>30</b>	<b>111</b>	<b>39</b>	<b>21</b>	<b>4</b>	<b>64</b>





Organization	Open Requests Previous Month End	Incoming Requests	Closed Requests	Open Requests Current Month End	Backlog 21-120 days	Backlog 121-364 days	Backlog 365 or more days	Total Backlog
AGO	7	1	3	5	4	3	1	8
CAO	0	0	0	0	0	0	0	0
CFO	0	0	0	0	0	0	0	0
CIO	1	1	0	2	0	0	0	0
CIO/FOIA	24	3	0	27	5	0	0	5
GC	3	0	0	3	0	0	0	0
IA	0	0	0	0	0	0	0	0
LA	2	0	0	2	3	0	0	3
NESDIS	14	4	0	18	1	2	0	3
NMFS	16	12	20	8	11	13	2	26
NOS	21	6	5	22	8	1	1	10
NWS	10	3	1	12	4	1	0	5
OAR	3	0	0	3	1	0	0	1
OMAO	0	0	0	0	0	0	0	0
OC	0	0	0	0	0	0	0	0
PPI	0	0	0	0	0	0	0	0
USAO	2	1	0	3	1	0	0	1
WFMO	6	1	1	6	1	1	0	2
<b>NOAA Totals</b>	<b>109</b>	<b>32</b>	<b>30</b>	<b>111</b>	<b>39</b>	<b>21</b>	<b>4</b>	<b>64</b>





<b>Tracking Number</b>	<b>Type</b>	<b>Requester</b>
DOC-NOAA-2017-000609	Request	Brian Murphy
DOC-NOAA-2017-000579	Request	Emily Yehle
DOC-NOAA-2017-000613	Request	Dan Vergano
DOC-NOAA-2017-000611	Request	Mark Sperling
DOC-NOAA-2017-000638	Request	Michael Ravnitzky
DOC-NOAA-2017-000655	Request	Zeenat Mian
DOC-NOAA-2017-000647	Request	Judson Witham
DOC-NOAA-2017-000633	Request	Nicole Daiker
DOC-NOAA-2017-000632	Request	David Gotfredson
DOC-NOAA-2017-000631	Request	Benjamin P. Simpson
DOC-NOAA-2017-000577	Request	Alexis M. Thomas
DOC-NOAA-2017-000612	Request	Martha V. Mendoza
DOC-NOAA-2017-000615	Request	Russ Rector
DOC-NOAA-2017-000550	Request	Jennifer Smith Richards
DOC-NOAA-2017-000596	Request	Laura Dumais
DOC-NOAA-2017-000545	Request	Benjamin Kleesattel
DOC-NOAA-2017-000605	Request	Justin Hall
DOC-NOAA-2017-000683	Request	Matthew J. Novak
DOC-NOAA-2017-000679	Request	Jennifer A. Burnette
DOC-NOAA-2017-000650	Request	Shaun Williams
DOC-NOAA-2017-000659	Request	Dan Fountain
DOC-NOAA-2017-000589	Request	Marshall Morales
DOC-NOAA-2017-000639	Request	Stanley Tromp
DOC-NOAA-2017-000616	Request	Leandra Gallego
DOC-NOAA-2017-000572	Request	Karen MacDonald
DOC-NOAA-2017-000607	Request	Brian Matthews
DOC-NOAA-2017-000601	Request	Michael G. Zolfo
DOC-NOAA-2017-000573	Request	Jason Plautz
DOC-NOAA-2017-000600	Request	Amanda Johnson
DOC-NOAA-2017-000580	Request	Bill Marshall
DOC-NOAA-2017-000610	Request	Sara Reardon
DOC-NOAA-2017-000614	Request	Kendra Pierre-Louis

Requester Organization	Submitted	Assigned To	Perfected?
Geographic Information Services, Inc.	02/03/2017	AGO	Yes
Environment & Energy Publishing	02/08/2017	NESDIS	Yes
BuzzFeed News	02/07/2017	NESDIS	Yes
Paul Hastings LLP	02/06/2017	NESDIS	Yes
	02/03/2017	NESDIS	Yes
	02/21/2017	NMFS	Yes
	02/17/2017	NMFS	Yes
	02/15/2017	NMFS	Yes
KFMB CBS News 8	02/15/2017	NMFS	Yes
Recirculating Farms Coalition	02/15/2017	NMFS	Yes
Animal Rights Hawaii	02/08/2017	NMFS	Yes
Associated Press	02/07/2017	NMFS	Yes
	02/07/2017	NMFS	Yes
Chicago Tribune	02/02/2017	NMFS	Yes
Public Employees for Environmental Responsibility (PEER)	02/02/2017	NMFS	Yes
Frederick, Perales, Allmon, & Rockwell PC	02/01/2017	NMFS	Yes
Langan Engineering	02/01/2017	NMFS	Yes
Gizmodo / Univision	02/25/2017	NOAA FOIA	No
	02/23/2017	NOAA FOIA	Yes
	02/17/2017	NOAA FOIA	No
	02/21/2017	NOS	Yes
Riddell Williams	02/10/2017	NOS	Yes
Freelance Journalist	02/10/2017	NOS	Yes
Stetson University College of Law	02/09/2017	NOS	Yes
	02/07/2017	NOS	Yes
	02/02/2017	NOS	Yes
Doherty & Progar	02/13/2017	NWS	Yes
National Journal	02/07/2017	NWS	Yes
Massachusetts Institute of Technology	02/02/2017	NWS	Yes
Judicial Watch	02/08/2017	OCIO	Yes
Nature	02/06/2017	USEC	Yes
Popular Science	02/14/2017	WFMO	Yes

<b>Due</b>	<b>Closed Date</b>	<b>Status</b>	<b>Dispositions</b>
03/15/2017	TBD	Assignment Determination	
03/10/2017	TBD	Assignment Determination	
03/15/2017	TBD	Assignment Determination	
03/15/2017	TBD	Assignment Determination	
03/16/2017	TBD	Assignment Determination	
03/29/2017	TBD	Assignment Determination	
03/20/2017	TBD	Assignment Determination	
03/21/2017	TBD	Assignment Determination	
03/21/2017	TBD	Assignment Determination	
03/21/2017	TBD	Assignment Determination	
03/10/2017	TBD	Assignment Determination	
03/15/2017	TBD	Assignment Determination	
03/15/2017	TBD	Assignment Determination	
03/10/2017	TBD	Assignment Determination	
03/28/2017	TBD	Assignment Determination	
03/10/2017	TBD	Assignment Determination	
03/15/2017	TBD	Assignment Determination	
TBD	TBD	Submitted	
03/29/2017	TBD	Assignment Determination	
TBD	TBD	Assignment Determination	
03/29/2017	TBD	Assignment Determination	
03/14/2017	TBD	Assignment Determination	
03/21/2017	TBD	Assignment Determination	
03/15/2017	TBD	Assignment Determination	
03/10/2017	TBD	Assignment Determination	
03/15/2017	TBD	Assignment Determination	
03/14/2017	TBD	Assignment Determination	
03/10/2017	TBD	Assignment Determination	
03/14/2017	TBD	Assignment Determination	
03/10/2017	TBD	Assignment Determination	
03/15/2017	TBD	Assignment Determination	
03/21/2017	TBD	Assignment Determination	

## Detail

I am seeking the RFP / SOW / PWS for a contract that was awarded on July 16th 2013 entitled TECHNICAL SUPP  
I request all communications from NOAA principal scientist John Bates concerning the study authored by Thomas  
Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of any ag  
I hereby request full and complete disclosure of the database(s) held by the National Oceanic and Atmospheric Ad  
I request a digital/electronic copy of the NOAA NESDIS document: Review and Clearance Procedures for Agreem  
I request to receive a copy of any letters produced by Office of NOAA General Counsel and signed by NOAA to be  
I want the United States Government and It's Army Corp of Engineers, NOAA, EPA, US Coast Guard and Departm  
I am requesting the inventory of cetaceans held in captivity today. Cetaceans that are alive today. Held at any mari  
1) All MMIR notifications & verifications of transfer/transport related to mammals in the Navy's Marine Mamm  
PLEASE SEE ATTACHMENT FOR FULL REQUEST: This letter is a request for records under the Freedom of Inf  
Requesting wild-capture permits issued to Miami Seaquarium between the years of 1985 and 1990. Wild-capture p  
Aggregate totals of reports by fishery observers in the Hawaii Longline Observer Program related to vessel conditi  
Please send me all information on record for each BDTTLENOSE OOLPHIN - TURSIOPS TRUNCATUS listed on  
Please provide all records from the Marine Mammal Inventory for marine mammals both alive and deceased that v  
Each year, my organization submits requests under the Freedom of Information Act (5 U.S.C. 552, as amended) s  
Freedom of Information Act Request – Application No. SWG-2005-00522 – Correspondence with Revesser, LLC a  
Langan Engineering, Environmental, Surveying and Landscape Architecture D.P.C. (Langan) is currently conducti  
I request a list of all vacant positions that the NOAA is unable to fill as a result of the current federal hiring freeze, e  
A copy of the most current Marine Mammal Inventory Report, listing all cetaceans both living and deceased.  
I want to do a FOIA on Kenneth Joseph Roberts to see if he was seconded or special assignment to NOAA while h  
I am making this request under the Freedom of Information Act. I am requesting information for the area of Lake H  
We request a copy of the document produced by the Yakama Nation in February 2012 as a Preliminary Assessme  
In November 2016, the cabinet in Ottawa approved Kinder Morgan's proposed expansion of its existing TransMour  
Obtaining copies of public records regarding any information you may have as to street drain run off into St. Peters  
Please provide the following from NOAA Office of Response and Restoration, regarding the Carla Maersk/Conti Pe  
Map showing the triangulation and traverse stations of the United States Coasts and Geodetic Survey for Hoquiam  
I would like access to any and all documents filed by the City of Wood Dale, Illinois, in their application and approv  
I am requesting all emails between the address "john.bates@noaa.gov" and any email address with the  
1. All correspondence between the Service and representatives of the Executive Office of the President of the Unit  
Any and all records of communication between NOAA scientist Thomas Karl and Director of the Office of Science  
Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of all com  
Any and all records, data or documents associated with the former National Oceanic and Atmospheric Administrat



PORT SERVICES FOR COASTAL SERVICES CENTER. This contract was awarded to the Baldwin Group. Karl that appears in the June 2015 issue of Science (now titled "Possible artifacts of data biases in agency communications to, or from, Dr. John Bates regarding the 2015 Karl et al study in Science magazine administration ("NOAA"), National Centers for Environmental Information concerning Climate Events.

used in the TRO process concerning Zeenat Mian  
Department of Interior to produce three Charts and Maps of this 1,500 acre DEAD ZONE that lays from WEST of the park, seaquarium, or aquarium in the United States. Wild caught cetaceans.  
Marine Mammal Protection Act, 16 USC § 552, et seq. Specifically, Recirculating Farms Coalition requests the following permits issued to Indianapolis Zoo between the years of 1985 and 1990. Wild-capture permits issued to assess, labor, health and welfare by year over the past 10 years. Documents sufficient to show comments on the attached document.

were wild caught, captive born and/or imported between May 28, 2016, and the date of this request. I am seeking information from major federal agencies about the incidence of violence and threats against them and/or Craig Millard. This request is for all correspondence, emails and reports exchanged between (1) Congress and a Phase I Environmental Assessment for 159 Alexander Street in Yonkers, New York. As part of the Executive Order enacted by the President effective at noon on January 22, 2017. If a single list has not been compiled, I request

you served in the US Navy within in Naval Fleet Atlantic as a Dental Technician and Fleet Marine Forces I. The location is bounded by 45° 40' N on the north, 45° 20' N on the south, 83° 20' W on the east, and 83° 20' W on the west. The document is for natural resources damages in the Multnomah Channel and Lower Columbia River. The document is for a proposed pipeline into the Port of Metro Vancouver, which could increase tanker traffic by more than 1,000 trucks per day in the bay areas; in particular Treasure Island and Madeira Beach (if available). If possible, I would like to see a report on a ship collision on 3/9/2015 in the Houston Ship Channel: 1 - Fate and transport forecast for both the ship and the oil, Washington-Oregon. Diagram NL 10-5 Hoquiam.

request to be a "StormReady" city. I am interested in Wood Dale's application documents, Wood Dale's StormReady program, and the domain name "mail.house.gov" between the dates October 1, 2015 and January 31, 2016. I am interested in the United States, the President, and/or those purporting to contact the Agency on behalf of the President, creation of the National Security and Technology Policy John Holdren. The time frame for the requested records is January 20, 2009 through the present. I am interested in communications sent to Benjamin Friedman, Craig McLean, and Mitchell Ross between 2/1 and 2/6 mentioned in the attached information (NOAA) employee Jack Bates, associated with his tenure at the National Climatic Data Center. This

[REDACTED]  
up, and it appears that it went through a GSA contract. BALDWIN GROUP INC THE GS10F0312R / DC  
n the recent global surface warming hiatus"). Please include e-mails, letters, hand-written notes, m  
re (see <http://science.sciencemag.org/content/348/6242/1469>) from July 30, 2014 to February 4, 2017. I  
Data, including the following dataset(s) : 1. Global Marine Data 2. Local Climatological Data 3. Normals F

of the Bridge and Sediment Basin and Wastes Delta at Fort Ticonderoga and the area 20+ Miles up the

oes, releases) related to mammals in the Navy's Marine Mammal Program covering the time period Janu  
g records from the National Marine Fisheries Service: • The most recent stock assessment data for the  
National Aquarium between the years of 1985 and 1990. Wild-capture permits issued to Shedd Aquariu  
ecorded by observers in the Hawaii Longline Observer Program in summary form without identifying ind

I seeking data for all available facilities.

r employees. Accordingly, Public Employees for Environmental Responsibility (PEER) now asks that, as  
Craig Millard and/or Reverser, LLC, and (2) the National Marine Fisheries Service Habitat Conservation  
assessment, we are requesting records for the site. Please consider this a formal Freedom of Informati  
request the lists that have been generated by each office or department individually.

Field Service Medical Technician; Fleet Marine Forces Atlantic between October 1st 1969--October 15th  
and 83°; 40' W on the west. 1. Maps, search logs, or other records detailing the area covered, either  
: relates to the Portland Harbor Superfund site and purports to describe how hazardous releases from P  
ips annually off the Pacific coast. Please send me your reports, correspondence and internal briefing no  
to receive a breakdown of the contributions of things like car wash soap and litter to marine pollution ov  
a potential air plume and contaminated water 2- The human health hazard assessment 3- The environm

IReady plan, and any communication between Wood Dale and NOAA or NWS. I also would like any doc

ted between January 20, 2017 and January 27, 2017, and concerning the operation of the Service's soc  
ough January 20, 2017.

ning Milo Yiannopoulos, riots at Berkeley, or requesting information about federal money and grants to tl  
is to include but not be limited to the following personnel records, yearly performance reviews, professic

[REDACTED]  
DCEA133C13NC0616 Award Date: 07/16/2013 Expiration Date: 08/14/2018

memorandums, voice and video recordings and other documented forms of communication.

would like to receive the information in electronic form, preferably a searchable PDF or in XML format.

hourly 4. Normals Daily 5. Normals Monthly 6. Normals Annual/Seasonal 7. Precipitation 15 Minute 8. Pr

Lake. It should be noted, adding BILLIONS of Gallons of Leachate and Chemical Laden Waters from La

January 1, 2016 to present. 3) All necropsy reports related to dead mammals in the Navy's Marine Mammal Barataria Bay Estuarian System Stock of Common Bottlenose Dolphins. • All data concerning unusual m between the years of 1985 and 1990. Wild-capture permits issued to Disney Epcot between the years individuals or companies involved related to: \_ Drinking water supply and quality \_ Food supplies and quali

you have done in years past, you provide information for calendar year 2016. Specifically, we request th Division, at St. Petersburg, since October 27th, 2016. Of particular interest are materials related to Reve n Law (FOIL) request for information regarding buildings, construction, chemical spills, underground stc

1971. Mr. Roberts could have been seconded on TAD/TDY to NOAA between 1969-1971 via Military A within or outside the Thunder Bay National Marine Sanctuary, by NOAA vessels and/or personnel durin ortland Harbor injured natural resources in the Multnomah Channel and Lower Columbia River. The doc tes on the impacts of this project. I seek such records prepared by or for your department, on the projec er the past decade.

mental impact analysis report Thank you

uments or correspondence regarding the approval of Wood Dale's application, certification, and any sul

ial media accounts. 2. Any documents or materials, including but not limited to, guides, manuals, handb

re University of California Berkeley and University of Washington. I also request any further communica onal certifications, awards for accomplishments, disciplinary paperwork associated with the employee, ar

precipitation Hourly 9. Weather Radar (Level II) 10. Weather Radar (Level III)

ake George, Champlain Canal, Gels Falls Feeder Canal and the Hudson River ..... ADDED Vastly Tox

Program covering the time period January 1, 2016 to present. 4) Current Marine Mammal Inventory of I  
mortality events in Atlantic bottlenose dolphins in the Gulf of Mexico from 2009 to present. • All informati  
s of 1980 and 1985. In all cases, we request documentation of the acting veterinarian in each capture.  
ly \_ Toilet and cleaning facilities \_ Bedbug and other insect infestations \_ Drug use \_ Weapons on board

re following records and/or documents concerning acts of violence or threats against National Oceanic &  
asser, LLC's, pending application with the US Army Corps of Engineers, reference number SWQ-2005-0  
rage tanks (USTs), monitoring wells, ground water sampling, asbestos abatement, radon, hazardous m

ssistance Command Vietnam CONUS or MACV Saigon.

ig bathymetric surveys and/or shipwreck hunting expeditions from calendar year 2011 to the present, to  
ument was likely received after its completion in February 2012.

ts' environmental, carbon, and climate change impacts, and oil spill risks and impacts. Records generat

osequent changes or alterations that may have been made to the StormReady plan.

ooks, policies, or presentations used to instruct or train Service personnel in the use of its public-facing

tion from those officials in response. I would like to receive the information in searchable electronic form  
rd documents sufficient to show length of employment/tenure in this position and all previous positions v

[REDACTED]

ic Materials from General Electric, Hurcules Chemical, Finch Pruyn and Glens Falls Mills as well as the  
iving mammals in the Navy's Marine Mammal Program.  
on regarding the LOF designation for the Gulf menhaden (*Brevoortia patronus* hereinafter "Gulf menhad

d \_ Working hours of crew \_ Physical attacks of crew by captains \_ Crew injuries \_ Medical neglect \_ Cr

and Atmospheric Administration (NOAA) employees and professional observer contractor employees as  
0522. This project involves a possible canaled subdivision on Mustang Island, just south of Port Aransas  
aterials, and any other documents that your department may have regarding the above-referenced prop

include Project Shiphunt in May, 2011 and TBNMS's search for the steamer CHOCTAW during August  
ted since Jan. 1, 2016 to the present day. \_\_\_\_\_ Exclude media and press releases, and m

Twitter account, @NWS. This request includes any documents that speak to the style or tone that agenc

iat.

with NOAA, job descriptions of all positions within NOAA, and communications between John Bates and

Imperial Chemical and Colorant and the Refractory and Lime Kilns / Cement Plants at Glens Falls, Fort

len”) purse seine fishery. • All data recorded by independent observers on Gulf menhaden fishing boats

ew payment withheld \_ Crew requests to go home denied \_ Difference in treatment by nationality I would

follows: A summary of all incidents of violence, threats, or harassment against NOAA employees that o  
s, Texas.


erty. The subject site is located in the town of Yonkers, Westchester County, New York and is located o

2011 (<http://thunderbay.noaa.gov/research/expeditions.html#research2011>) as well as any subsequent

aterial already publicly released (for example, online). If there is such material online I would appreciate

oy personnel are directed to adopt in their use of the account. Government reports have indicated that th

Thomas R. Karl.



Edward and from Curtis Falls and Chestertown International Paper Mills. The MIND BOGGLING Poison  
from 1992 to present. • Any information pertaining to takings of Common Bottlenose Dolphins in and arc  
I like to receive the information in electronic format.

occurred in calendar year 2016. The summary should include the date, location, and nature of the incident  
on the eastern shore of the Hudson River. It is currently bound to the north by the Former BICC cables pr

expeditions. 2. Locations of any submerged cultural resources, specifically shipwrecks, abandoned vessels  
if you could refer me to it.

Service uses a variety of training materials. 3. Any documents or materials used to instruct Service personnel



ing of the Water Shed BEFORE the GIANT MESS at Fort Ticonderoga certainly expanded and continue  
ound Baratavia Bay. • Visual representations and GPS data on Gulf menhaden landings from recent yea

nt or threat together with a summary of what, if any, outcomes stemmed from the incident or threat (e.g.  
roperty, to the east by Alexander Street followed by the MTA bus depot, to the south by the Sun Chemic  
sels, or aircraft found in this area.

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, arrest, conviction, ongoing investigation). A summary of all incidents of violence, threats, or har

als West site, and to the west by the Hudson River. The site is identified on the Tax Map as Block 2615

itter account, @NWS. 4. All emails sent or received by the Office of the NOAA Ass



res to Jet and Cable Plow through.

byc

---

**From:** Sarah Brabson - NOAA Federal <sarah.brabson@noaa.gov>  
**Sent:** Wednesday, February 15, 2017 12:25 PM  
**To:** mark.graff@noaa.gov  
**Subject:** Fwd: Signature on PTA required  
**Attachments:** ATT00001.html; NOAA6001 PTA 2017 2-8-17 signed jp cc.pdf

Mark, here is the final corrected and signed NOAA6001 PTA. The PIA is in the folder already. Please sign both and return to me.

I'm on my way downtown for a meeting. About 2:30 I will send all the NOAA6001 docs to DOC and separately the NOAA4700 PTA and controls assessment.

Sent from my iPhone

Begin forwarded message:

**From:** Barbara Von mettenheim - NOAA Affiliate <[barbara.vonmettenheim@noaa.gov](mailto:barbara.vonmettenheim@noaa.gov)>  
**Date:** February 15, 2017 at 12:16:52 PM EST  
**To:** Sarah Brabson - NOAA Federal <[sarah.brabson@noaa.gov](mailto:sarah.brabson@noaa.gov)>  
**Cc:** "John D. Parker - NOAA Federal" <[john.d.parker@noaa.gov](mailto:john.d.parker@noaa.gov)>, Thomas Murphy - NOAA Federal <[Thomas.K.Murphy@noaa.gov](mailto:Thomas.K.Murphy@noaa.gov)>  
**Subject:** Fwd: Signature on PTA required

Here it is, Sarah!!

Thank you,  
Barbara

Barbara von Mettenheim, PhD, CISSP  
Contractor at NOS  
NOAA  
ISSO NOAA6001  
(b)(6) cell  
240-533-0860, desk

----- Forwarded message -----

**From:** Christopher Cartwright - NOAA Federal <[christopher.cartwright@noaa.gov](mailto:christopher.cartwright@noaa.gov)>  
**Date:** Wed, Feb 15, 2017 at 11:13 AM  
**Subject:** Re: Signature on PTA required  
**To:** Barbara Von mettenheim - NOAA Affiliate <[barbara.vonmettenheim@noaa.gov](mailto:barbara.vonmettenheim@noaa.gov)>  
**Cc:** Hugh Johnson - NOAA Federal <[hugh.johnson@noaa.gov](mailto:hugh.johnson@noaa.gov)>, Thomas Murphy - NOAA Federal <[Thomas.K.Murphy@noaa.gov](mailto:Thomas.K.Murphy@noaa.gov)>

Here it is. Thanks, Chris

On Wed, Feb 15, 2017 at 8:55 AM, Barbara Von mettenheim - NOAA Affiliate

<[barbara.vonmettenheim@noaa.gov](mailto:barbara.vonmettenheim@noaa.gov)> wrote:

Hi Chris

Do you think you might be able to sign this today? The privacy office is waiting for it. We're kind of in a tight spot in terms of the ATO.

Thank you,  
Barbara

Barbara von Mettenheim, PhD, CISSP  
Contractor at NOS  
NOAA  
ISSO NOAA6001  
(b)(6) cell  
[240-533-0860](tel:240-533-0860), desk

----- Forwarded message -----

From: **Barbara Von mettenheim - NOAA Affiliate** <[barbara.vonmettenheim@noaa.gov](mailto:barbara.vonmettenheim@noaa.gov)>  
Date: Tue, Feb 14, 2017 at 10:32 AM  
Subject: Signature on PTA required  
To: Christopher Cartwright - NOAA Federal <[christopher.cartwright@noaa.gov](mailto:christopher.cartwright@noaa.gov)>

Hi Chris

Might you please sign this PTA at your earliest convenience.

Thank you,  
Barbara

Barbara von Mettenheim, PhD, CISSP  
Contractor at NOS  
NOAA  
ISSO NOAA6001  
(b)(6) cell  
[240-533-0860](tel:240-533-0860), desk





(b) (5)

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Monday, February 6, 2017 9:36 AM  
**To:** Toland, Michael (Federal)  
**Subject:** Re: Current list of open FOIAs  
**Attachments:** FOIA Listing 2017-02-02 (1) (1).xls

Here you go, Mike--as requested.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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On Mon, Feb 6, 2017 at 9:01 AM, Toland, Michael (Federal) <[MToland@doc.gov](mailto:MToland@doc.gov)> wrote:

Mark,

Would you also please call me now at [202-360-8421](tel:202-360-8421) so we can discuss the other requests you have? I am trying to compile a status update for Katrina and Lisa C.

Regards,

Mike

*Michael J. Toland, Ph.D.*

*Deputy Chief FOIA Officer,*

*Departmental Privacy Act Officer,*

*Deputy Director FOIA/Privacy Act Operations, and*

*Office of the Secretary Chief Privacy Officer*

*U.S. Department of Commerce*

*Office of Privacy and Open Government*

*Office: [\(202\) 482-3842](tel:2024823842)*

*Email: [mtoland@doc.gov](mailto:mtoland@doc.gov)*

**From:** Mark Graff - NOAA Federal [mailto:[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)]

**Sent:** Monday, February 06, 2017 8:54 AM

**To:** Toland, Michael (Federal) <[MToland@doc.gov](mailto:MToland@doc.gov)>

**Subject:** Re: Current list of open FOIAs

I'm available. Do you have a call-in number I can dial in to?

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

**(b)(6)** (C)

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On Mon, Feb 6, 2017 at 7:31 AM, Toland, Michael (Federal) <[MToland@doc.gov](mailto:MToland@doc.gov)> wrote:

Hi Mark,

We have to update today on these requests. Can I get a list with status from you? I also need to speak to you and Alvin about the case in litigation before 10:00 AM.

Thanks,

Mike

*Michael J. Toland, Ph.D.*

*Deputy Chief FOIA Officer,*

*Departmental Privacy Act Officer,*

*Deputy Director FOIA/Privacy Act Operations, and*

*Office of the Secretary Chief Privacy Officer*

*U.S. Department of Commerce*

*Office of Privacy and Open Government*

*Office: [\(202\) 482-3842](tel:2024823842)*

*Email: [mtoland@doc.gov](mailto:mtoland@doc.gov)*

**From:** Mark Graff - NOAA Federal [mailto:[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)]

**Sent:** Monday, February 06, 2017 7:28 AM

**To:** Toland, Michael (Federal) <[MToland@doc.gov](mailto:MToland@doc.gov)>

**Subject:** Re: Current list of open FOIAs

That works on my end--thanks Mike.

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

**(b)(6)** (C)

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On Fri, Feb 3, 2017 at 7:01 AM, Toland, Michael (Federal) <[MToland@doc.gov](mailto:MToland@doc.gov)> wrote:

Thanks for the heads-up. Let's talk on Monday?

*Michael J. Toland, Ph.D.*

*Deputy Chief FOIA Officer,*

*Departmental Privacy Act Officer,*

*Deputy Director FOIA/Privacy Act Operations, and*

*Office of the Secretary Chief Privacy Officer*

*U.S. Department of Commerce*

*Office of Privacy and Open Government*

*Office: [\(202\) 482-3842](tel:2024823842)*

*Email: [mtoland@doc.gov](mailto:mtoland@doc.gov)*

**From:** Mark Graff - NOAA Federal [mailto:[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)]

**Sent:** Thursday, February 02, 2017 4:20 PM

**To:** Davis, James (Contractor) <[jdavis@doc.gov](mailto:jdavis@doc.gov)>; Toland, Michael (Federal) <[MToland@doc.gov](mailto:MToland@doc.gov)>

**Subject:** Re: Current list of open FOIAs

No problem James--

Mike, just as a heads-up (b)(5)



Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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On Thu, Feb 2, 2017 at 4:11 PM, Davis, James (Contractor) <[jdavis@doc.gov](mailto:jdavis@doc.gov)> wrote:

Thank you Mark for the quick turnaround.

James H. Davis

FOIA Analyst

[202-482-8064](tel:2024828064)

**From:** Mark Graff - NOAA Federal [mailto:[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)]

**Sent:** Thursday, February 02, 2017 3:42 PM

**To:** Davis, James (Contractor) <[jdavis@doc.gov](mailto:jdavis@doc.gov)>

**Cc:** Toland, Michael (Federal) <[MToland@doc.gov](mailto:MToland@doc.gov)>

**Subject:** Re: Current list of open FOIAs

Hello James,

Please see attached.

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:(301)628-5658) (O)

(b)(6) (C)

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On Thu, Feb 2, 2017 at 2:18 PM, <[jdavis@doc.gov](mailto:jdavis@doc.gov)> wrote:

**You have received 1 secure file from [jdavis@doc.gov](mailto:jdavis@doc.gov).**

Use the secure link below to download.

---

Per Michael Toland, please provide a list of open FOIAs in the attached chart with a short concise description. Please return by COB today to Michael via accellion . Thank you in advance.

Sincerely,

James H. Davis  
FOIA Analyst

**Secure File Downloads:**

Available until: **04 March 2017**

Click link to download:

(b)(5)

24.50 KB

You have received secure links within this email sent via [Commerce - OCIO Secure File Sharing](#). To retrieve the files, please click on the links above. To learn how your company can benefit from Accellion Secure File Sharing, please visit <http://www.accellion.com>

Secured by [Accellion](#)

BOU	Tracking Number	Type	Requester
	DOC-NOAA-2017-000331	Request	Adam J. Rappaport
	DOC-NOAA-2017-000346	Request	Anthony V. Schick
	DOC-NOAA-2017-000362	Request	Jaclyn Prange
	DOC-NOAA-2017-000497	Request	Rachel Clattenburg
	DOC-NOAA-2017-000351	Request	Yogin Kothari

**DOC REQUESTS - ASSIGNED TASKS TO NOAA**

	DOC-OS-2017-000267	TASK	Stephen S. Braun
	DOC-OS-2017-000308	TASK	Michael Best

Requester Organization	Submitted	Assigned To	Perfected	Due
Citizens for Responsibility and Ethics in Washington	12/16/2016	LA	YES	01/24/2017
Oregon Public Broadcasting	12/19/2016	Ana Liza Malabanan	YES	02/23/2017
	12/22/2016	USEC	YES	02/09/2017
Public Citizen	01/25/2017	USEC	YES	03/02/2017
UCS	12/20/2016	USEC	YES	

Associated Press	12/19/2016	NOAA/USEC	YES	01/11/2017
	01/26/2017	NOAA/USEC	YES	02/27/2017

Closed Dat

(b)(5)

Dispositions

TBD

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TBD

TBD



**(b)(5)**

TBD

TBD

TBD

TBD

**Detail**

CREW requests copies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump's transition team, including representatives of Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect.

I request copies of any communications from regional staff in Oregon, Washington or Idaho since July 2016 involving both of the following keywords: 'Trump', 'President'. Scope modified to limit search by NMFS West Coast Region "Supervisory" staff located in Oregon, Washington or Idaho.

Please produce records in possession, custody, or control that are, include, or reflect communications between National Oceanic and Atmospheric Administration's (NOAA's) staff and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Wilbur Ross, Ray Washburne, David Bohigian, Joan Maginnis, George Sifakis, William Gaynor, A. Mark Neuman, and Tom Leppert.

On behalf of Public Citizen, Inc., and pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. s. 552, I request:

1. All records of communications from or on behalf of the Trump Administration and/or the Trump Transition Team to the National Oceanic and Atmospheric Administration (NOAA) providing guidance on which agency matters NOAA employees may or may not publicly discuss and/or regulating how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request. Background discussion of the concerns motivating this request is provided in the January 24, 2017, article in Politico by Andrew Restuccia, Alex Guill&eacute;n, and Nancy Cook, entitled Information lockdown hits Trump's federal agencies, available at <http://www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122>.
2. All records of communications disseminated internally to NOAA employees to provide guidance on which agency matters NOAA employees may or may not publicly discuss and/or to regulate how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and on behalf of the Union of Concerned Scientists, I write to request access to and copies of all communications and attachments between National Oceanic and Atmospheric Administration staff and the following individuals from November 14, 2016 to present:

1. Anyone with the following email domain: @ptt.gov
2. Anyone with the following email domain: @donaldjtrump.com

copies of All emails sent to or sent from your agency employees in which the Internet domains "trump.com", "trumporg.com", "ptt.gov", "donaldjtrump.com" or "donaldtrump.com" are in email addresses in the To, From, CC,BCC, Subject or Body fields of the message. The time frame for this request is June 3, 2016 through December 5, 2016. for the following Officials: Secretary of Commerce Penny Pritzker Deputy Secretary Bruce H. Andrews Chief of Staff Jim Hock General Counsel Kelly R. Welsh Undersecretary for National Oceanic and Atmospheric Administration Dr Kathryn Sullivan Acting Undersecretary for International Trade Kenneth E. Hyatt Undersecretary for Industry and Security Eric L. Hirschhorn Director of the U.S. Census Bureau John Thompson Assistant Secretary for Economic Development Jay Williams

Under the Freedom of Information Act, I hereby request any emails produced or received by your agency to or from any member or part of the transition team, as well as any emails which include any or all of the following terms or phrases: • Trump • Transition • President-Elect • New administration • New boss

---

**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Wednesday, February 15, 2017 1:32 PM  
**To:** Sarah Brabson - NOAA Federal  
**Subject:** Re: Signature on PTA required  
**Attachments:** NOAA6001 PTA 2017 2-8-17 signed jp cc mhg.pdf; NOAA6001 2017 PIA signed mhg.pdf

Here they both are. PIA is signed on the most recent version I got from the M: Drive folder.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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On Wed, Feb 15, 2017 at 12:25 PM, Sarah Brabson - NOAA Federal <[sarah.brabson@noaa.gov](mailto:sarah.brabson@noaa.gov)> wrote:  
Mark, here is the final corrected and signed NOAA6001 PTA. The PIA is in the folder already. Please sign both and return to me.  
I'm on my way downtown for a meeting. About 2:30 I will send all the NOAA6001 docs to DOC and separately the NOAA4700 PTA and controls assessment.

Sent from my iPhone

Begin forwarded message:

**From:** Barbara Von mettenheim - NOAA Affiliate <[barbara.vonmettenheim@noaa.gov](mailto:barbara.vonmettenheim@noaa.gov)>  
**Date:** February 15, 2017 at 12:16:52 PM EST  
**To:** Sarah Brabson - NOAA Federal <[sarah.brabson@noaa.gov](mailto:sarah.brabson@noaa.gov)>  
**Cc:** "John D. Parker - NOAA Federal" <[john.d.parker@noaa.gov](mailto:john.d.parker@noaa.gov)>, Thomas Murphy - NOAA Federal <[Thomas.K.Murphy@noaa.gov](mailto:Thomas.K.Murphy@noaa.gov)>  
**Subject:** Fwd: Signature on PTA required

Here it is, Sarah!!

Thank you,  
Barbara

Barbara von Mettenheim, PhD, CISSP  
Contractor at NOS

NOAA  
ISSO NOAA6001  
(b)(6) cell  
[240-533-0860](tel:240-533-0860), desk

----- Forwarded message -----

From: **Christopher Cartwright - NOAA Federal** <[christopher.cartwright@noaa.gov](mailto:christopher.cartwright@noaa.gov)>  
Date: Wed, Feb 15, 2017 at 11:13 AM  
Subject: Re: Signature on PTA required  
To: Barbara Von mettenheim - NOAA Affiliate <[barbara.vonmettenheim@noaa.gov](mailto:barbara.vonmettenheim@noaa.gov)>  
Cc: Hugh Johnson - NOAA Federal <[hugh.johnson@noaa.gov](mailto:hugh.johnson@noaa.gov)>, Thomas Murphy - NOAA Federal <[Thomas.K.Murphy@noaa.gov](mailto:Thomas.K.Murphy@noaa.gov)>

Here it is. Thanks, Chris

On Wed, Feb 15, 2017 at 8:55 AM, Barbara Von mettenheim - NOAA Affiliate <[barbara.vonmettenheim@noaa.gov](mailto:barbara.vonmettenheim@noaa.gov)> wrote:

Hi Chris

Do you think you might be able to sign this today? The privacy office is waiting for it. We're kind of in a tight spot in terms of the ATO.

Thank you,  
Barbara

Barbara von Mettenheim, PhD, CISSP  
Contractor at NOS  
NOAA  
ISSO NOAA6001  
(b)(6) cell  
[240-533-0860](tel:240-533-0860), desk

----- Forwarded message -----

From: **Barbara Von mettenheim - NOAA Affiliate** <[barbara.vonmettenheim@noaa.gov](mailto:barbara.vonmettenheim@noaa.gov)>  
Date: Tue, Feb 14, 2017 at 10:32 AM  
Subject: Signature on PTA required  
To: Christopher Cartwright - NOAA Federal <[christopher.cartwright@noaa.gov](mailto:christopher.cartwright@noaa.gov)>

Hi Chris

Might you please sign this PTA at your earliest convenience.

Thank you,  
Barbara

Barbara von Mettenheim, PhD, CISSP  
Contractor at NOS  
NOAA  
ISSO NOAA6001  
(b)(6) cell  
[240-533-0860](tel:240-533-0860), desk

# U.S. Department of Commerce

## NOAA



### Privacy Impact Assessment for the NOS Enterprise Information System NOAA6001

Reviewed by: \_\_\_\_\_, Bureau Chief Privacy Officer

- Concurrence of Senior Agency Official for Privacy/DOC Chief Privacy Officer
- Non-concurrence of Senior Agency Official for Privacy/DOC Chief Privacy Officer

---

Signature of Senior Agency Official for Privacy/DOC Chief Privacy Officer

Date

**U.S. Department of Commerce Privacy Impact Assessment**  
**NOS Enterprise Information System**  
**NOAA6001**

**Unique Project Identifier: 006-48-02-00-01-0511-00**

**Introduction: System Description**

The National Ocean Service (NOS) Enterprise Information System (EIS) is an integrated collection of components designed to provide general office automation, infrastructure and connectivity services to NOS Headquarters and component program and staff offices either resident in Silver Spring, MD, or logically connected to the system through WAN links.

NOAA6001 groups elements of the system into three areas, each of which serves a distinct and specific function:

- **Network Devices** -- NOS SSMC (Silver Spring Metro Center) campus backbone and NOS Wide Area Network (WAN)
- **NOS Domain Servers** -- The NOS domain infrastructure components and Headquarters Local Area Network (File, Print, Application) services
- **Web Application Servers** -- NOS application and database hosting services

In addition to the general purpose office automation support (file/printer sharing, application hosting, collaboration, etc.) provided by NOAA6001, the system provides help desk services and supports a number of internal web sites and a minor application which collects, stores and/or disseminates PII. NOAA6001 also stores BII information on file shares.

- **Constituents Database** – PII, no BII – AAMB upgraded the Constituents Database to a newer version of .NET and encrypted the fields that house privacy data. This version addresses issues identified in the 2014 SCA assessment. This upgrade reduces the risk over the former version of the application

**Information Sharing**

NOAA6001 collects and stores information related to the Office of the Assistant Administrator, Management and Budget (AAMB).

NOAA6001 collects and stores limited PII, specifically, names, telephone numbers and email addresses (voluntarily submitted by data providers and customers) to facilitate external coordination with data providers.

NOAA6001 is the general support system for NOS and stores PII on an ad-hoc basis as part of the application and hiring of employees, and the processing of HR data about employees. Electronic copies of resumes and hiring ranking are stored temporarily during the hiring phase; in addition, the system stores COOP information, travel authorization and vouchers, passports and international travel forms, information for the security badging process, and performance appraisal ranking.



AAMB collects and stores limited BII from businesses or other entities that are providing proprietary information in support of a grant application or federal acquisition actions. Occasionally financial information included with the acquisition package.

Other than the system noted above, there are no applications or databases that collect or employee PII. AAMB does not have a separate HR division, but utilizes the NOAA Workforce Management Office.

In NOS, the Local Registration Authority (LRA) is responsible for identity verification of NOS administrators that need to request public key infrastructure (PKI) certificates from DOD. This verification process uses form DD-2841 that requires the LRA to enter PII. This form is stored on the NOS network in a password protected zip file. The PII collected consists of the unique identification number from a federal government-issued identification credential with a picture, for example Military ID card or Passport card; the unique identification number from a non-federal government-issued identification card, for example Driver License card. The form also contains common access card (CAC) card electronic data interchange personal identifier (EDIP), full name, work email, work phone number. Only the numbers are collected from the artifacts and stored in the system. The LRA returns the artifacts to the user and does not store images of them on NOAA6001 systems.

NOAA6001 has four websites using Tier 2 multi-session cookies that are not collecting PII. They are used for analytics and for improving the customer experience. The four sites are: <http://oceanservice.noaa.gov>, <http://oceanoday.noaa.gov>, <http://celebrating200years.noaa.gov> and <http://estuarinebathymetry.noaa.gov>.

The use of Tier 2 multi-session cookies that are not collecting PII is a requirement by the Federal CIO (<https://policy.cio.gov/web-policy/analytics>), which states:

"A. All agencies must participate in the General Service Administration's (GSA) Digital Analytics Program DAP and deploy the DAP tracking code on all public facing agency websites. The DAP provides agencies with free quantitative analytics to inform website management. Participation in the DAP does not preclude agencies from using other analytics programs." And

"C. Agency use of web measurement and customization technologies must comply with OMB Memorandum M-10-22, Guidance for Online Use of Web Measurement and Customization Technologies".

The Federal CIO provides the mandate to use tier-2 multi-session cookies and/or other technologies for tracking analytics.

#### **A citation of the legal authority to collect PII and/or BII**

The general legislation supporting the system is 5 U.S.C.301, one of the statutes concerning government organization and employees.

**The Federal Information Processing Standard (FIPS) 199 security impact category for NOAA6001 is moderate.**

**Section 1: Status of the Information System**

1.1 Indicate whether the information system is a new or existing system.

This is a new information system.

This is an existing information system with changes that create new privacy risks.  
(Check all that apply.)

Changes That Create New Privacy Risks (CTCNPR)					
a. Conversions		d. Significant Merging		g. New Interagency Uses	
b. Anonymous to Non-Anonymous		e. New Public Access		h. Internal Flow or Collection	
c. Significant System Management Changes		f. Commercial Sources		i. Alteration in Character of Data	
j. Other changes that create new privacy risks (specify):					

This is an existing information system with no changes that create new privacy risks.

**Section 2: Information in the System**

2.1 Indicate what personally identifiable information (PII)/business identifiable information (BII) is collected, maintained, or disseminated. (Check all that apply.)

Identifying Numbers (IN)					
a. Social Security		e. Alien Registration	X	i. Financial Account	
b. Taxpayer ID		f. Driver's License	X	j. Financial Transaction	
c. Employee ID		g. Passport	X	k. Vehicle Identifier	
d. File/Case ID		h. Credit Card		l. Employer ID Number	
m. Other identifying numbers: military identification numbers; CAC electronic data interchange personal identifier (EDIP)					

General Personal Data (GPD)					
a. Name	X	g. Date of Birth		m. Religion	
b. Maiden Name		h. Place of Birth		n. Financial Information	X
c. Alias		i. Home Address	X	o. Medical Information	
d. Gender	X	j. Telephone Number	X	p. Military Service	

e. Age		k. Email Address	X	q. Physical Characteristics	
f. Race/Ethnicity	X	l. Education	X	r. Mother's Maiden Name	
s. Other general personal data (specify):					

<b>Work-Related Data (WRD)</b>					
a. Occupation	X	c. Telephone Number	X	f. Salary	
b. Job Title	X	d. Email Address	X	g. Work History	X
c. Work Address	X	e. Business Associates			
h. Other work-related data (specify):					

<b>System Administration/Audit Data (SAAD)</b>					
a. User ID	X	c. Date/Time of Access	X	e. ID Files Accessed	
b. IP Address		a. Queries Run		f. Contents of Files	
d. Other system administration/audit data (specify):					
<b>Other Information (specify)</b>					

2.2 Indicate sources of the PII/BII in the system. *(Check all that apply.)*

<b>Directly from Individual about Whom the Information Pertains</b>					
In Person	X	Hard Copy: Mail/Fax	X	Online	X
Telephone		Email	X		
Other (specify): Procurement data is provided in proposals and other procurement documents					

<b>Government Sources</b>					
Within the Bureau	X	Other DOC Bureaus		Other Federal Agencies	
State, Local, Tribal		Foreign			
Other (specify):					

Non-government Sources					
Public Organizations		Public Media, Internet	X	Private Sector	X
Commercial Data Brokers					
Other (specify): Procurement data is provided in proposals and other procurement documents					

2.3 Indicate the technologies used that contain PII/BII in ways that have not been previously deployed. *(Check all that apply.)*

Technologies Used Containing PII/BII Not Previously Deployed (TUCPBNDP)			
Smart Cards		Biometrics	
Caller-ID		Personal Identity Verification (PIV) Cards	
Other (specify):			
X	There are no technologies used that contain PII/BII in ways that have not been previously deployed.		

### **Section 3: System Supported Activities**

3.1 Indicate IT system supported activities, which raise privacy risks/concerns. *(Check all that apply.)*

Activities			
Audio recordings		Building entry readers	
Video surveillance		Electronic purchase transactions	
Other (specify):			
X	There are no IT system supported activities, which raise privacy risks/concerns.		

### **Section 4: Purpose of the System**

4.1 Indicate why the PII/BII in the IT system is being collected, maintained, or disseminated. *(Check all that apply.)*

Purpose			
To determine eligibility		For administering human resources programs	X
For administrative matters	X	To promote information sharing initiatives	X
For litigation		For criminal law enforcement activities	

For civil enforcement activities		For intelligence activities	
Other (specify): For procurement and grant award activities	X		

**Section 5: Use of the Information**

5.1 In the context of functional areas (business processes, missions, operations, etc.) supported by the IT system, describe how the PII/BII that is collected, maintained, or disseminated will be used. Indicate if the PII/BII identified in Section 2.1 of this document is in reference to a federal employee/contractor, member of the public, foreign national, visitor or other (specify).

The owners of the used the Constituents Database information to create mailing lists of NOS stakeholders and constituents. In general, the laws that created the various NOS programs include provisions for the program to accomplish a mission. The mission may involve partnerships and educating the public. The collection and storage of information is part of accomplishing the legislated mission of those programs, the NOS, and NOAA (members of the public and federal employees).

NOAA6001 stores PII on an ad-hoc basis as part of the application and hiring of employees, including electronic copies of resumes and the processing of HR data about employees including hiring ranking are stored temporarily during the hiring phase, including, standard HR information such as travel authorization and vouchers, passports and international travel forms, information for transmitting the security badge request email which includes only an email address and possibly a phone number, and performance appraisal ranking. The travel information collected is kept in both hard and soft forms. The hard copies are kept in a locked file cabinet and the soft copies are kept on the shared drive in a folder accessible only to travel admins. The travel documents contain only the traveler’s name, home address, and a truncated vendor number associated to the traveler’s name. There are no social security numbers or dates of birth.

AAMB collects and stores limited BII on an ad-hoc basis from businesses or other entities that are providing proprietary information in support of federal acquisition actions. Occasionally there is financial information included with the acquisition package.

**Section 6: Information Sharing and Access**

6.1 Indicate with whom the bureau intends to share the PII/BII in the IT system and how the PII/BII will be shared. (Check all that apply.)

Recipient	How Information will be Shared			
	Case-by-Case	Bulk Transfer	Direct Access	Other (specify)
Within the bureau	X			
DOC bureaus				

Federal agencies	X			
State, local, tribal gov't agencies				
Public				
Private sector				
Foreign governments				
Foreign entities				
Other (specify):				

6.2 Indicate whether the IT system connects with or receives information from any other IT systems authorized to process PII and/or BII.

	Yes, this IT system connects with or receives information from another IT system(s) authorized to process PII and/or BII. Provide the name of the IT system and describe the technical controls which prevent PII/BII leakage:
X	No, this IT system does not connect with or receive information from another IT system(s) authorized to process PII and/or BII.

6.3 Identify the class of users who will have access to the IT system and the PII/BII. (Check all that apply.)

<b>Class of Users</b>			
General Public		Government Employees	X
Contractors	X		
Other (specify):			

**Section 7: Notice and Consent**

7.1 Indicate whether individuals will be notified if their PII/BII is collected, maintained, or disseminated by the system. (Check all that apply.)

**Information Kept on the System**

X	Yes, notice is provided pursuant to a system of records notice published in the Federal Register and discussed in Section 9.	
X	Yes, notice is provided by a Privacy Act statement and/or privacy policy. The Privacy Act statement and/or privacy policy can be found at:	There are warnings/messages on the front page of the Constituents' Database ( <a href="http://www9.nos.noaa.gov/NOSConstituentsDB">www9.nos.noaa.gov/NOSConstituentsDB</a> ) with reference to the Privacy Act of 1974. There is an electronic privacy policy that describes the collection and use of the privacy information. Note that this notice is only for the employees who enter PII

		into the database.
X	Yes, notice is provided by other means.	Specify how: Prospective employees are given notice in writing. Notice is provided to businesses who are providing proprietary information in support of federal acquisition actions as part of the acquisition process and is not handled by NOAA6001.
	No, notice is not provided.	Specify why not:

7.2 Indicate whether and how individuals have an opportunity to decline to provide PII/BII.

X	Yes, individuals have an opportunity to decline to provide PII/BII.	Specify how: Individuals provide information on a voluntary basis through individuals who provide their business cards. If they do not want to be placed in the database, they do not provide their business cards.  Federal employees may decline in writing to provide PII to their supervisors, but this may affect their employment.  Private businesses may decline to provide II/BII by not including it in their proposals to the federal government, but this may affect their ability to obtain contracts.  NOS gathers names and business addresses of people with whom NOS routinely engages who have a known interest in the NOS mission and program from public-facing websites where there is an expectation of being contacted with information related to the ocean field, or from emails users send to NOS. They do not have an opportunity to decline to provide PII/BII, but those users who no longer want to receive information from NOS can send an email requesting that they be removed from the database.
	No, individuals do not have an opportunity to decline to provide PII/BII.	Specify why not:

7.3 Indicate whether and how individuals have an opportunity to consent to particular uses of their PII/BII.

x	Yes, individuals have an opportunity to consent to particular uses of their PII/BII.	Specify how: Businesses provide information related to procurement activities on a voluntary basis through proposals. All information received from businesses is handled in the manner dictated by the federal acquisition regulations (FAR). Applicants for positions are providing their personal information on a voluntary basis through their resumes. There is only one use for this information. For ongoing employee business, such as travel, there is only
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		one specific use for each PII collection.  Those individuals who are placed in the Constituents Database without preliminary consent may request to be removed from this database, for which there is only one use.
	No, individuals do not have an opportunity to consent to particular uses of their PII/BII	Specify why not:

**7.4** Indicate whether and how individuals have an opportunity to review/update PII/BII pertaining to them.

X	Yes, individuals have an opportunity to review/update PII/BII pertaining to them.	Specify how: An annual process requires stakeholders to send an email to all individuals in the Constituents database, providing them an opportunity to opt out or update their contact information.  Constituents Database: Users may submit updates to the Web site administrator based on information obtained from a mass mailing.  Federal employees, and businesses review the information prior to providing it. Any updates required for the information provided can be made by resubmitting the documents previously submitted through the channel previously used to submit.
	No, individuals do not have an opportunity to review/update PII/BII pertaining to them.	Specify why not:

**Section 8: Administrative and Technological Controls**

**8.1** Indicate the administrative and technological controls for the system. *(Check all that apply.)*

	All users signed a confidentiality agreement or non-disclosure agreement.
X	All users are subject to a Code of Conduct that includes the requirement for confidentiality.
X	Staff (employees and contractors) received training on privacy and confidentiality policies and practices.
X	Access to the PII/BII is restricted to authorized personnel only.
X	Access to the PII/BII is monitored, tracked, or recorded.  Explanation: The Constituents Database has audit trails enabled.  Procurement information within NOAA6001 is not monitored or tracked. It is kept on shared drives, access to which is restricted by access control lists (ACLs). NOAA6001 configures laptops with full disk encryption. If PII is kept on a laptop, the data is encrypted. NOAA6001 restricts access to shared folders by ACL. PII is not centralized in a database, and it cannot be easily monitored for access. However, as



	<p>stated above, the access to the shared folders is restricted by ACL.</p> <p>Employee evaluations and potential employee resumes are not monitored, tracked, or recorded within NOAA6001. They are kept on shared drives, access to which is restricted by ACL.</p> <p>NOAA policy requires users not to keep data on their local drives, that they should save it on their own ACL-restricted folders on the shared drive. Policy also requires users to remove all PII from their file share when no longer needed.</p>
	<p>The information is secured in accordance with FISMA requirements.</p> <p>Provide date of most recent Assessment and Authorization (A&amp;A): Current ATO was issued on December 1, 2016.</p> <p><input type="checkbox"/> This is a new system. The A&amp;A date will be provided when the A&amp;A package is approved.</p>
X	The Federal Information Processing Standard (FIPS) 199 security impact category for this system is a moderate or higher.
X	NIST Special Publication (SP) 800-122 and NIST SP 800-53 Revision 4 Appendix J recommended security and privacy controls for protecting PII/BII are in place and functioning as intended; or have an approved Plan of Action and Milestones (POAM).
X	Contractors that have access to the system are subject to information security provisions in their contracts required by DOC policy.
	Contracts with customers establish ownership rights over data including PII/BII.
	Acceptance of liability for exposure of PII/BII is clearly defined in agreements with customers.
	Other (specify):

**8.2 Provide a general description of the technologies used to protect PII/BII on the IT system.**

All information is stored within the accredited boundaries of NOAA6001 is in network data shares controlled by established permission based on the organizational, project, or employee access rights. Any access to specific restricted files or folders is requested through an access change request, which is reviewed and documented by the NOAA6001 Information System Security Officer for authorization and mission 'need-to-know' requirement prior to implementation. NOAA6001 implements least privilege through file share permissions to ensure privacy and open only to those demonstrating a "need to know."

Any PII information transmitted electronically must follow the federal government and NOAA standard procedure of secure packaging such as utilization of Department of Commerce (DOC) Accellion for encryption in transit.

NOAA6001 IT staff implements the security controls listed in NIST Special Publication 800-53 R4 required for a moderate system. NOAA6001 is under a current Authorization to Operate (ATO) was issued on December 1, 2016. In compliance with NIST Special Publication 800-53 rev 4, AAMB has a full security program, with performance measures and goals, in order to complete continuous monitoring activities, which include annual security control reviews, quarterly vulnerability scanning, monthly review of security access

control list, weekly review of audit logs, handling of access change requests and change control board activities. The risk assessment includes the possible threats and vulnerability to the confidentiality, integrity, and availability of mission and sensitive PII data along with the countermeasures.

Every year the IT system uses and independent contractor that performs a thorough continuous monitoring for the assessment and authorization (A&A) process. The A&A process ensures that the security plan and operational, management, and technical controls meet Department of Commerce (DOC) and NOAA guidelines for continued operation.

**Section 9: Privacy Act**

9.1 Indicate whether a system of records is being created under the Privacy Act, 5 U.S.C. § 552a. *(A new system of records notice (SORN) is required if the system is not covered by an existing SORN).*

As per the Privacy Act of 1974, "the term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual."

X	Yes, this system is covered by an existing system of records notice. Provide the system name and number: NOAA-11, Contact Information for Members of the Public Requesting or Providing Information Related to NOAA's Mission; DEPT-18, Employees Information not covered by other Notices.
	Yes, a system of records notice has been submitted to the Department for approval on <u>(date)</u> .
	No, a system of records is not being created.

**Section 10: Retention of Information**

10.1 Indicate whether these records are covered by an approved records control schedule and monitored for compliance. *(Check all that apply.)*

X	There is an approved record control schedule. Provide the name of the record control schedule: 1609-06 in the NOAA Disposition Handbook
	No, there is not an approved record control schedule. Provide the stage in which the project is in developing and submitting a records control schedule:
X	Yes, retention is monitored for compliance to the schedule.
X	No, retention is not monitored for compliance to the schedule. Provide explanation: Employee PII is generally kept on shared files of federal employees. These shares are access controlled and only available to the employee.

10.2 Indicate the disposal method of the PII/BII. (Check all that apply.)

<b>Disposal</b>			
Shredding	X	Overwriting	X
Degaussing	X	Deleting	X
Other (specify):			

**Section 11: NIST Special Publication 800-122 PII Confidentiality Impact Levels**

11.1 Indicate the potential impact that could result to the subject individuals and/or the

	Low – the loss of confidentiality, integrity, or availability could be expected to have a limited adverse effect on organizational operations, organizational assets, or individuals.
X	Moderate – the loss of confidentiality, integrity, or availability could be expected to have a serious adverse effect on organizational operations, organizational assets, or individuals.
	High – the loss of confidentiality, integrity, or availability could be expected to have a severe or catastrophic adverse effect on organizational operations, organizational assets, or individuals.

11.2 Indicate which factors were used to determine the above PII confidentiality impact levels. (Check all that apply.)

X	Identifiability	Provide explanation: Individuals (federal employees) may be identified.
X	Quantity of PII/BII	Provide explanation: There is the potential of PII collected and stored on 133 employees as well as contact information for constituents. NOAA6001 Users may be keeping on shared drives and computers an unknown amount of BII on companies who provided information as part of the acquisition process.
X	Data Field Sensitivity	Provide explanation: Data is sensitive but unclassified
X	Context of Use	Provide explanation: People or organizations provided their information voluntarily. .
	Obligation to Protect Confidentiality	Provide explanation:
X	Access to and Location of PII	Provide explanation: NOAA6001 users keep information on access-restricted shared drives and/or encrypted laptops.
	Other:	Provide explanation:

**Section 12: Analysis**

12.1 Indicate whether the conduct of this PIA results in any required business process changes.

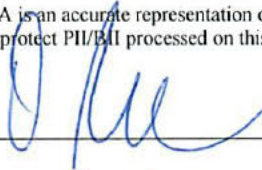
X	Yes, the conduct of this PIA results in required business process changes. Explanation: Constituents database owners documented their business process related to the handling of PII as a result of the assessment
	No, the conduct of this PIA does not result in any required business process changes.

12.2 Indicate whether the conduct of this PIA results in any required technology changes.

**Information Kept in the System**

	Yes, the conduct of this PIA results in required technology changes. Explanation:
X	No, the conduct of this PIA does not result in any required technology changes.

## Points of Contact and Signatures

<p><b>System Owner</b></p> <p>Name: Donna Rivelli Office: NOS Phone: 240-533-0900 Email: Donna.Rivelli@noaa.gov</p> <p>I certify that this PIA is an accurate representation of the security controls in place to protect PII/BII processed on this IT system.</p> <p>Signature: <u></u></p> <p>Date signed: <u>2/14/17</u></p>	<p><b>Information Technology Security Officer</b></p> <p>Name: John D. Parker Office: NOS Phone: 240-533-0832 Email: john.d.parker@noaa.gov</p> <p>I certify that this PIA is an accurate representation of the security controls in place to protect PII/BII processed on this IT system.</p> <p>Signature: <u>PARKERJOHN.D.136 5835914</u> <small>Digitally signed by PARKERJOHN.D.1365835914 DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=PARKERJOHN.D.1365835914 Date: 2017.02.10 08:05:46 -0500</small></p> <p>Date signed: _____</p>
<p><b>Authorizing Official</b></p> <p>Name: Christopher Cartwright Office: NOS Phone: 240-533-0969 Email: Christopher.cartwright@noaa.gov</p> <p>I certify that this PIA is an accurate representation of the security controls in place to protect PII/BII processed on this IT system.</p> <p>Signature: <u>CARTWRIGHT.CHRIS TOPHER.1365832702</u> <small>Digitally signed by CARTWRIGHT.CHRISTOPHER.1365832702 DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=CARTWRIGHT.CHRISTOPHER.1365832702 Date: 2017.02.10 10:35:05 -0500</small></p> <p>Date signed: _____</p>	<p><b>Bureau Chief Privacy Officer</b></p> <p>Name: Mark Graff Office: NOAA Privacy Phone: 301-628-5658 Email: Mark.Graff@noaa.gov</p> <p>I certify that the PII/BII processed in this IT system is necessary, this PIA ensures compliance with DOC policy to protect privacy, and the Bureau/OU Privacy Act Officer concurs with the SORNs and authorities cited.</p> <p>Signature: <u>GRAFF.MARK.HYRUM.1514447892</u> <small>Digitally signed by GRAFF.MARK.HYRUM.1514447892 DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=GRAFF.MARK.HYRUM.1514447892 Date: 2017.02.15 13:31:07 -0500</small></p> <p>Date signed: _____</p>

**This page is for internal routing purposes and documentation of approvals. Upon final approval, this page must be removed prior to publication of the PIA.**

**U.S. Department of Commerce**  
**NOAA**



**Privacy Threshold Analysis**  
**for the**  
**NOS Enterprise Information System**  
**(NOAA6001)**

**U.S. Department of Commerce Privacy Threshold Analysis**  
**NOS Enterprise Information System**  
**(NOAA6001)**

**Unique Project Identifier: 006-48-02-00-01-0511-00**

**Introduction:** This Privacy Threshold Analysis (PTA) is a questionnaire to assist with determining if a Privacy Impact Assessment (PIA) is necessary for this IT system. This PTA is primarily based from the Office of Management and Budget (OMB) privacy guidance and the Department of Commerce (DOC) IT security/privacy policy. If questions arise or further guidance is needed in order to complete this PTA, please contact your Bureau Chief Privacy Officer (BCPO).

**Description of the information system and its purpose:**

The National Ocean Service (NOS) Enterprise Information System (EIS) is an integrated collection of components designed to provide general office automation, infrastructure and connectivity services to NOS Headquarters and component program and staff offices either resident in Silver Spring, MD, or logically connected to the system through WAN links.

NOAA6001 groups elements of the system into three areas, each of which serves a distinct and specific function:

**Network Devices** -- NOS SSMC (Silver Spring Metro Center) campus backbone and NOS Wide Area Network (WAN)

**NOS Domain Servers** -- The NOS domain infrastructure components and Headquarters Local Area Network (File, Print, Application) services

**Web Application Servers** -- NOS application and database hosting services

In addition to the general purpose office automation support (file/printer sharing, application hosting, collaboration, etc.) provided by NOAA6001, the system provides help desk services and supports a number of internal web sites and a minor application which collects, stores and/or disseminates PII.

**Questionnaire:**

1. What is the status of this information system?

- This is a new information system. *Continue to answer questions and complete certification.*
- This is an existing information system with changes that create new privacy risks. *Complete chart below, continue to answer questions, and complete certification.*

<b>Changes That Create New Privacy Risks (CTCNPR)</b>			
a. Conversions		d. Significant Merging	g. New Interagency Uses
b. Anonymous to Non-Anonymous		e. New Public Access	h. Internal Flow or Collection

c. Significant System Management Changes		f. Commercial Sources		i. Alteration in Character of Data	
j. Other changes that create new privacy risks (specify):					

This is an existing information system in which changes do not create new privacy risks. *Continue to answer questions, and complete certification.*

2. Is the IT system or its information used to support any activity, which may raise privacy concerns?

NIST Special Publication 800-53 Revision 4, Appendix J, states “Organizations may also engage in activities that do not involve the collection and use of PII, but may nevertheless raise privacy concerns and associated risk. The privacy controls are equally applicable to those activities and can be used to analyze the privacy risk and mitigate such risk when necessary.” Examples include, but are not limited to, audio recordings, video surveillance, building entry readers, and electronic purchase transactions.

Yes. *Please describe the activities, which may raise privacy concerns.*

No

3. Does the IT system collect, maintain, or disseminate business identifiable information (BII)?

As per DOC Privacy Policy: “For the purpose of this policy, business identifiable information consists of (a) information that is defined in the Freedom of Information Act (FOIA) as “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” (5 U.S.C.552(b)(4)). This information is exempt from automatic release under the (b)(4) FOIA exemption. “Commercial” is not confined to records that reveal basic commercial operations” but includes any records [or information] in which the submitter has a commercial interest” and can include information submitted by a nonprofit entity, or (b) commercial or other information that, although it may not be exempt from release under FOIA, is exempt from disclosure by law (e.g., 13 U.S.C.).”

Yes, the IT system collects, maintains, or disseminates BII about: *(Check all that apply.)*

**Companies** - the names of the companies interested in information developed by NOS, which is provided by the users

**Other business entities** - AAMB collects and stores limited BII from businesses or other entities that are providing proprietary information in support of a grant application or federal acquisition actions. Occasionally this is financial information included with the acquisition package.

No, this IT system does not collect any BII.

4. Personally Identifiable Information

4a. Does the IT system collect, maintain, or disseminate **personally** identifiable information (PII)?

As per OMB 07-16, Footnote 1: “The term ‘personally identifiable information’ refers to information which can be used to distinguish or trace an individual’s identity, such as their name, social security number, biometric records, etc... alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother’s maiden name, etc...”



Yes, the IT system collects, maintains, or disseminates PII about: *(Check all that apply.)*

- DOC employees
- Contractors working on behalf of DOC
- Members of the public

No, this IT system does not collect any PII.

***If the answer is “yes” to question 4a, please respond to the following questions.***

4b. Does the IT system collect, maintain, or disseminate PII other than user ID?

Yes, the IT system collects, maintains, or disseminates PII other than user ID.

*The Constituents’ database collects limited PII from stakeholders involved with or interested in information provided by the National Ocean Service.*

*NOAA6001 collects and stores information related to the Office of the Assistant Administrator, Management and Budget (AAMB), which includes limited PII, specifically, names, telephone numbers and email addresses (voluntarily submitted by data providers and customers) to facilitate external coordination with data providers.*

*NOAA6001 stores PII on an ad-hoc basis as part of the application and hiring of employees, and the processing of HR data about employees. Electronic copies of resumes and hiring ranking are stored temporarily during the hiring phase; in addition, the system stores COOP information, travel authorization and vouchers, passports and international travel forms, information for the security badging process, and performance appraisal ranking.*

*In NOS, the Local Registration Authority (LRA) is responsible for identity verification of NOS administrators that need to request public key infrastructure (PKI) certificates from DOD. This verification process uses form DD-2841 that requires the LRA to enter PII. This form is stored on the NOS network in a password protected zip file. The PII collected consists of the unique identification number from a federal government-issued identification credential with a picture, for example Military ID card or Passport card; the unique identification number from a non-federal government-issued identification card, for example Driver License card. The form also contains common access card (CAC) card electronic data interchange personal identifier (EDIP), full name, work email, work phone number. Only the numbers are collected from the artifacts and stored*

*in the system. The LRA returns the artifacts to the user and does not store images of them on NOAA6001 systems.*

No, the user ID is the only PII collected, maintained, or disseminated by the IT system.

4c. Will the purpose for which the PII is collected, stored, used, processed, disclosed, or disseminated (context of use) cause the assignment of a higher PII confidentiality impact level?

Examples of context of use include, but are not limited to, law enforcement investigations, administration of benefits, contagious disease treatments, etc.

Yes, the context of use will cause the assignment of a higher PII confidentiality impact level.

No, the context of use will not cause the assignment of a higher PII confidentiality impact level.

***If any of the answers to questions 2, 3, 4b, and/or 4c are “Yes,” a Privacy Impact Assessment (PIA) must be completed for the IT system. This PTA and the approved PIA must be a part of the IT system’s Assessment and Authorization Package.***





(b)(5)

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Thanks everyone--

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
[\(301\) 628-5658](tel:3016285658) (O)  
(b)(6) (C)

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----- Forwarded message -----

From: **Bogomolny, Michael (Federal)** <[MBogomolny@doc.gov](mailto:MBogomolny@doc.gov)>  
Date: Wed, Mar 1, 2017 at 4:23 PM  
Subject: RE: CREW Litigation Update  
To: "Graff, Mark (Federal)" <[Mark.Graff@noaa.gov](mailto:Mark.Graff@noaa.gov)>  
Cc: "Toland, Michael (Federal)" <[MToland@doc.gov](mailto:MToland@doc.gov)>, "Chua, Alvin (Federal)" <[achua@doc.gov](mailto:achua@doc.gov)>

Mark,

(b)(5)

(b)(5)

Thanks,

bogo

**Michael Bogomolny**

Acting Chief, Information Law Division

mbogomolny@doc.gov [\(202\) 482-0703](tel:202-482-0703)

United States Department of Commerce  
Office of the General Counsel

Office of the Assistant General Counsel

for Employment, Litigation, and Information

**From:** Mark Graff - NOAA Federal [mailto:[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)]

**Sent:** Thursday, February 09, 2017 11:42 AM

**To:** Chua, Alvin (Federal) <[achua@doc.gov](mailto:achua@doc.gov)>

**Cc:** Toland, Michael (Federal) <[MToland@doc.gov](mailto:MToland@doc.gov)>; Bogomolny, Michael (Federal) <[MBogomolny@doc.gov](mailto:MBogomolny@doc.gov)>

**Subject:** Re: CREW Litigation Update

Hi Alvin,

(b)(5) [Redacted]

[Redacted] ?

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:301-628-5658) (O)

(b)(6) [Redacted] (C)

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On Thu, Feb 9, 2017 at 11:31 AM, Chua, Alvin (Federal) <[achua@doc.gov](mailto:achua@doc.gov)> wrote:

Good morning Mark/Mike,

(b)(5) [Redacted]

(b)(5) [Redacted]

- [Redacted]
- [Redacted] ? Please confirm.

Thank you,

Alvin Chua

Attorney

Office of the General Counsel | U.S. Department of Commerce

Office: [202.482.5023](tel:202.482.5023) | Fax: [202.482.2552](tel:202.482.2552)

E-mail: [achua@doc.gov](mailto:achua@doc.gov)

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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

*Via FOIAonline*

March 2, 2017

Adam J. Rappaport  
Citizens for Responsibility and Ethics in Washington  
455 Massachusetts Ave., NW 6<sup>th</sup> Floor  
Washington, DC 20001

Re: FOIA Request DOC-NOAA-2017-000331

Dear Mr. Rappaport:

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on December 16, 2016, in which you requested:

(C)opies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump's transition team, including representatives of Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect..

On February 6, 2017, a search was conducted by the NOAA Chief of Staff, who leads the NOAA Landing Team within the Office of the Undersecretary. The search included an electronic search of the email inbox and outbox of the Chief of Staff using the connective search terms "Trump" & "Questionnaire" as well as "Transition" & "Questionnaire". This search did not locate any responsive records. This search was reasonably calculated to uncover relevant documents as any questionnaires submitted from President Trump's transition teams would have been received by the NOAA Chief of Staff who leads the NOAA landing team.

Additionally, on February 6, 2017, a search was conducted by the undersigned NOAA FOIA Officer, within the Office of the Chief Information Officer. The search included an electronic search of the FOIA Officer's email inbox and outbox using the connective search terms "Trump" & "Questionnaire" as well as "Transition" & "Questionnaire". The search did not locate any responsive records. This search was reasonably calculated to uncover relevant documents as the NOAA FOIA Officer would have had oversight of any prior FOIA requests where searches had located, or requesters had similarly sought, questionnaires submitted from President Trump's transition team.

No additional locations exist where responsive records would be likely to be found that would not have been located by the searches already conducted.

If you have questions regarding this correspondence please contact Mark Graff at [mark.graff@noaa.gov](mailto:mark.graff@noaa.gov), or by phone at (301) 628-5658, or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

**GRAFF.MARK.HY**  
**RUM.1514447892**

Digitally signed by  
GRAFF.MARK.HYRUM.1514447892  
DN: c=US, o=U.S. Government,  
ou=DoD, ou=PKI, ou=OTHER,  
cn=GRAFF.MARK.HYRUM.1514447892  
Date: 2017.03.02 16:47:24 -05'00'

Mark H. Graff  
FOIA Officer  
National Oceanic and Atmospheric Administration

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**From:** Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>  
**Sent:** Wednesday, February 15, 2017 4:56 PM  
**To:** Mark Graff - NOAA Affiliate  
**Subject:** Weekly FOIA Incoming and High Visibility Requests 02.08.17 - 02.15.17 (DRAFT FOR YOUR USE)  
**Attachments:** Weekly FOIA Incoming and High Visibility Requests 02.08.17 - 02.15.17.xls

See attachment.

--

Lola Stith  
Contractor - The Ambit Group, LLC  
NOAA Office of the Chief Information Officer (OCIO)  
(c (b)(6) [REDACTED])  
[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)

<b>Tracking Number</b>	<b>Type</b>	<b>Requester</b>
DOC-NOAA-2017-000631	Request	Benjamin P. Simpson
DOC-NOAA-2017-000580	Request	Bill Marshall
DOC-NOAA-2017-000573	Request	Jason Plautz
DOC-NOAA-2017-000601	Request	Michael G. Zolfo
DOC-NOAA-2017-000616	Request	Leandra Gallego
DOC-NOAA-2017-000589	Request	Marshall Morales
DOC-NOAA-2017-000579	Request	Emily Yehle
DOC-NOAA-2017-000577	Request	Alexis M. Thomas
DOC-NOAA-2017-000614	Request	Kendra Pierre-Louis
DOC-NOAA-2017-000617	Request	Emily C. Atkin
DOC-OS-2017-000555	Request Detail Task	Adam Kengor
DOC-OS-2017-000554	Other	Adam Kengor
DOC-OS-2017-000329	Other	Michael Best
DOC-OIG-2017-000453	Request Detail Task	Barry Harrell

Requester Organization	Submitted	Assigned To
Recirculating Farms Coalition	02/15/2017	NOAA
Judicial Watch	02/08/2017	OCIO
National Journal	02/07/2017	NWS
Doherty & Progar	02/13/2017	NWS
Stetson University College of Law	02/09/2017	NOS
Riddell Williams	02/10/2017	NOS
Environment & Energy Publishing	02/08/2017	Maria S. Williams
Animal Rights Hawaii	02/08/2017	Tawand Hodge Tonic
Popular Science	02/14/2017	NOAA
New Republic	02/14/2017	NOAA
Mr.	02/15/2017	NOAA
Mr.	02/15/2017	NOAA
	02/08/2017	NOAA
	02/08/2017	OCAO

Case File Assigned To	Perfected?	Due	Closed Date	Status
NOAA	No	TBD	TBD	Submitted
OCIO	Yes	03/10/2017	TBD	Assignment Determination
NWS	Yes	03/10/2017	TBD	Assignment Determination
NWS	Yes	03/14/2017	TBD	Assignment Determination
NOS	Yes	03/15/2017	TBD	Assignment Determination
NOS	Yes	03/14/2017	TBD	Assignment Determination
Maria S. Williams	Yes	03/10/2017	TBD	Assignment Determination
Tawand Hodge Tonic	Yes	03/10/2017	TBD	Assignment Determination
NOAA	No	TBD	TBD	Submitted
NOAA	No	TBD	TBD	Submitted
Harriette Boyd	No	03/03/2017	TBD	Open
Harriette Boyd	No	03/03/2017	TBD	Open
Harriette Boyd	No	02/14/2017	TBD	Open
Laura Main	Yes	02/15/2017	02/15/2017	Closed

**Detail**

Recirculating Farms Coalition requests the following records from the National Marine Fisheries Service: • The most recent stock assessment data for the Barataria Bay Estuarine System Stock of Common Bottlenose Dolphins. • All data concerning unusual mortality events in Atlantic bottlenose dolphins in the Gulf of Mexico from 2009 to present. • All information regarding the LOF designation for the Gulf menhaden (*Brevoortia patronus*) and Technology Policy John Holdren. The time frame for the requested records is January 20, 2009 through January 20, 2017.

I am requesting all emails between the address "john.bates@noaa.gov" and any email address with the domain name "mail.house.gov"; between the dates October 1, 2015 and January 31, 2016.

approval to be a "StormReady" city. I am interested in Wood Dale's application documents, Wood Dale's StormReady plan, and any communication between Wood Dale and NOAA or NWS. I also would like any

Petersburg's bay areas; in particular Treasure Island and Madeira Beach (if available). If possible, I would like to receive a breakdown of the contributions of things like car wash soap and litter to marine pollution over the past

Assessment for natural resources damages in the Multnomah Channel and Lower Columbia River. The document relates to the Portland Harbor Superfund site and purports to describe how hazardous releases from

Karl that appears in the June 2015 issue of Science (now titled "Possible artifacts of data biases in the recent global surface warming hiatus"). Please include e-mails, letters, hand-written notes, memorandums,

permits issued to Indianapolis Zoo between the years of 1985 and 1990. Wild-capture permits issued to National Aquarium between the years of 1985 and 1990. Wild-capture permits issued to Shedd Aquarium between the

Administration (NOAA) employee Jack Bates, associated with his tenure at the National Climatic Data Center.

This is to include but not be limited to the following personnel records, yearly performance reviews, professional certifications, awards for accomplishments, disciplinary paperwork associated with the employee, and documents

agency, including but not limited to documents distributed to NOAA employees from transition officials. Please also include communications between NOAA employees that cite instructions from Trump transition team

qualifications and anything in writing or electronic format such as resumes and supporting documents, that shows these qualifications of successful, selected applicants to announcement BIS-OEE-2014-0013, BIS-OEE-2014-

qualifications and anything in writing or electronic format such as resumes and supporting documents, that shows these qualifications of successful, selected applicants to announcement BIS-OEE-2014-0003, and BIS-OEE-2014-

Records from 2015 and 2016 relating to or mentioning Wilbur Ross, including communications received from or

I request that a copy of the following documents be provided to me: OIG Case Notification 16-1404.

---

**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Thursday, March 2, 2017 5:43 PM  
**To:** Stephen Lipps - NOAA Federal; John Almeida - NOAA Federal; Holmes, Colin; Robert Moller - NOAA Federal; Scott Smullen - NOAA Federal; Jeff Dillen - NOAA Federal; Kristen Gustafson - NOAA Federal  
**Cc:** Tom Taylor; Kimberly Katzenbarger - NOAA FEDERAL; Charles; Dennis Morgan - NOAA Federal; Stacey Nathanson - NOAA Federal; Robert Swisher - NOAA Federal; Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate; Lola Stith - NOAA Affiliate; Zachary Goldstein - NOAA Federal; Douglas Perry - NOAA Federal; Nkolika Ndubisi - NOAA Federal; Jeri Dockett - NOAA Affiliate; Cc: OCIO/OPPA; Troy Wilds - NOAA Federal  
**Subject:** Weekly FOIA Incoming and High Visibility Requests  
**Attachments:** OCE Court Order re Fees.pdf; Weekly FOIA Incoming and High Visibility Requests 02.22.17 - 03.01.17.xls

Good Evening,

Attached is this week's report. Of note is a request by Gizmodo/Univision seeking a list of all vacant positions that cannot be filled as a result of the hiring freeze. (DOC-NOAA-2017-000683).

A search was tasked to NOAA by DOC based on a FOIA request to the Department from ProPublic seeking a list of all appointees hired under the Temporary Transition Schedule C Authority and Temporary Transition SES Appointing Authorities. (DOC-OS-2017-000578) Also, DOC tasked NOAA to search for records in response to a Slate FOIA request that was submitted seeking communications between specific members of the Trump Organization and the Department of Commerce. (DOC-OS-2017-000597).

In litigation, the Court has issued a scheduling order in the *CREW* litigation, where the requester had sought questionnaires submitted by President Trump's transition team. (b)(5)

Also, in the *Our Children's Earth* litigation, the Court issued a ruling granting, in part, the Plaintiff's Motion for Attorney's Fees. However, the Court ruled that the fees would be at a reduced rate from what the Plaintiff's sought, and would have to account for unnecessary/excessive time billed. The parties will be required to submit a joint brief with a proposed judgment consistent with that order. A copy of that order is attached.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OUR CHILDREN’S EARTH  
FOUNDATION, et al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES  
SERVICE, et al.,

Defendants.

Case No. [14-cv-01130-WHO](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION FOR  
ATTORNEY’S FEES**

Re: Dkt. No. 82

Plaintiffs seek an award of \$723,202.74 in attorney’s fees and \$3,190.39 in costs for succeeding in part on their consolidated lawsuits filed under the Freedom of Information Act (FOIA) against the federal agency defendants. Dkt. 94. I conclude that plaintiffs are eligible and entitled to an award of attorney’s fees, but at a significantly reduced amount in light of requested hourly rates that are not adequately supported and unnecessary or excessive time billed.

**BACKGROUND**

Plaintiffs Our Children’s Earth Foundation and Ecological Rights Foundation are Bay Area non-profits dedicated to protecting the environment.<sup>1</sup> Plaintiffs sent a series of nine FOIA requests to National Marine Fisheries Service (NMFS) starting in May 2013. The requests concerned NMFS’s oversight of activities by Stanford University and the impact of those activities on the Central California Coast steelhead. Plaintiffs were concerned with Stanford University’s operation of Searsville Lake and Dam, which were built in 1892, and other related water diversions and infrastructure that Stanford uses to provide non-potable water for its campus. Plaintiffs believe that “Lake Water System” adversely affects the steelhead by reducing water

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<sup>1</sup> See Declaration of Annaliese Beaman (Dkt. No. 83) ¶ 2. Plaintiffs are referred to collectively as OCE.

1 flows in San Francisquito Creek and its tributaries and cutting the steelhead off from access to  
 2 upstream spawning habitat. *See* Judge Conti’s March 30, 2015 Order [Dkt. No. 59] at 3-4.  
 3 Plaintiffs attempted to enjoin Stanford’s activities in a separate lawsuit, *Our Children’s Earth*  
 4 *Foundation v. Stanford Univ.*, No. 13-cv-00402-JSW (N.D. Cal.).<sup>2</sup>

5 In response to what OCE contends were deficient responses to its first four FOIA requests,  
 6 plaintiffs filed their first lawsuit (*OCE I*) in April 2014. In that lawsuit, OCE challenged whether  
 7 NMFS’s responses to plaintiffs’ FOIA requests were adequate, whether NMFS had a pattern and  
 8 practice of tardy and incomplete responses, and whether FWS failed to meet its internal deadline  
 9 to respond to NMFS.<sup>3</sup> Plaintiffs filed their second lawsuit (*OCE II*) in September 2014, based on  
 10 the tardy or otherwise deficient responses to their second set of FOIA Requests (FOIA requests 5 -  
 11 8). In *OCE II* plaintiffs alleged that NMFS failed to adequately respond to their additional FOIA  
 12 requests, and reiterated their argument that NMFS had a pattern and practice of tardy and  
 13 incomplete responses to FOIA requests.<sup>4</sup> The lawsuits were related by Judge Conti.<sup>5</sup>

14 In *OCE I*, the parties moved for summary judgment. Plaintiffs argued that: (1) NMFS  
 15 failed to adequately describe its searches or conducted an inadequate search and withheld  
 16 documents without sufficient justification; (ii) they were entitled to a declaratory judgment that  
 17 NMFS violated FOIA’s deadlines in responding to their four requests and in three related internal  
 18 appeals, and FWS violated FOIA’s deadlines in responding to a referral of documents from  
 19 NMFS; and (iii) the alleged violations of the FOIA are a part of a pattern and practice of non-

20 \_\_\_\_\_  
 21 <sup>2</sup> The government contends that plaintiffs’ first FOIA request was filed “as discovery” for the  
 22 Stanford lawsuit. *Oppo*. 6.

23 <sup>3</sup> A second defendant in *OCE I*, Fisheries and Wildlife Service (FWS) was alleged to have failed  
 24 to respond to NMFS’s request that FWS review and release under the FOIA portions of FWS’s  
 25 documents that NMFS had in its possession.

26 <sup>4</sup> The Army Corps of Engineers (Corps) was also named as a defendant in *OCE II*, as having failed  
 27 to appropriately respond to plaintiffs’ FOIA requests.

28 <sup>5</sup> Plaintiffs filed a third lawsuit (*OCE III*) in June 2015, which was also related to 14-1130. In  
*OCE III*, plaintiffs asserted that NMFS had failed to provide a timely final decision in response to  
 OCE’s ninth FOIA request (from April 2015) regarding more “up-to-date information” on the  
 same subject matter. Judge Conti, on plaintiffs’ request and without opposition from NMFS,  
 dismissed *OCE III* as “prudentially moot.” October 2015 SJ Order at 17-18. Plaintiffs are not  
 seeking fees or costs related to that lawsuit. *Mot.* 4, n.1.

1 compliance with the FOIA's mandates, so the Court should enjoin NMFS and order it to comply  
2 with its FOIA obligations. March 30, 2015 Order at 6-7. The government opposed those  
3 arguments.

4 In an Order dated March 30, 2015 [Dkt. No. 59, Case No. 14-1130], Judge Conti: (i) ruled  
5 that NMFS failed to conduct adequate searches in response to OCE's first and third FOIA  
6 requests;<sup>6</sup> (ii) held in abeyance the determination as to whether NMFS adequately invoked FOIA  
7 Exemption (b)(6) to withhold names and contact information from responsive documents pending  
8 further supplementation of the factual record by NMFS (concerning the privacy concerns that  
9 would be implicated by release of that information); (iii) affirmed in part the withholding of some  
10 attorney-client documents, but concluded that NMFS had not met its burden to explain why  
11 certain portions of documents did not contain segregable and releasable information or why one  
12 specific document was withheld as attorney-client privileged and, therefore, held in abeyance the  
13 determination as to NMFS's withholding of those documents was appropriate; and (iv) granted  
14 plaintiffs' request for a declaratory judgment that NMFS failed to comply with the statutorily  
15 mandated response and appeal deadlines with respect to the four FOIA requests at issue. *Id.* at 8-  
16 26.<sup>7</sup> Judge Conti denied plaintiffs' motion and granted defendants' motion regarding  
17 withholdings, redactions, and timeliness. *Id.* at 28.<sup>8</sup>

18 NMFS then provided additional information to the Court concerning its withholdings and  
19 redactions, and plaintiffs submitted responses regarding the same.<sup>9</sup> In an Order dated July 20,

20 \_\_\_\_\_  
21 <sup>6</sup> Judge Conti granted plaintiffs' motion on the adequacy of the search as to the first and third  
22 FOIA requests, and granted defendants' motion as to the adequacy of the searches in response to  
23 the second and fourth requests. *Id.* at 12.

24 <sup>7</sup> Judge Conti, however, expressly did not reach the question of whether plaintiffs had proven that  
25 NMFS had a pattern and practice of untimely responses, because "[t]he pattern and practice and  
26 cutoff date allegations are repeated, with a fuller evidentiary record, in cross-motions for  
27 summary judgment pending in" *OCE II*, and the Judge intended to address them in a subsequent  
28 order. *Id.* at 22.

<sup>8</sup> Plaintiffs point out that in preparing its cross-motion for summary judgment in *OCE I*, NMFS  
uncovered two additional responsive documents and disclosed them in full. *See* Declaration of  
Gary Stern [Dkt. No. 41, 14-1130] ¶ 17.

<sup>9</sup> As part of its supplemental briefing, NMFS decided to release two previously withheld in full  
documents and to release three redacted documents that had previously been withheld in full. It

1 2015, Judge Conti addressed the issues remaining from *OCE I*, as well as the cross-motions filed  
 2 in *OCE II*. Judge Conti characterized the remaining arguments made by plaintiffs as: (i) NMFS  
 3 failed to adequately search for records responsive to two of its requests; (ii) NMFS improperly  
 4 withheld or overly redacted responsive records under two FOIA exemptions; (iii) NMFS was  
 5 defying Department of Commerce (of which NMFS is a part) regulations by cutting off their  
 6 search for responsive records at the date the FOIA request is received rather than the date the  
 7 search begins; and (iv) the request for a declaratory judgment that NMFS's and the Corps'  
 8 responses to plaintiffs' requests were untimely, and grant declaratory and injunctive relief to  
 9 remedy NMFS's alleged pattern and practice of FOIA violations. July 20, 2015 Order [Dkt. No.  
 10 70, Case No. 14-1130] at 3-4. NMFS and the Corps cross-moved for summary judgment, arguing  
 11 that their responses were adequate and declaratory and injunctive relief were unwarranted. *Id.* at  
 12 4.<sup>10</sup>

13 As to the substance of the adequacy of NMFS's responses, Judge Conti found that: (i)  
 14 NMFS had failed to provide sufficient information for the court to determine whether NMFS  
 15 conducted an adequate search, ordered NMFS to supplement the factual record, and held in  
 16 abeyance the issue of summary judgment on NMFS's search; (ii) NMFS had properly withheld  
 17 draft biological opinions under FOIA Exemption (b)(5), but did not adequately justify its  
 18 withholding or non-redaction of an email under (b)(5), and as such NMFS was required to  
 19 supplement the factual record to justify its withholding and non-redaction, and the court held in  
 20 abeyance summary judgment on the withholding of that document; and (iii) granted summary  
 21 judgment to NMFS withholding under FOIA Exemption (b)(7) of names in a report. *Id.* 5-17.

22 As to the issue of untimely responses and pattern and practice of delay and improper cutoff  
 23 dates, Judge Conti: (i) granted plaintiffs' request for declaratory relief that NMFS violated its  
 24 statutory duties with respect to the timeliness of its responses and appeals, but declined to enter

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25  
 26 also stated it was conducting a supplemental search for documents responsive to OCE's first and  
 27 third FOIA requests. Dkt. No. 60 at 4-5; *see also* Dkt. No. 59 at 19, 21.

28 <sup>10</sup> In its cross-motion pleadings in *OCE II*, NMFS decided "upon additional review" to release an  
 additional eleven documents in part and one in full. Dkt. No. 19 (14-4365) ¶ 28; Dkt. No. 18-1  
 (14-4365) ¶ 5.

1 declaratory relief against the Corps; (ii) determined that further facts were needed to address  
 2 plaintiffs' contention that NMFS was using an improper cutoff date when beginning its search for  
 3 documents and ordered supplemental briefing; and (iii) ordered plaintiffs to submit supplemental  
 4 briefing on the status of their pending FOIA requests as to the pattern and practice of delay claim.  
 5 *Id.* at 17-25. Finally, as to plaintiffs' request for injunctive relief, the Judge ordered NMFS "to  
 6 comply with FOIA and its deadlines, due to the Court's finding that the Fisheries Service has  
 7 failed to do so previously and the potential that these offenses might continue. Yet the Court,  
 8 having so ordered and having GRANTED declaratory relief, DENIES WITHOUT PREJUDICE  
 9 further injunctive relief at this time," in part because of "the fact that Plaintiffs appear to be  
 10 repeatedly making large requests in sufficiently rapid succession that the Fisheries Service is  
 11 unable to complete its response to one request before receiving a second" and recognizing  
 12 evidence of good faith and efforts on the part of NMFS to comply with its deadlines and  
 13 significantly improve its future performance. *Id.* at 26-27. The Court held in abeyance the  
 14 motions regarding NMFS's exemption claims, adequacy challenge, cutoff dates, and pattern and  
 15 practice allegations pending the supplementation of the record. *Id.* at 29-30.<sup>11</sup>

16 Following that round of supplementation, in an October 21, 2015 Order, Judge Conti  
 17 addressed the remaining issues and ruled that: (i) NMFS's declarants had addressed the concerns  
 18 over the adequacy of the search and granted NMFS summary judgment on that issue; (ii)  
 19 determined that one record had been appropriately withheld under (b)(5) based on a supplemental  
 20 *Vaughn* index and granted NMFS summary judgment on its withholdings under (b)(5); (iii) found  
 21 that NMFS cured its showing of non-segregability of withheld information based on its  
 22 supplemental *Vaughn* index, except as to one document,<sup>12</sup> and granted NMFS summary judgment  
 23 on segregability as to all documents except that one; and (iv) granted summary judgment to NMFS

24  
 25 <sup>11</sup> As part of its supplemental briefing, NMFS decided to release a redacted document that had  
 26 been withheld in full. Dkt. No. 27 (14-4365) at 2. NMFS also explained its search cut-off policy  
 27 (which OCE contends was "new"), requiring that if one or more subject-matter expert are required  
 28 to search for documents, the date each expert starts his/her search establishes the cut-off date.  
 Dkt. No. 27-4 (14-4365), ¶18(b).

<sup>12</sup> The Court ordered NMFS to produce the document at issue, or explain further why it should be  
 withheld. October 21 2015 Order at 15. NMFS decided to produce the document.

1 based on additional information as to the cutoff dates used for searches. October 21, 2015 Order  
2 [Dkt. No 72, 14-1130] at 4-17.

3 As to the pattern and practice of delay claim, Judge Conti reviewed the evidence and found  
4 that NMFS was curing its processing and response problems and backlog, and therefore denied  
5 injunctive relief. However, in light of the “unmistakable history” of untimeliness and delay, Judge  
6 Conti granted declaratory relief to plaintiffs, concluding that: “(1) that the Fisheries Service has  
7 previously been engaged in a pattern-and-practice of failure to meet FOIA deadlines; (2) that the  
8 Fisheries Service has previously provided responses that were frequently and unreasonably  
9 delayed; (3) that due to these delays the Fisheries Service effectively provided no ability to FOIA  
10 requestors to anticipate when data might be provided; and (4) that due to these delays information  
11 was often provided after a long enough period of time that the data could be out-of-date,  
12 effectively negating its value and effectuating a complete denial of information.” *Id.* at 20-21. He  
13 also granted “limited” injunctive relief to plaintiffs, requiring NMFS to provide any outstanding  
14 production in response to certain of plaintiffs’ requests within 30 days. *Id.* at 21. Any further  
15 injunctive relief was denied without prejudice, but he required NMFS to show cause as to how it  
16 was curing its prior violations and intended to continue its response-time improvements going  
17 forward. *Id.* at 22.

18 After the case was reassigned to me in November 2015, I addressed whether any issues  
19 remained to be decided following Judge Conti’s October and November 2015 Orders as well as  
20 the supplemental briefing filed by the parties regarding NMFS’s efforts to cure its past timeliness  
21 violations and ensure those would not occur in the future. In an order dated January 20, 2016, I  
22 determined that Judge Conti had resolved all pending issues, and concluded that the evidence  
23 regarding NMFS’s substantial reduction of its FOIA-response backlog and the “technical,  
24 administrative, and staffing improvements” NMFS had implemented to ensure timely processing  
25 of FOIA requests on a forward-going basis meant that continuing injunctive relief was not  
26 warranted. January 20, 2016 Order [Dkt. No. 75]. A stipulated judgment was entered on February  
27 16, 2016. Plaintiffs now seek over \$700,000 in attorney’s fees for the hours they spent litigating  
28 *OCE I* and *OCE II*, as well as costs. Defendants oppose plaintiffs’ entitlement to any fees, and



1 challenge the reasonableness of the amount sought.

2 **LEGAL STANDARD**

3 FOIA authorizes courts to “assess against the United States reasonable attorney fees and  
4 other litigation costs reasonably incurred in any case under this section in which the complainant  
5 has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E). This provision “has as its fundamental  
6 purpose the facilitation of citizen access to the courts to vindicate the public’s statutory rights,” as  
7 the fees and costs of bringing suit could otherwise “present a virtually insurmountable barrier  
8 which [would] ba[r] the average person from forcing governmental compliance with the law.”  
9 *Exner v. F.B.I.*, 443 F. Supp. 1349, 1352 (S.D. Cal. 1978).

10 A court may grant an award of attorney’s fees under 5 U.S.C. § 552(a)(4)(E) where the  
11 plaintiff establishes that it is both eligible for and entitled to an award. *See Church of Scientology*  
12 *of California v. U.S. Postal Serv.*, 700 F.2d 486, 489 (9th Cir. 1983); *Rosenfeld v. U.S. Dep’t of*  
13 *Justice*, 903 F. Supp. 2d 859, 865 (N.D. Cal. 2012). To be eligible for an award, the plaintiff must  
14 show that “(1) the filing of the action could reasonably have been regarded as *necessary* to obtain  
15 the information; and (2) the filing of the action had a *substantial causative* effect on the delivery  
16 of the information.” *Church of Scientology*, 700 F.2d at 489 (emphasis in original).

17 If the court determines that the plaintiff is eligible for attorney’s fees, the court may then,  
18 “in the exercise of its discretion, determine that [it] is *entitled* to an award of attorney’s fees.” *Id.*  
19 at 492 (emphasis in original). In making this determination, courts consider “(1) the benefit to the  
20 public, if any, deriving from the case; (2) the commercial benefit to the complainant; (3) the nature  
21 of the complainant’s interest in the records sought; and (4) whether the government’s withholding  
22 of the records sought had a reasonable basis in law.” *Id.*; *accord Long v. U.S. I.R.S.*, 932 F.2d  
23 1309, 1313 (9th Cir. 1991). “These four criteria are not exhaustive, however, and the court may  
24 take into consideration whatever factors it deems relevant in determining whether an award of  
25 attorney’s fees is appropriate.” *Long*, 932 F.2d at 1313 (internal quotation marks omitted). Once  
26 eligibility is established, “[t]he decision to award attorney’s fees is left to the sound discretion of  
27 the trial court.” *Church of Scientology*, 700 F.2d at 492.

**DISCUSSION**

**I. WHETHER PLAINTIFFS SUBSTANTIALLY PREVAILED AND ARE ELIGIBLE FOR ATTORNEY'S FEES**

The government does not contest that plaintiffs substantially prevailed in *OCE I*, but argues that plaintiffs were not successful in *OCE II*, and therefore are not eligible for fees for that portion of the litigation. As noted above, in his July and October 2015 orders, Judge Conti addressed the claims asserted in *OCE II* (as well as issues asserted in *OCE I*). In the July Order, Judge Conti granted plaintiffs' request for a declaratory judgment that NMFS's responses to plaintiffs' FOIA requests 5-8 were untimely. July 2015 Order at 20-21. That by itself constitutes "success," albeit on a discrete issue. *See Hajro v. United States Citizenship & Immigration Servs.*, 900 F. Supp. 2d 1034, 1045 (N.D. Cal. 2012) (prevailing on summary judgment and obtaining injunctive relief on claim that defendant's responses were untimely constitutes substantial success), *reversed on other grounds* by 811 F.3d 1086, 1092 (9th Cir. 2016); *Or. Nat. Desert Ass'n v. Gutierrez*, 442 F. Supp. 2d 1096, 1098 (D. Or. 2006) (determination that agency failed to provide a timely response sufficient to create entitlement to fees), *aff'd in pertinent part, rev'd in part on other grounds* by *Or. Nat. Desert Ass'n v. Locke*, 572 F.3d 610 (9th Cir. 2009).

After initially finding that NMFS provided insufficient information in its declarations and *Vaughn* index to demonstrate the adequacy of some of its searches and withholdings, when NMFS provided supplemental briefing and declarations Judge Conti concluded that the searches were adequate and the withholdings justified (except as to one document under Exemption (b)(5), which NMFS decided to release). In addition, after receiving plaintiffs' summary judgment motion and while preparing its cross-motion pleadings in *OCE II*, NMFS decided "upon additional review" to release an additional eleven documents in part and one in full. Dkt. No. 19 (14-4365) ¶ 28; Dkt. No. 18-1 (14-4365) ¶ 5. Following the next round of supplemental briefing, NMFS decided to release in part yet another document that had been withheld. Dkt. No. 27 (14-4365) at 2. The evidentiary record supports plaintiffs' contention that these documents were produced as a result of *OCE II*.<sup>13</sup> Plaintiffs, therefore, prevailed, on another discrete portion of their litigation in

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<sup>13</sup> NMFS argues that its responses to Requests 5 through 8 were not produced as a result of the



1 securing these supplemental productions under a catalyst theory. *See, e.g., Dorsen v. United States*  
 2 *SEC*, 15 F. Supp. 3d 112, 120 (D.D.C. 2014) (plaintiff prevailed where FOIA suit prompted  
 3 additional or speedier release of documents); *Judicial Watch, Inc. v. United States DOJ*, 878 F.  
 4 Supp. 2d 225, 232 (D.D.C. 2012) (catalyst theory satisfied where after a final agency response and  
 5 commencement of lawsuit, additional documents were produced).

6 More importantly, in light of the “unmistakable history” of “unreasonable” untimeliness  
 7 and delay, Judge Conti granted plaintiffs’ request for a declaratory judgment that NMFS failed to  
 8 provide them with timely responses and had a past pattern and practice of untimely responses.  
 9 That judgment, along with the limited injunctive relief (requiring NMFS to respond to plaintiffs’  
 10 then-pending FOIA requests by a date certain), confers prevailing party status on plaintiffs as well.  
 11 The government in an attempt to avoid fees for *OCE II* argues that plaintiffs did not secure any  
 12 relief in *OCE II* beyond what they would have been entitled to given the claims asserted in *OCE I*.  
 13 *Oppo*. 7-8. However, Judge Conti specifically held the pattern and practice claim in abeyance in  
 14 *OCE I* to determine it on the more complete evidentiary record presented in *OCE II*. *OCE II*,  
 15 therefore, was a necessary part to the Court’s eventual determination.

16 Similarly, the fact that further, more wide-spread injunctive relief was not granted in  
 17 response to the allegations raised in both *OCE I* and *OCE II* in the October 2015 or January 2016  
 18 Orders was due to the strong showing NMFS made on the steps the agency had taken and was  
 19 continuing to take to extinguish its backlog and implement policies and practices to ensure timely  
 20 responses in the future. The government spends much time in its brief and declarations attempting  
 21 to show that the new policies and practices NMFS implemented in order to reduce the backlog  
 22 discussed by Judge Conti and myself in the October 2015 and January 2016 Orders were not  
 23 conceived in order to respond to, or spurred on by, plaintiffs’ litigation but were underway prior to  
 24 the filing of *OCE I* and *OCE II*. *See, e.g., Oppo*. 9-10. Plaintiffs counter that argument by citing  
 25 to notes and other documents produced by NMFS staff showing that efforts to reduce the backlog

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26  
 27 litigation, and cites testimony showing that NMFS began work processing and responding to these  
 28 requests before the *OCE II* complaint was filed. *See Hornof Decl.* ¶ 7. NMFS also argues that the  
 three FOIA requests subject to Judge Conti’s limited order of injunctive relief, were also being  
 processed and responses “underway” before the October 21, 2015 Order. *Id.* ¶¶ 10-11.

1 were just being formulated in June 2015 and were implemented in part to avoid litigation, like the  
2 suits at issue which were the only ones pending at the relevant time. *See, e.g.*, Reply 3-4.

3 However, in order to determine that plaintiffs are eligible for an award of attorney's fees, I  
4 need not resolve this factual dispute. That plaintiffs secured additional documents from NMFS  
5 after *OCE II* was filed and after NMFS took a closer look at its searches and withholdings and,  
6 more importantly, secured another declaratory judgment recognizing that the agency failed to  
7 provide timely responses, had engaged in a pattern and practice of tardy responses, and secured  
8 limited injunctive relief as to then-pending but not sued upon FOIA requests, is success significant  
9 enough to establish plaintiffs' eligibility for fees.<sup>14</sup>

10 In sum, plaintiffs were the prevailing parties on significant portions of both *OCE I* and  
11 *OCE II* and are eligible for an award of attorney's fees and costs.<sup>15</sup> The next step is to determine  
12 if they are entitled to them.

## 13 **II. WHETHER PLAINTIFFS ARE ENTITLED TO ATTORNEY'S FEES**

14 The factors courts consider in determining whether a plaintiff is entitled to attorney's fees  
15 include "(1) the benefit to the public, if any, deriving from the case; (2) the commercial benefit to  
16 the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether  
17 the government's withholding of the records sought had a reasonable basis in law." *Church of*

18 \_\_\_\_\_  
19 <sup>14</sup> That said, the evidence on the whole indicates that NMFS took more concrete, specific, and  
20 immediate steps following Judge Conti's Orders to extinguish its backlog and commit additional  
21 resources to speeding up its response times than the agency might have taken but-for plaintiffs'  
22 suits.

23 <sup>15</sup> Plaintiffs repeatedly imply that they were successful on their improper cut-off date challenges,  
24 arguing that their lawsuits were the catalyst for NMFS's new cut-off date policy. Mot. at 8, 10.  
25 The improper cut-off date issue was raised but not decided by Judge Conti in his March 30 Order,  
26 because the issue was also raised but supported by a fuller factual record in the *OCE II* summary  
27 judgment briefing that was pending. In his July Order, Judge Conti determined that, at most, a  
28 factual dispute existed, and again held the issue in abeyance for supplemental responses. In his  
October Order, Judge Conti found that plaintiffs had not established that NMFS used improper  
cut-off dates, and instead granted summary judgment to NMFS on plaintiffs' improper search cut-  
off date claim as to plaintiffs' *own* FOIA requests. October Order at 17. Later in the October  
Order, Judge Conti recognized that the "NMFS West Coast Region appears to have an updated  
process in place, using modern software, additional personnel, and policy changes (e.g., how the  
cut-off date changes where there are multiple SMEs assigned) to speed up its process. *See* Supp.  
Malabanian Decl. ¶¶ 15-18." *Id.* at 18. Judge Conti, however, never reached the issue of whether  
these lawsuits were the catalyst for NMFS's new, updated, or clarified policy with respect to  
search cut-off dates.

1 *Scientology*, 700 F.2d at 489. I will discuss each in turn.

2 **A. Benefit to the Public**

3 In considering the public benefit factor, courts consider “the degree of dissemination and  
4 the likely public impact that might result from disclosure.” *Church of Scientology*, 700 F.2d at  
5 493. The factor generally weighs in favor of an award where the information is broadly  
6 disseminated to the public. *See, e.g., Electronic Frontier Foundation v. Office of Dir. of Nat.*  
7 *Intelligence*, No. 07-cv-05278-SI, 2008 WL 2331959, at \*3 (N.D. Cal. June 4, 2008) (finding that  
8 the public benefit factor was satisfied where the plaintiff “immediately posted the requested  
9 information on its website” and “created press releases for public access”). Even where the degree  
10 of dissemination is limited, or where the level of public interest in the requested information itself  
11 is minimal, the public benefit factor may still favor an award “as long as there is a public benefit  
12 from the fact of . . . disclosure.” *O’Neill, Lysaght & Sun v. D.E.A.*, 951 F. Supp. 1413, 1423 (C.D.  
13 Cal. 1996).

14 Courts in this circuit have found a public benefit favoring an award, despite an absence of  
15 broad dissemination or a significant level of public interest in the requested information, where (1)  
16 the case “establishe[d] that the government may not withhold certain information pursuant to a  
17 particular FOIA exemption,” *Church of Scientology*, 700 F.2d at 493; (2) the plaintiffs were  
18 environmental nonprofits whose purpose was “to oversee and enforce compliance with the [Clean  
19 Air Act]” and the requested information was “being used to inform [the plaintiffs’] ongoing  
20 oversight and enforcement efforts,” *The Sierra Club v. United States Env’tl. Prot. Agency*, 75 F.  
21 Supp. 3d 1125, 1143-44 (N.D. Cal. 2014); and (3) the requested documents revealed a “long  
22 history of abuse” by a paid DEA informant and “expos[ed] the implications of the government  
23 dealing with untrustworthy paid informants.” *O’Neill*, 951 F. Supp. at 1423-24.

24 Plaintiffs argue that just like the plaintiffs in *Sierra Club* they “utilized the documents  
25 to advance their efforts to promote compliance with environmental laws intended to broadly  
26 benefit the public interest environmental protection. Specifically, they utilized the documents to  
27 organize public support for measures designed to persuade Stanford and NMFS to do more to  
28 protect a threatened fish species and to develop ESA citizen suits claims aiming to help the

1 survival and recovery of this threatened species.” Beaman Decl. ¶¶ 6-8; Mot. 15. Plaintiffs also  
 2 disseminated the information they secured to their members, the press, and the public through  
 3 messages, website postings, press releases, and interviews. Beaman Decl. ¶¶ 6-8.

4 As NMFS points out, it is unclear what role in that public outreach (if any) the information  
 5 actually secured by OCE as a direct result of the filing of these lawsuits or Judge Conti’s Orders  
 6 played. Beaman’s declaration is not specific on that point. *See, e.g., Cotton v. Heyman*, 63 F.3d  
 7 1115, 1120 (when evaluating the public benefit prong, the court must “evaluate the specific  
 8 documents at issue in the case at hand”). NMFS does not argue (or show by declaration) that the  
 9 information produced to OCE after the inception of the suits or Judge Conti’s Orders issued was  
 10 so ministerial or obscure that it could not have supported plaintiffs’ public interest and public  
 11 disclosure goals. The Beaman declaration, while not specifically focused on documents produced  
 12 as a result of this litigation, persuasively explains how the documents OCE received through its  
 13 FOIA requests and its litigation play a significant role in OCE’s mission to inform the public  
 14 about the activities of Stanford and the Central California Coast steelhead. Dkt. Nos. 83, 96.

15 In addition, this lawsuit effectively and publicly disclosed NMFS’s history of untimely  
 16 responses and significant backlog as well as the steps NMFS was undertaking to cure those  
 17 issues. That shed important light about the agency’s non-compliance with its duty under FOIA, a  
 18 situation Judge Conti repeatedly referred to as “clear, undisputed, and troubling.” March 30, 2015  
 19 Order at 24; *see also* July 20, 2015 Order at 19 (“In short, even though the Fisheries Service does  
 20 not take the FOIA’s deadlines seriously, ‘[t]here can be no doubt that Congress [did]’”). Finally,  
 21 plaintiffs secured a significant, contested legal ruling from Judge Conti: that FOIA allows both  
 22 declaratory judgment and injunctive relief as remedies for untimely responses. NMFS vigorously  
 23 argued that the only available remedy for a violation under FOIA was an order requiring  
 24 production of withheld documents; a position that was soundly rejected by Judge Conti. March  
 25 30, 2015 Order at 24-26; July 20, 2015 Order at 19-21.

26 On this record, plaintiffs have shown that this litigation through the information released  
 27 and the legal principles established conferred a significant benefit on the public.  
 28

**B. Commercial Benefit to the Complainant/Nature of Plaintiffs' Interests**

The second and third factors are “the commercial benefit to the complainant” and “the nature of the complainant’s interest in the records sought.” *Church of Scientology*, 700 F.2d at 492. Courts regularly consider these factors together. *See, e.g., id.* at 494; *Am. Small Bus. League v. U.S. Small Bus. Admin.*, No. 08-cv-00829-MHP, 2009 WL 1011632, at \*3 (N.D. Cal. Apr. 15, 2009); *Electronic Frontier Foundation*, 2008 WL 2331959, at \*3.

As a general matter, if a “commercial benefit will inure to the plaintiff from the information,” or if the plaintiff “intends to protect a private interest” through the FOIA litigation, then “an award of attorney’s fees is not recoverable.” *Church of Scientology*, 700 F.2d at 494. On the other hand, where the plaintiff “is indigent or a nonprofit public interest group, an award of attorney’s fees furthers the FOIA policy of expanding access to government information.” *Id.* The Ninth Circuit has instructed that, pursuant to the second and third factors, a court “should generally award fees if the complainant’s interest in the information sought was scholarly or journalistic or public-oriented,” but should not do so “if his interest was of a frivolous or purely commercial nature.” *Long*, 932 F.2d at 1316.

Plaintiffs argue that their non-profit status combined with the lack of any private commercial interest in the information they secured, strongly favors an award under these factors. *See* Beaman Decl. ¶¶ 1, 6-8. The government counters that contrary to plaintiffs’ current assertion that their goal in *OCE I* and *OCE II* was to force NMFS to provide more timely and fulsome responses to their and others’ FOIA requests, the real purpose of these lawsuits was to force NMFS to produce documents that plaintiffs could and did use in their suit against Stanford University. Declaration of Robin M. Wall [Dkt. No. 92-1], Ex. L (“Stanford Summary Judgment Papers,” noting that some of the FOIA production was used on a motion to compel and on a motion for summary judgment in the Stanford case). That purpose, according to the government, is a private one that does not make plaintiffs entitled to fees. *Oppo*. 11-13.

The cases relied on by NMFS considered private litigants who used FOIA to secure evidence in support of their private lawsuits. *See Hersh & Hersh v. U.S. Dept. of Health and Human Services*, No. 06-04234-PJH, 2008 U.S. Dist. LEXIS 110977, at \*7 (N.D. Cal. July 9,

1 2008) (denying an award of attorney’s fees where “plaintiff undertook this FOIA request for  
2 decidedly commercial purposes” when plaintiff was litigating private lawsuit against a defendant  
3 regarding defective medical devices and plaintiff failed to secure disclosure of the “vast majority”  
4 of documents it sought); *Ellis v. United States*, 941 F. Supp. 1068, 1078 (D. Utah 1996) (denying  
5 fees where documents sought for assistance in private tort suit, because while documents produced  
6 under FOIA created “some slight public benefit in bringing the government into compliance with  
7 FOIA and providing information of general interest to the public, the disclosure of the records did  
8 not add to the fund of information necessary to make important political choices”).<sup>16</sup> They do not  
9 address the situation here, where non-profit environmental advocacy organizations bring suit  
10 under FOIA as part of their ongoing efforts to shed light on how an agency is (or is not) protecting  
11 the environment, albeit with respect to a specific project.

12 Moreover, while plaintiffs were undoubtedly motivated in some part to secure documents  
13 from NMFS in order to assist their litigation against Stanford, there was a significant and separate  
14 public benefit sought and secured by plaintiffs shedding light on the actions of NMFS (as  
15 opposed to the actions of Stanford) in carrying out its agency duties and on its handling of  
16 plaintiffs’ and others’ FOIA requests.<sup>17</sup>

17 These factors weigh in favor of plaintiffs’ entitlement to fees.  
18  
19

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20 <sup>16</sup> I recognize that the court in *Sierra Club v. United States EPA*, 75 F. Supp. 3d 1125, 1144 (N.D.  
21 Cal. 2014) rejected an agency’s argument that a non-profit environmental group plaintiff had a  
22 commercial interest in the FOIA litigation because they intended to bring environmental litigation,  
in part because “Plaintiffs were not pursuing a separate private lawsuit against Luminant at the  
time they initiated the FOIA request.” The court, therefore, did not directly reach the issue raised  
here.

23 <sup>17</sup> NMFS’s other cases are inapposite, as they do not address whether use of documents secured  
24 through FOIA in other litigation equals a “commercial” interest in the FOIA litigation, but stand  
25 for the proposition that having a personal interest in the records sought does not increase the  
26 access to those records under FOIA. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143  
27 n.10 (1975) (“Sears’ rights under the Act are neither increased nor decreased by reason of the fact  
28 that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the  
average member of the public. The Act is fundamentally designed to inform the public about  
agency action and not to benefit private litigants.”); *Shannahan v. IRS*, 672 F.3d 1142, 1151 (9th  
Cir. 2012) (requestors’ interest in IRS documents about themselves to use in their civil tax suit  
does not negate applicability of FOIA exemptions preventing disclosure).



**C. Reasonable Basis in Law**

The fourth factor is “whether the government’s withholding had a reasonable basis in law”; in other words, whether the government’s actions appeared to have “a colorable basis in law” or instead appeared to be carried out “merely to avoid embarrassment or to frustrate the requester.” *Church of Scientology*, 700 F.2d at 492, 492 n.6; *see also Rosenfeld*, 903 F. Supp. 2d at 870; *Am. Small Bus. League*, 2009 WL 1011632, at \*4. This factor “is not dispositive” and can be outweighed where the other relevant factors favor an award. *Rosenfeld*, 903 F. Supp. 2d at 870 (internal quotation marks omitted); *see also O’Neill*, 951 F. Supp. at 1425 (noting that the reasonable basis in law factor “in particular should not be considered dispositive”). The burden is on the government to demonstrate that its withholding was reasonable. *Sierra Club*, 75 F. Supp. 3d at 1145.

Here, Judge Conti repeatedly found in no uncertain terms that NMFS failed to provide timely responses under FOIA. *See, e.g.*, March 30, 2015 Order at 24 (with respect to NMFS’s violation of FOIA deadlines “the record is clear, undisputed, and troubling .... In short, even though the Fisheries Service does not take the FOIA’s deadlines seriously, ‘[t]here can be no doubt that Congress [did].’”); July 20, 2015 Order at 19 (“The records in both this and the related case show a clear and undisputed breach of this [FOIA response deadline] requirement.”); October 21, 2015 Order at 18-19 (“the Court has received showing [of] an unmistakable history that the Fisheries Service fails to meet its statutory deadlines under FOIA and causes Plaintiffs (and likely others similarly situated) to suffer unpredictable, unreasonable delays.”).<sup>18</sup>

Judge Conti also found that in litigating this case, NMFS repeatedly failed to explain with sufficient detail the adequacy of its searches and the reasons for its withholdings thereby necessitating additional rounds of briefing by the parties and orders by the court.<sup>19</sup> As such, I

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<sup>18</sup> Judge Conti’s repeated use of strong adjectives like “troubling” and “unreasonable” separates this case from those relied on by NMFS where fees were denied because delayed responses were caused by confusion or “bureaucratic difficulty” in handling requests. *Oppo*. at 14.

<sup>19</sup> I recognize that Judge Conti ultimately found that NMFS had conducted adequate searches and appropriately withheld all documents except one. But those conclusions were reached only after multiple rounds of briefing and decision, necessitated by NMFS’s initially deficient declarations and *Vaughn* indexes.

1 conclude that neither NMFS's general responses to the FOIA requests nor its litigation position  
2 before this Court had a reasonable basis in law.

3 In sum, plaintiffs are entitled to an award of attorney's fees. The next step is to determine  
4 the amount owed.

### 5 **III. REASONABLE AMOUNT OF ATTORNEY'S FEES AND COSTS**

6 "[O]nce the court has determined that the plaintiff is both eligible for and entitled to  
7 recover fees, the award must be given and the only room for discretion concerns the  
8 reasonableness of the amount requested." *Long*, 932 F.2d at 1314. In making this determination,  
9 the court must scrutinize the reasonableness of (i) the hourly rates and (ii) the number of hours  
10 claimed. *Id.* at 1313-14. "If these two figures are reasonable, then there is a strong presumption  
11 that their product, the lodestar figure, represents a reasonable award." *Id.* at 1314 (internal  
12 quotation marks omitted). Nevertheless, a court "may authorize an upward or downward  
13 adjustment from the lodestar figure if certain factors relating to the nature and difficulty of the  
14 case overcome this strong presumption and indicate that such an adjustment is necessary." *Id.*

#### 15 **A. Hourly Rate**

16 NMFS argues plaintiffs' hourly rates are excessively high, and that the Court should apply  
17 the hourly rates set forth in the *Laffey* matrix plus locality adjustments, which would result in a  
18 decrease of 22.9% in the requested lodestar. *Oppo*. at 20-22. As I recognized in  
19 *Public.Resource.org v. United States Internal Revenue Serv.*, No. 13-CV-02789-WHO, 2015 WL  
20 9987018, at \*6 (N.D. Cal. Nov. 20, 2015), "[a]bsent some showing that the rates stated in the  
21 matrix are in line with those prevailing in this community . . . I agree [that] that the matrix is not  
22 persuasive evidence of the reasonableness of its requested rates." As in *Public.Resource.org*, I  
23 will not bind plaintiffs to the *Laffey* matrix, especially as statutory fee awards from this District do  
24 not establish that the *Laffey* matrix rates are in line with prevailing rates for statutory fee cases in  
25 the Bay Area legal community. *See, e.g., Public.Resource.org* (awarding rates from \$205 for  
26 paralegals up to \$645 for senior/lead counsel); *Sierra Club*, 75 F. Supp. 3d at 1152-53 (approving  
27 hourly rates of \$350 to \$650 in FOIA action); *Rosenfeld*, 904 F. Supp. 2d at 1001, 1004  
28 (approving hourly rates of \$460, \$550, and \$700 in FOIA action); *Hajro v. U.S. Citizenship &*



1 *Immigration Servs.*, 900 F. Supp. 2d 1034, 1054 (N.D. Cal. 2012) (approving hourly rates of \$450  
2 to \$625 in FOIA action) *vacated and remanded on other grounds*, 2015 WL 6405473 (9th Cir.  
3 Oct. 23, 2015); *see also Hiken v. Dep't of Def.*, 836 F.3d 1037, 1039 (9th Cir. 2016) (reversing  
4 district court order awarding fees at matrix rate).

5 The rates sought by counsel in this case are, generally, higher than the rates approved in  
6 other recent FOIA cases in this District. They are also, more importantly, significantly higher than  
7 rates that were requested and approved by these *same* counsel in recent cases in this District for  
8 environmental litigation. *See, e.g., OCE v. EPA*, 13-cv-02857 (Dkt. Nos. 82, 99) (awarding fees  
9 from \$435 to \$655/hr for work through early 2015); *San Francisco Baykeeper v. West Bay*  
10 *Sanitary Dist.*, No. 09-5676, 2011 WL 6012936 (N.D. Cal. Dec. 1, 2011) (approving \$585/hr for  
11 Sproul). Plaintiffs argue this upward departure is warranted because in the past they have relied  
12 on the *Laffey* matrix with locality adjustments, but recent cases confirm those rates under-  
13 compensate them. *See, e.g., Declaration of Christopher Sproul* [Dkt. No. 88] ¶ 15; *Declaration of*  
14 *Patricia Weisselberg* [Dkt. No. 86] ¶ 9.

15 Plaintiffs undertook a “market rate” analysis and seek compensation for that research from  
16 *this* case. The analysis was performed primarily by billing attorney Christopher Hudak. Hudak  
17 reviewed fee awards in a number of different types of cases from the Northern District, including  
18 class action litigation (antitrust, wage and hour, consumer protection, and securities) as well as one  
19 anti-SLAPP case and one FOIA case. *See, e.g., Declaration of Christopher Hudak* [Dkt. No. 84]  
20 ¶¶ 11-32. The market rate analysis did not consider more than one FOIA case (despite there being  
21 a number of cases on point) nor did it directly consider cases awarding statutory fees for  
22 environmental litigation.<sup>20</sup>

23 Plaintiffs have not demonstrated that the rates they seek here are reasonable for FOIA  
24

25 \_\_\_\_\_  
26 <sup>20</sup> The OCE attorneys did rely for “data points” on the Declaration of Richard M. Pearl from a  
27 state court case, *Citizens Committee To Complete The Refuge, Inc. v. City of Newark*, Case No.  
28 RG10530015, (CA Superior Ct. County of Alameda). The Pearl declaration focused on attorney’s  
fees rates through 2014, and did review some statutory fee-shifting awards, as opposed to the class  
action attorney’s fee awards focused on by the plaintiffs here. *See, e.g., Weisselberg Decl.* ¶¶ 11-  
16; *Sproul Decl., Ex. 32; Hudak Decl.* ¶ 34.

1 litigation (or environmental fee-shifting litigation). They seek to downplay the fact that in cases  
 2 from 2014 and 2015 *these same attorneys* requested significantly lower attorney’s fee rates. I do  
 3 not believe the case law supports limiting plaintiffs to their prior requested rates, but I do believe  
 4 that any *significant* upward departure should be justified, for example, by declarations explaining  
 5 the increases in light of increased expenses from doing business and practicing in certain markets  
 6 or other factors. I also do not find plaintiffs’ focus as support for their requested hourly rates in  
 7 these cases on large scale, complex class action cases to be persuasive. That is not to say that  
 8 FOIA cases cannot be complex. But the high rates awarded for complex class action cases can be  
 9 explained in large part by the necessity in those cases for plaintiffs’ counsel to incur significant  
 10 cost outlays (for experts, document review systems, travel, depositions, etc.) as well as attorney  
 11 time (to review hundreds of thousands of documents, numerous depositions, etc.) which are not  
 12 typically required in FOIA cases and were not required in these cases.

13 Accordingly, I find that the hourly rates plaintiffs request here are not adequately  
 14 supported and are not reasonable. This conclusion is consistent with *Hiken v. Dep’t of Def.*, 836  
 15 F.3d 1037, 1044–46 (9th Cir. 2016), where the Ninth Circuit confirmed that a “reasonable rate” is  
 16 the rate prevailing “in the community” for “similar work” performed by attorneys of comparable  
 17 skill and experience and based on record evidence of prevailing historical rates. I do not find that  
 18 plaintiffs’ survey is based on the performance of “similar work” by attorneys of comparable skill  
 19 and experience.

20 Plaintiffs shall recalculate their lodestar based on hourly rates that are consistent with the  
 21 rates they requested in prior FOIA or environmental cases for the same time periods. For  
 22 example, time spent on these cases in 2015 should be sought at the same rate previously sought  
 23 and/or awarded by a court for time spent in 2015. For time in 2016 as to which plaintiffs may  
 24 have not had an hourly rate approved by another court plaintiffs are entitled to a 10% increase  
 25 over their 2015 approved-rates, absent specific justification supported by a declaration explaining  
 26 why a particular attorney or paralegal should be granted a higher percentage increase.<sup>21</sup>

27 \_\_\_\_\_  
 28 <sup>21</sup> For any biller in these cases who has not had a prior-court-submitted or approved billing rate,  
 plaintiffs shall use a prior-court-approved billing rate for an attorney or paralegal of comparable

**B. Hours Expended**

NMFS also argues that the hours sought by plaintiffs cover time and tasks that were neither necessary nor reasonable for the prosecution of these suits and asks me to reduce the requested fee amount for the following:

- A \$188,381.47 reduction for plaintiffs’ work on the claims they lost;
- A \$26,686.22 reduction for work on pleadings and other papers that were never filed;
- A \$89,442.20 reduction for work performed at the administrative stage and review of documents produced;
- A reduction for work unrelated to *OCE I* and *OCE II*; and
- A 30-50% reduction generally for excessive, redundant, and unnecessary work.<sup>22</sup>

**1. Claims Lost**

NMFS argues that plaintiffs are not entitled to \$188,381.47 in fees (calculated at the hourly rates that NMFS objects to) for “distinct” claims they lost: (i) claims against FWS and the Corps; (ii) claims regarding the adequacy of the searches in *OCE II* (based on a frivolous argument that NMFS’s declarant’s testimony was “hearsay”); (iii) unsuccessful challenges to NMFS’s withholdings; (iv) claims regarding actual and pattern and practice search cut-off dates; and (v) plaintiffs’ response to the October 21 2015 Order to Show Cause as to whether further injunctive relief was necessary.<sup>23</sup>

With respect to the \$3,506.18 incurred with *OCE III*, plaintiffs admit they do not seek to recover for that time. So there is no longer a dispute as to that time/amount. The only other unsuccessful legal theory/claim NMFS “breaks out” time for is the \$23,032.40 plaintiffs charge

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experience.

<sup>22</sup> Plaintiffs explain that before submitting their request, most billers took 10% of the time billed “off the top” to account for any potential inefficiencies or redundancies in their work. Sproul Decl. ¶¶ 92, 97; Weisselberg Decl. ¶ 41; Isaacs Decl. ¶¶ 6-7; Costa Decl. ¶ 6; Hudak Decl. ¶ 35 (worked over 100 hours, but seeking payment for approximately 30 hours).

<sup>23</sup> NMFS breaks down the \$188,381.47 (or more accurately \$188,381.48) as follows: \$23,032.40 for 37.1 hours spent on the opposition to NMFS’s showing in response to Judge Conti’s OSC; \$161,842.90 as a 50% reduction from the \$323,685.79 plaintiffs billed for pleadings, summary judgment, supplemental briefing and the joint submission; and \$3,506.18 incurred with *OCE III*.

1 for 37.1 hours spent responding to NMFS's showing in response to Judge Conti's Order to Show  
2 Cause. Oppo. 17. However, I find that that time was reasonable and necessary. Judge Conti's  
3 OSC raised significant questions regarding the steps NMFS was taking to address its FOIA  
4 backlog, and NMFS filed a detailed response, supported by declarations. Plaintiffs filed a brief to  
5 contest some of the assertions made by NMFS, but that pleading was helpful and relied on by me  
6 in determining whether any live issues remained in the litigation, even though I denied plaintiffs'  
7 request for further injunctive relief as to the backlog.

8 NMFS does not break out the time spent on the other "unsuccessful" issues because  
9 plaintiffs' billing records do not allow them to. NMFS instead argues the 595.6  
10 hours/\$323,685.79 plaintiffs billed to pleadings for the summary judgment, supplemental briefing,  
11 and the joint submission required by the October 2015 Order should be reduced by 50% to  
12 account for plaintiffs' other losing claims/theories. Oppo. 17-18; Wall Decl., Ex. B (Summary  
13 Fee Analysis). I disagree.

14 As to claims against FWS and the Corps for their alleged part in causing repeated delays in  
15 NMFS's FOIA responses, while plaintiffs were not ultimately successful in their claims against  
16 those entities, the claims made were part and parcel of the impermissible and excessive delay  
17 claims against NMFS. This time is compensable.

18 As to claims regarding the adequacy of the searches in *OCE II* (based in part on the  
19 argument that NMFS's declarant's testimony was hearsay), while plaintiffs eventually lost this  
20 claim, Judge Conti forced NMFS to submit supplemental briefing explaining the adequacy of its  
21 searches. NMFS's initial explanations, therefore, were deficient and plaintiffs' successfully  
22 argued that deficiency to Judge Conti in their initial and supplemental briefing. This time is  
23 compensable.

24 As to the unsuccessful challenges to NMFS's withholdings, plaintiffs eventually lost all  
25 but one of these claims. But in the process of the initial and supplemental rounds of briefing,  
26 NMFS agreed to produce more documents and NMFS had to explain its actions in greater detail  
27 due to deficiencies in their initial briefing and declarations. This time is compensable.

28 And as to the eventually unsuccessful claim regarding NMFS's pattern and practice of

1 applying improper search cut-off dates, while plaintiffs did not secure an order from Judge Conti  
2 finding that NMFS had an illegal pattern or practice, the record supports at least an inference that  
3 during this litigation NMFS implemented a new or clarified policy. Even assuming it was simply  
4 a clarified policy, that clarification produced a public benefit for future FOIA requestors. This  
5 time is compensable.

## 6 **2. Pleadings and Papers Never Filed**

7 NMFS argues that plaintiffs should not be compensated for 49.1 hours/\$26,686.22 for  
8 work on pleadings that were never filed, including draft amended complaints in *OCE I* and *OCE*  
9 *II*, a motion for reconsideration, and a motion for relief. Wall Decl., Ex. G (Unfiled Papers).

10 In reply, Sproul explains: (i) the work done on the unfiled SAC in May 2014 in *OCE I* was  
11 used on the motion for summary judgment in *OCE I* and is therefore compensable (Sproul Reply  
12 Decl. ¶ 5); (ii) the 3.16 hours billed in February 2015 for a “motion for relief” was in fact work  
13 done for the Notice Regarding Submitted Matter and Request For Ruling filed on March 2, 2015  
14 (*id.* ¶ 6); (iii) 13.19 hours of work in October 2014 was for a pleading filed in *OCE II*, Dkt. 58 (*id.*  
15 ¶ 7); (iv) 1.32 hours of time billed in May 2015, was cut from the request on plaintiffs’ Reply (and  
16 not currently sought); and (iv) the remaining hours that were spent on the unfiled motion for  
17 reconsideration in January 2016 are compensable because that unfiled motion was used as  
18 leverage to get NMFS to agree to a form of judgment and produce additional documents. *Id.* ¶ 8.  
19 Weisselberg also, on review, cut 0.56 of time from her entries challenged in Wall’s Ex. G, because  
20 those entries represented work on what was to become *OCE III*. Weisselberg. Reply Decl. ¶ 11.

21 Considering the declarations, I find that all of the challenged time except the time spent on  
22 the unfiled motion for reconsideration is compensable. Plaintiffs have adequately identified how  
23 the time identified by NMFS was spent or used for pleadings actually filed in this action.  
24 However, the time spent on the unfiled motion for reconsideration in January 2016 was created  
25 voluntarily by plaintiffs and used for “leverage” but was never necessary or useful for any  
26 contested decision made by me.

## 27 **3. Administrative Efforts**

28 NMFS wants a further reduction for 157.7 hours/\$89,442.20 that plaintiffs spent drafting

1 FOIA requests, working on the agency administrative appeals, and reviewing the documents  
 2 produced. Wall Decl., Ex. I. Generally, “work performed during the pre-litigation administrative  
 3 phase of a FOIA request is not recoverable under FOIA.” *Elec. Privacy Info. Ctr. v. United States*  
 4 *Dep't of Homeland Sec.*, 811 F. Supp. 2d 216, 237 (D.D.C. 2011); *but see Public.Resource.org*,  
 5 2015 WL 9987018, at \*8 (allowing recovery for two time entries on letters seeking agency  
 6 reconsideration “given the clear overlap in subject matter between the letter and this litigation, the  
 7 letter’s explicit contemplation of a lawsuit, and the proximity in time between the letter and the  
 8 filing of” the complaint).

9 In their Reply and supporting declarations, plaintiffs cut some of the contested time for  
 10 work on the FOIA requests and administrative appeals, but kept the time spent on two specific  
 11 FOIA requests in. As explained by lead counsel Sproul:

12 I and my co-counsel have been mindful that we are not entitled to  
 13 recover for drafting all our FOIA requests and reviewing all the  
 14 documents obtained for the purpose of learning the substantive  
 15 content of those documents for the Plaintiffs’ citizen suit litigation  
 16 against Stanford or larger public advocacy campaign related to  
 17 Stanford and the San Francisquito Creek watershed. However, we  
 18 have concluded that we may recover for time spent drafting FOIA  
 19 requests specifically intended to garner information for use in this  
 20 litigation and reviewing documents for such litigation purposes. I  
 21 and my co-counsel have carefully segregated the time spent drafting  
 22 FOIA requests reviewing documents such that we are seeking  
 23 recovery only for the latter time. With respect to drafting FOIA  
 24 requests, we are seeking to recover for time spent drafting (or  
 25 appealing responses concerning) only two of the multiple FOIA  
 26 requests at issue in this proceeding that Plaintiffs specifically used to  
 27 gather information used as evidence against NMFS in this case:  
 28 FOIA requests sent on April 3, 2014 and November 24, 2015. (the  
 latter is Exhibit M to the Wall Declaration, (OCE I, Dkt. 92-1). The  
 April 3, 2014 FOIA sought documents concerning the searches done  
 by NMFS and the responses provided by NMFS to Plaintiffs in  
 response to their FOIA requests with the aim of developing evidence  
 that NMFS’s searches have not complied with FOIA. Plaintiffs’  
 November 24, 2015 FOIA request sought documents with the  
 specific intent of trying to garner evidence that Plaintiffs’ litigation  
 had catalyzed NMFS to respond more promptly to Plaintiffs’ FOIA  
 requests. The aim was to develop evidence in support of catalyst  
 theory arguments for purposes of attorney fees recovery in  
 settlement and, if necessary, a fees motion. Plaintiffs’ November 24,  
 2015 FOIA Request sought documents related to NMFS’s assertions  
 that it had instituted several FOIA reforms also with the specific  
 intent of trying to garner evidence that Plaintiffs’ litigation had  
 catalyzed NMFS to institute these reforms. Again, our aim was to  
 develop evidence in support of catalyst theory arguments for



1 purposes of attorney fees recovery in settlement and, if necessary, a  
 2 fees motion. As discussed in the Reply Declaration of Patricia  
 3 Weisselberg, Plaintiffs have in fact used documents obtained in  
 4 response to their FOIA requests as exhibits supporting the catalyst  
 theory arguments they are advancing in their Fees Motion and  
 plaintiffs agree to reduce some of their time spent on drafting the  
 FOIA requests and the administrative appeals.

5 Sproul Reply Decl. ¶ 10.

6 Accordingly, Michael Costa cut 11.91 hours/\$6,148.98 for drafting FOIA requests and  
 7 appeals, except for the work he did on the April 3, 2014 and November 24, 2015 FOIA requests  
 8 that were aimed at gathering information for this lawsuit. Costa Reply Decl. ¶ 3. Jodene Isaacs  
 9 cut 11.21 hours/\$5,599.40 for drafting FOIA requests and appeals. Isaacs Reply Decl. ¶ 2.  
 10 Weisselberg cut 8.74 hours spent on FOIA appeals, included in Wall's Ex. I. Weisselberg Reply  
 Decl. ¶ 13.

11 The bulk of the remaining time appears to be for document review conducted primarily by  
 12 Costa and Isaacs. NMFS argues that document review is simply not compensable. *See, e.g.,*  
 13 *Sierra Club v. United States EPA*, 75 F. Supp. 3d 1125, 1149 (N.D. Cal. 2014) ("As Plaintiffs  
 14 received, at least in part, the relief they sought when the EPA produced the documents, the time  
 15 they expended reviewing the documents was is properly characterized as post-relief activity,  
 16 separate from the litigation."); *Citizens for Responsibility & Ethics v. United States DOJ*, 825 F.  
 17 Supp. 2d 226, 231 (D.D.C. 2011) ("Plaintiff would have had to expend this time had DOJ timely  
 18 produced the documents without litigation; the cost of reviewing documents produced in response  
 19 to a FOIA request is simply the price of making such a request.").

20 Plaintiffs respond that in this case, where the adequacy of NMFS's searches and  
 21 withholdings were central claims, plaintiffs needed to spend significant amounts of time reviewing  
 22 the documents to support those claims in litigation. That might be true but plaintiffs'  
 23 withholding claims were almost totally rejected (except for one document) and plaintiffs'  
 24 inadequate search claims were likewise mostly unsuccessful (except for two narrow wins in *OCE*  
 25 *I*). Plaintiffs also do not cite any case law allowing for recovery of time spent reviewing document  
 26 productions where that review is necessary for a plaintiff to be able to challenge the adequacy of  
 27 an agency's search or the propriety of withholdings.  
 28

1 Based on the declarations, I find that the Costa time spent on the two identified FOIA  
 2 requests is compensable, given the overlap in subject matter between requests and this litigation as  
 3 well as the proximity in time between those requests and the filing of pleadings in this case. The  
 4 time spent reviewing the documents produced is not compensable.

5 **4. Work Unrelated to *OCE I* and *OCE II***

6 NMFS argues that plaintiffs should not be compensated for 8.9 hours/\$4,461.23 billed by  
 7 Sproul, Weisselberg, Isaacs, and Costa that it contends is unrelated to *OCE I* and *OCE II*,  
 8 including litigation with Stanford and entries related to FWS and the Corps. Wall Decl., Ex. H  
 9 (Unrelated Matters). In Reply, Weisselberg explains the relevance of her entries listed on Exhibit  
 10 H to *OCE I* and *OCE II*. Weisselberg Reply Decl. ¶ 12. Sproul also addresses the 8.9 hours listed  
 11 in Exhibit H, and other than two mistakes accounting for 0.35/hours (which were cut in the Reply)  
 12 adequately explains that those hours billed were necessary for *OCE I* and *OCE II*. Sproul Reply  
 13 Decl. ¶ 9; *see also* Costa Reply Decl. ¶ 16. This time is compensable.

14 NMFS also argues that plaintiffs have (perhaps inadvertently) claimed time for work on  
 15 *OCE III*, despite their claim that they are not seeking that time. In its Opposition and supporting  
 16 declaration, NMFS identified 5.9 hours/\$3,506.18 it contends was incurred on *OCE III*. *See* Wall  
 17 Decl., Ex. D. As noted above, this time is not compensable.

18 **5. Reduction for Excessive or Redundant Work**

19 NMFS asks the Court to reduce by 30-50% any fee award to account for excessive,  
 20 cumulative, and inefficient billing. *Oppo.* at 24. NMFS specifically challenges: (i) the 158 hours  
 21 spent on the opening attorney's fees motion and declarations; (ii) 249 hours on summary judgment  
 22 and supplemental briefing in *OCE I*; (iii) 263.8 hours on summary judgment and supplemental  
 23 briefing in *OCE II*; (iv) 157.7 hours on the "administrative phase" including record review; and (v)  
 24 the fact that five attorneys worked on the case, which NMFS contends is excessive given the  
 25 nature of these cases and is demonstrated by the 173.7 hours/\$107,885.73 billed for telephone  
 26 calls and email correspondence between counsel for "coordination" purposes. Wall Decl., Ex. F  
 27 (Coordination Activities).

28 In their Reply declarations, two of the billing attorneys exercised "more" billing judgment



1 to cut hours in light of potential redundancy. *See* Costa Reply Decl. ¶ 4 (cutting 4.05  
2 hours/\$2,136.38); Isaacs Reply Decl. ¶ 3 (cutting just over 14 hours/\$7,087.91). No other  
3 reductions for excessive or redundant work appear to have been made, other than the 10%  
4 “off the top” that each of the billing attorneys took off their time initially.

5 The time spent on the opening attorney’s fees motion and declarations is excessive and  
6 unreasonable. In particular, plaintiffs should not be compensated for the time Hudak spent  
7 (unsuccessfully as addressed above) surveying cases in order to determine what billing rates  
8 should be used for plaintiffs in this fee motion. Moreover, the time spent in drafting the fee  
9 motion which itself does not raise any unique issues or issues of first impression is excessive.  
10 Plaintiffs purport to be experienced FOIA and environmental litigators; submission of fee petitions  
11 is a regular part of that work. I recognize that reviewing the time records, exercising billing  
12 judgment, and creating supporting declarations will take significant time in each case no matter  
13 how experienced counsel is. But the time spent on the *brief* appears to be excessive in and of  
14 itself. A 25% reduction in the time spent on the opening attorney’s fees motion is appropriate, as  
15 is elimination of the time Hudak spent on his inapposite attorney’s fees survey.

16 As to time spent on the Reply brief and declarations (which NMFS did not have the  
17 opportunity to attack), I conclude that the time spent on the brief itself is reasonable, but not the  
18 time spent reviewing the time slips and submitting supplemental declarations, because much of  
19 *that* time was spent accounting for errors pointed out by NMFS and then making additional  
20 reductions for improper or otherwise redundant billing. Only 50% of the time spent on the  
21 declarations in support of the Reply is compensable.

22 As to the 249 hours spent on summary judgment and supplemental briefing in *OCE I* as  
23 well as the 263.8 hours spent on summary judgment and supplemental briefing in *OCE II*, I find  
24 that the time is reasonable and compensable. The summary judgment briefing was extensive,  
25 detailed and addressed a number of issues where there was little precedent. In these circumstances  
26 I cannot say the time spent was unreasonable.

27 As to the 157.7 hours on the “administrative phase” including record review, as noted  
28 above, plaintiffs have voluntarily cut all time on drafting the FOIA requests, except for time Costa

United States District Court  
Northern District of California

1 spent on two, and I have already found that time spent reviewing the documents produced is not  
2 compensable.

3 Finally, as to the time spent on coordination between counsel, I find that 173.7 hours is  
4 excessive. While this case was complex in the sense that there were a large number of FOIA  
5 requests at issue, at least three lawsuits filed, and multiple rounds of summary judgment and  
6 additional briefing required, the sheer number of attorneys involved many of whom it appears  
7 were involved in part because of the Stanford litigation meant that there was an excessive  
8 amount of “coordination.” A 25% reduction in the amount of time spent on coordination is  
9 appropriate.

10 **C. Costs**

11 Plaintiffs seek \$3,190.39 in costs. Dkt. No. 94. NMFS does not oppose the amount of  
12 costs, but argues instead that in light of the limited nature of plaintiffs’ success and the agency’s  
13 good faith, costs are not warranted. Oppo. at 24-25. Having concluded that plaintiffs are  
14 substantially prevailing and that the agency’s defenses were without a reasonable basis in law, an  
15 award of costs is appropriate. Plaintiffs are awarded \$3,190.39 in costs.

16 **CONCLUSION**

17 For the foregoing reasons, plaintiffs will be awarded attorney’s fees, but at a significantly  
18 reduced amount, and are awarded \$3,190.39 in costs.

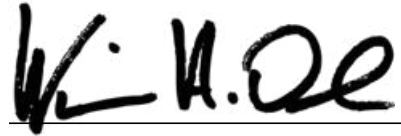
19 Within twenty days of the date of this Order, plaintiffs shall, after meeting and conferring  
20 with defense counsel, submit a *joint* supplemental brief and proposed judgment containing a  
21 revised request for attorney’s fees that excludes all of the time I have identified above as not being  
22 compensable. The parties shall make all reasonable efforts to reach agreement on the time to be  
23 included in light of the time that has been excluded by this Order. If the parties cannot agree, any  
24 remaining disputes shall be explained in no more than two pages.

25 Plaintiffs must also recalculate their lodestar, using hourly rates that were approved for  
26 them in past years and using a rate for 2016 that is no more than 10% above their 2015 rates,  
27 unless otherwise justified. At the time the joint supplemental brief and proposed judgment is filed,  
28 plaintiffs shall submit a declaration explaining and identifying: (i) the rates for each biller for each

1 year billed; (ii) the case(s) for which each biller's rates have been requested and approved; (iii) the  
2 basis for the 2016 hourly rates sought; and (iv) the basis for any hourly rate sought for a biller who  
3 has not had her or his time approved by a prior court order.

4 **IT IS SO ORDERED.**

5 Dated: March 1, 2017

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8 William H. Orrick  
9 United States District Judge  
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United States District Court  
Northern District of California

<b>Tracking Number</b>	<b>Type</b>	<b>Requester</b>
DOC-NOAA-2017-000701	Request	Zeenat Mian
DOC-NOAA-2017-000683	Request	Matthew J. Novak
DOC-NOAA-2017-000679	Request	Jennifer A. Burnette
DOC-OS-2017-000578	Request Detail Task	Derek Kravitz
DOC-OS-2017-000597	Other	Josh Voorhees

Requester Organization	Submitted	Assigned To	Case File Assigned To
	03/01/2017	NOAA	NOAA
Gizmodo / Univision	02/25/2017	NOAA	NOAA
	02/23/2017	NOAA	NOAA
ProPublic	02/22/2017	USEC	Harriette Boyd
Slate	02/24/2017	NOAA	James Davis

<b>Perfected?</b>	<b>Due</b>	<b>Closed Date</b>	<b>Status</b>
No	TBD	TBD	Initial Evaluation
No	TBD	TBD	Submitted
No	TBD	TBD	Assignment Determination
No	03/08/2017	TBD	Open
Yes	03/10/2017	TBD	Open

**Detail**

Under the Freedom of Information Act I would like to request all documents and communications inter office (within NOAA) and intra-office (between NOAA and external sources/entities) pertaining to the email titled &quot;FORMAL COMPLAINT: HARASSED yet again by HMMA volunteer&quot; sent by Zeenat Mian. Period I request a list of all vacant positions that the NOAA is unable to fill as a result of the current federal hiring freeze, enacted by the President effective at noon on January 22, 2017. If a single list has not been compiled, I request the lists that have been generated by each office or department individually.

A copy of the most current Marine Mammal Inventory Report, listing all cetaceans both living and deceased. Appointees under Temporary Transition Schedule C (TTC) Authority and Temporary Transition SES Appointing Authorities (NC SES) hired between January 20, 2017 and present (the return of this request), as specified in this memo: <https://www.chcoc.gov/content/temporary-transition-schedule-c-authority-and-temporary-transition-senior-> I hereby request a copy of any records or communications, including but not limited to emails, between the Department of Commerce and the Trump Organization, including but not limited to those with the following company representatives: Donald J. Trump, Jr.; Eric Trump; Ivanka Trump, Allen Weisselberg, George Sorial,

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**From:** Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov>  
**Sent:** Monday, February 6, 2017 10:24 AM  
**To:** Mark Graff - NOAA Federal; Eller, Rayna (Federal)  
**Cc:** Lola Stith - NOAA Affiliate; Shawn Martin - NOAA Federal  
**Subject:** Re: FOIA Appeal Acknowledgment DOC-NOAA-2016-001563  
**Attachments:** RR REDACTED b(5) b(6) 99 files index.xlsx; UR FULL RELEASE 2016-001563 14 files index.xlsx; UR FULL RELEASE 2016-001563 25 files index.xlsx; UU FULLY WITHHOLD b(5) 2016-001563 464 files index.xlsx; UU REDACTED b(5) b(6) CLEAN COPY 2016-001563 99 files index.xlsx; UU REFER fs.fed.us 2016-001563 177 files index.xlsx

(b)(5)

On Mon, Feb 6, 2017 at 5:03 AM, Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)> wrote:  
Hello Rayna,

(b)(5)

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
[\(301\) 628-5658](tel:3016285658) (O)  
(b)(6) (C)

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On Fri, Feb 3, 2017 at 9:09 AM, Eller, Rayna (Federal) <[REller@doc.gov](mailto:REller@doc.gov)> wrote:

Mark,

I have been assigned this appeal following the retirement of Alice McKenna. The requester's attorney has contacted us regarding the status of the appeal.



(b)(5)

(b)(5)

Thank you.

Rayna Eller

Staff Attorney

General Law Division

Office of the General Counsel

[202-482-5550](tel:202-482-5550)

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Ana Liza S. Malabanan  
Freedom of Information Act (FOIA) Coordinator  
Information Services and Management Branch  
Operations, Management & Information Division  
NOAA Fisheries West Coast Region  
U.S. Department of Commerce  
Office: 562-980-4008





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To

Annie Birnie - NOAA Federal <annie.birnie@noaa.gov>;Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>

Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

Odell, Steve (USAOR) <steve.odell@usdoj.gov>;Sean Martin <sean.martin@usdoj.gov>

Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>;Annie Birnie - NOAA Federal <annie.birnie@noaa.gov>;Eri

Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>;Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>;Annie Birnie - NOAA Federal <annie.birnie@noaa.gov>

Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>;Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>

Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>;Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>;Annie Birnie - NOAA Federal <annie.birnie@noaa.gov>

Goehring, Bradley -FS <bgoehring02@fs.fed.us>

Martin, Sean (USAOR) <sean.martin@usdoj.gov>

Goehring, Bradley -FS <bgoehring02@fs.fed.us>

Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

Odell, Steve (USAOR) <steve.odell@usdoj.gov>;Sean Martin <sean.martin@usdoj.gov>;Sheila Lynch - NOAA Feder

Black, Val - OGC (VAL.BLACK@OGC.USDA.GOV) <val.black@ogc.usda.gov>;'Sheila Lynch - NOAA Federal' (sheila.ly

Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

Sean Martin <sean.martin@usdoj.gov>;Odell, Steve (USAOR) <steve.odell@usdoj.gov>

Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>;Annie Birnie - NOAA Federal <annie.birnie@noaa.gov>

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Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>;Annie Birnie - NOAA Federal <annie.birnie@noaa.gov>

Odell, Steve (USAOR) <steve.odell@usdoj.gov>;Sean Martin <sean.martin@usdoj.gov>

Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

Annie Birnie - NOAA Federal <annie.birnie@noaa.gov>;Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>

Odell, Steve (USAOR) <steve.odell@usdoj.gov>;Sean Martin <sean.martin@usdoj.gov>

Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

Kim Kratz - NOAA Federal <kim.kratz@noaa.gov>

Kim Kratz - NOAA Federal <kim.kratz@noaa.gov>;Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>;Annie B

Sean Martin <sean.martin@usdoj.gov>;Odell, Steve (USAOR) <steve.odell@usdoj.gov>

Odell, Steve (USAOR) <steve.odell@usdoj.gov>;Sean Martin <sean.martin@usdoj.gov>



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1.7.16 Friends of Mount Hood Timberline Bike Park Consultation.pdf

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From

Nancy Johnson - NOAA Federal <nancy.johnson@noaa.gov>

Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>

Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>

3.pdf

Annie Birnie - NOAA Federal <annie.birnie@noaa.gov>

To

Jim B. Muck - NOAA Federal <jim.b.muck@noaa.gov>;Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>;Jen

Goehring, Bradley -FS <bgoehring02@fs.fed.us>

Northrop, Lisa A -FS <lorthrop@fs.fed.us>

Goehring, Bradley -FS <bgoehring02@fs.fed.us>

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Re: Timberline	4 image001.png;image002.png;image003.png;image004.png
Letter regarding Timberline Bike Park	1 2015_12_16_final-NMFS_Reinitiation_Timberline_MHNF_WC
Re: FW: Draft NMFS BiOp Comments	4 image001.png;image002.png;image003.png;image004.png



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DateSent DateSent From

12162015 11:23 Sandra Forrester - NOAA Affiliate <sandra.forrester@noaa.gov>

12282015 15:22 Jim B. Muck - NOAA Federal <jim.b.muck@noaa.gov>

1072016 13:46 Kim Kratz - NOAA Federal <kim.kratz@noaa.gov>

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4252016 9:48 Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>

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7142016 16:07 Eric Murray - NOAA Federal <eric.murray@noaa.gov>

8042016 10:17 Annie Birnie - NOAA Federal <annie.birnie@noaa.gov>

8042016 15:17 Nancy Johnson - NOAA Federal <nancy.johnson@noaa.gov>

8042016 15:25 Annie Birnie - NOAA Federal <annie.birnie@noaa.gov>

8052016 9:40 Bonnie Hossack - NOAA Affiliate <bonnie.hossack@noaa.gov>

To	Subject	At
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Goehring, Bradley -FS <bgoehring02@fs.fed.us>;Wanner,	Review Requested: Updated proposed action	1
nlinkford@fs.fed.us <nlinkford@fs.fed.us>	Fwd: Review Requested: Updated proposed a	1
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Goehring, Bradley -FS <bgoehring02@fs.fed.us>	Timberline	
Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>;Kei	05-19 Timberline draft.	1
Annie Birnie - NOAA Federal <annie.birnie@noaa.gov>	QA Review of Timberline BiOp	
Mischa Connine - NOAA Federal <mischa.connine@noaa.g	Fwd: Memo on ACS issue in Timberline Bike P	1
Annie Birnie <annie.birnie@noaa.gov>	Timberline Reintiation	1
Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>;Sf	Timberline Bike Park Re-initiation.	1
Annie Birnie - NOAA Federal <annie.birnie@noaa.gov>	Final Word document - Timberline Downhill B	1



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1.7.16 Friends of Mount Hood Timberline Bike Park Consultation.pdf

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Final Memo re ACS consistency 8.3.16.pdf

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0.7.1491.15217 Message 6242016 7:18  
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0.7.1491.15222 Message 6242016 11:55  
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0.7.1491.15232 Message 7072016 7:31  
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0.7.1491.15257.4 File

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0.7.1491.15266.5 File  
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Subject	At
Re: Memo re: ACS consistency and timberline	1
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Re: Timberline BiOp	1
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client-attorney privilege information - Timberline	1
attorney-client privilege Timberline biop	1
Re: Revised ACS memo	1
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Re: Revised timberline biop	
attorney-client privilege Timberline Bike Park	
Re: Update on BARK	
Re: Update on BARK	
Next steps for timberline	
Re: Letter from Mt. Hood National Forest	
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Re: Letter from Mt. Hood National Forest	
Re: Timberline bike park draft.	
Re: Timberline bike park draft.	
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Re: Timberline - revised biop	
Re: Timberline - revised biop	
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Re: reviewed biop  
Re: New Timberline biop - review draft  
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Fwd: Comments on Draft Bike Park BiOp 6

Re: Timberline  
Re: Timberline  
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Re: Timberline  
turbidity measurements recordings  
Re: Timberline 1

re: draft BiOp for Timberline  
Re: Timberline, again 1

Re: draft BiOp for Timberline  
Re: a few more points from the call last week 1

Re: a few more points from the call last week 1

Re: a few more points from the call last week  
Re: FW: Comments on Draft Bike Park BiOp 4

RE: FW: Comments on Draft Bike Park BiOp	4
RE: FW: Comments on Draft Bike Park BiOp	5
Re: Revised timberline biop	1
RE: FW: Comments on Draft Bike Park BiOp	5
Re: Revised timberline biop	1
Re: Memo on Timberline Bike Park Biop	
Re: Memo on Timberline Bike Park Biop	
Re: Memo on Timberline Bike Park Biop	
Re: Memo on Timberline Bike Park Biop	1
Re: Memo on Timberline Bike Park Biop	
Re: Memo on Timberline Bike Park Biop	1
Re: final BiOp -- Timberline bike park	
RE: final BiOp -- Timberline bike park	1
Re: final BiOp -- Timberline bike park	1
Re: final BiOp -- Timberline bike park	1
RE: final BiOp -- Timberline bike park	1
Re: final BiOp -- Timberline bike park	1
Re: Reminder of Timberline call today at 11:45	
Re: Reminder of Timberline call today at 11:45	
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Re: Reminder of Timberline call today at 11:45	
Re: Reminder of Timberline call today at 11:45	
Re: Reminder of Timberline call today at 11:45	
Follow up on Timberline issue	

Fwd: Timberline Mountain Bike Park Implementation Update 4

Re: NW/SW Section 7 Reviewer Meeting - today 2 pm  
Timberline BO coordination.  
Re: Timberline BO coordination.  
Fwd: FW: Turbidity and Bumblebee information 1

Update on BARK  
RE: Update on BARK  
RE: Update on BARK  
Re: Update on BARK  
Fwd: Update on BARK  
Re: Update on BARK  
RE: Update on BARK  
Re: Update on BARK  
Re: Update on BARK  
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RE: Update on BARK  
FW: Timberline mountain bike project and NMFS  
Fwd: FW: Timberline mountain bike project and NMFS  
Re: \*\*attorney-client privileged\*\* reinitiation letter  
Re: FW: Timberline mountain bike project and NMFS  
\*\*attorney-client privileged\*\* reinitiation letter 1

RE: FW: Timberline mountain bike project and NMFS  
Re: FW: Timberline mountain bike project and NMFS  
Re: FW: Timberline mountain bike project and NMFS  
Re: \*\*attorney-client privileged\*\* reinitiation letter 1

Re: Letter from Mt. Hood National Forest  
RE: FW: Timberline mountain bike project and NMFS  
Re: Letter from Mt. Hood National Forest  
Re: Letter from Friends of Mt. Hood - Re-initiation of Consultation  
ACS memo 1

Memo re: ACS consistency and timberline 1

RE: ACS memo  
Re: ACS memo  
FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Order  
RE: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Order  
FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Order  
Re: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Order

Re: Memo re: ACS consistency and timberline  
RE: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Order  
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Follow up re: Timberline  
Timberline check in  
RE: Timberline check in  
Timberline  
Re: Timberline check in  
Re: Memo re: ACS consistency and timberline  
Re: FW: Supplemental information pertaining to Glade trail work 4

FW: Supplemental information pertaining to Glade trail work 5

Fwd: FW: Supplemental information pertaining to Glade trail work 5

Re: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Brief  
Re: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Brief  
Re: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Brief  
Re: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Brief  
Re: Memo re: ACS consistency and timberline  
Reinitiation question  
Re: Reinitiation question  
Re: Reinitiation question  
Re: Reinitiation question  
Fwd: Baseline condition question 1

RE: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Brief 1

RE: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Brief  
Re: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Brief  
RE: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Brief

Re: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Brief  
Re: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Brief  
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Re: timberline  
Timberline check in  
Re: timberline  
Re: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Order on mc  
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Re: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Order on mc  
Timberline 3.0  
RE: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Order on mc  
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RE: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Order on mc  
Re: Timberline bike park draft.  
RE: Timberline BiOp  
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Timberline BiOp  
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Fwd: Timberline BiOp  
Re: Timberline BiOp  
Re: Reinitiation question  
Re: Timberline BiOp -- status report due Monday 4/25  
Timberline BiOp -- status report due Monday 4/25  
Re: Reinitiation question  
Re: Timberline BiOp  
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Timberline - revised biop

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Re: Timberline - revised biop  
Re: Timberline BiOp  
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RE: Timberline BiOp  
Fwd: Timberline BiOp

FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Scheduling  
Re: client-attorney privilege information - Timberline 1

Timberline update

Re: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Scheduling  
Re: client-attorney privilege information - Timberline

Re: Timberline update

RE: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Scheduling  
Re: client-attorney privilege information - Timberline

Re: Client-attorney privilege information - Timberline v. 05-09-2016

RE: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Scheduling

Re: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Scheduling

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RE: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Scheduling

Re: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Scheduling

Fwd: Memo re: ACS consistency and timberline

Re: Memo re: ACS consistency and timberline

Re: Memo re: ACS consistency and timberline

Re: Memo re: ACS consistency and timberline

Fwd: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Scheduling

FW: FW: Activity in Case 3:13-cv-00828-AA Bark et al v. Northrop et al Brie 1

Revised Timberline biop 1

Revised ACS memo 1

Re: Revised ACS memo

Re: 05-19 Timberline draft.

Re: reviewed biop

Re: reviewed biop

Re: New Timberline biop - review draft

Re: New Timberline biop - review draft

Re: New Timberline biop - review draft

Re: New Timberline biop - review draft

Re: New Timberline biop - review draft

Re: New Timberline biop - review draft

Timberline

RE: Timberline

Re: Timberline

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RE: Timberline

Timberline 1

Re: Timberline

Re: Timberline

Re: Timberline

Timberline biop	
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Re: Timberline biop	
Fwd: Timberline biop	
Re: Timberline biop	
attorney-client privilege - Opinion comments	1
Timberline biop - phone call set for 9 am Thurs June 30	
Fwd: attorney-client privilege - Opinion comments	1
Re: Timberline biop - phone call set for 9 am Thurs June 30	
Re: Timberline.	
Re: Timberline.	
Timberline.	
Timberline, again	1
Fwd: draft BiOp for Timberline	
RE: draft BiOp for Timberline	
Fwd: draft BiOp for Timberline	
Re: draft BiOp for Timberline	
Re: draft BiOp for Timberline	
Draft timberline biop	1
RE: draft BiOp for Timberline	1
RE: draft BiOp for Timberline	2
Fwd: draft BiOp for Timberline	2

Revised timberline biop 1

Re: FW: Comments on Draft Bike Park BiOp 4

Re: FW: Comments on Draft Bike Park BiOp 5

Re: Revised timberline biop  
Re: Revised timberline biop  
final BiOp -- Timberline bike park  
Re: attorney-client privilege Timberline Bike Park  
Fwd: final BiOp -- Timberline bike park  
Re: final BiOp -- Timberline bike park  
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Re: final BiOp -- Timberline bike park  
ACS memo discussion 1

RE: final BiOp -- Timberline bike park 1

Re: final BiOp -- Timberline bike park 1

A couple of issues for your attention - one is URGENT 1

Memo on Timberline Bike Park Biop 1

Re: A couple of issues for your attention - one is URGENT  
Re: A couple of issues for your attention - one is URGENT  
Re: Memo on Timberline Bike Park Biop  
Re: Memo on Timberline Bike Park Biop  
Re: final BiOp -- Timberline bike park  
RE: final BiOp -- Timberline bike park 1



Re: Memo on Timberline Bike Park Biop  
Re: Memo on Timberline Bike Park Biop  
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RE: final BiOp -- Timberline bike park  
Re: Review of memo re ACS consistency  
Review of memo re ACS consistency 1

Re: Memo re: Aquatic Conservation Strategy for signature  
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Re: Review of memo re ACS consistency  
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Re: Memo re: Aquatic Conservation Strategy for signature  
Re: Memo re: Aquatic Conservation Strategy for signature 1

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Re: Timberline reinitiated biop 1

Timberline reinitiated biop 1

Fwd: Timberline reinitiated biop 1

RE: final BiOp -- Timberline bike park  
Re: final BiOp -- Timberline bike park  
Fwd: final BiOp -- Timberline bike park  
Re: final BiOp -- Timberline bike park 1

Re: final BiOp -- Timberline bike park 1

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Re: final BiOp -- Timberline bike park 1

Re: Memo on ACS issue in Timberline Bike Park litigation  
Re: final BiOp -- Timberline bike park 1

Fwd: final BiOp -- Timberline bike park  
RE: final BiOp -- Timberline bike park 1

AttachmentNames

ACS memo to file draft feb 4 gc\_em.docx

2016\_04-27\_draft\_timberline\_WCR-2016-4259-kp.doc

2016\_05-03\_draft\_timberline\_WCR-2016-4259-kp-sl-kp.doc

2016\_05\_13\_draft\_timberline\_WCR-2016-4259-kp.doc

ACS memo to file draft may 17 sdl revision\_em.docx

ESA.BiOp2.drfin.w\_FS\_USAO\_fdbk sdl.doc

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ESA.BiOp2.drfin.w\_FS\_USAO\_nmfs clean response.docx

2016\_05\_09\_draft\_timberline\_WCR-2016-4259.doc

2016\_05\_20\_draft\_timberline\_WCR-2016-4259-FS comments.doc;image001.png;image002.png;image0

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ESA.BiOp2.drfin.w\_FS\_USAO\_nmfs clean response\_Annie.doc

ESA.BiOp2.drfin.w\_FS\_USAO\_nmfs clean response\_Annie-kp.doc

ESA.BiOp2.drfin.w\_FS\_USAO\_nmfs clean response\_Annie-kp.doc

image001.png;image002.png;image003.png;image004.png

image001.png;image002.png;image003.png;image004.png

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ESA.BiOp2.drfin.070816.w\_USAO\_fdbk\_sdl clean-kp.doc

image001.png;image002.png;image003.png;image004.png;~WRD000.jpg

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CCL\_WCR-2016-4259\_Reinitiation2 Timberline.pdf

CCL\_WCR-2016-4259\_Reinitiation2 Timberline-kp.pdf

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Forest Responses to Judge Aiken Questions.docx

NMFS Reinitiation Timberline MHNF-kp\_12-11-15.docx

NMFS Reinitiation Timberline MHNF-kp\_12-11-15.docx

ACS memo to file draft feb 4 gc.docx

ACS memo to file draft feb 4 gc.docx

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Consult Glade Cross Supp Memo final.docx;image001.png;image002.png;image003.png;image004.png

Consult Glade Cross Supp Memo final.docx;image001.png;image002.png;image003.png;image004.png

sally\_brick.vcf

NMFS.ACSConsMemo.rvudrSL.w\_Odell\_prop\_edits.docx

TBP draft proposed action\_03-15-16.doc

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ACS memo to file draft may 17 sdl revision.docx

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CCL\_WCR-2016-4259\_Reinitiation2 Timberline-kp.pdf

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0.7.1491.20620 Message 5182016 7:35 Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>  
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0.7.1491.21065 Message 8042016 9:37 Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

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0.7.1491.21073 Message 8042016 15:28 Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

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0.7.1491.21074.1 File

0.7.1491.21074.2 File



To

Annie Birnie - NOAA Federal <annie.birnie@noaa.gov>;Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>

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Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>;Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>

Ken Phippen - NOAA Federal <ken.phippen@noaa.gov>;Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

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Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>;Annie Birnie - NOAA Federal <annie.birnie@noaa.gov>

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Black, Val - OGC (VAL.BLACK@OGC.USDA.GOV) <val.black@ogc.usda.gov>;'Sheila Lynch - NOAA Federal' (sheila.ly

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Odell, Steve (USAOR) <steve.odell@usdoj.gov>;Sean Martin <sean.martin@usdoj.gov>

Sheila Lynch - NOAA Federal <sheila.lynch@noaa.gov>

Kim Kratz - NOAA Federal <kim.kratz@noaa.gov>

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Sean Martin <sean.martin@usdoj.gov>;Odell, Steve (USAOR) <steve.odell@usdoj.gov>

Odell, Steve (USAOR) <steve.odell@usdoj.gov>;Sean Martin <sean.martin@usdoj.gov>

Subject	At
Annie's timberline questions	1
Re: Revised Timberline biop	3
New Timberline biop - review	1
Reminder and some resource:	4
Fwd: Letter from Mt. Hood N:	1
Fwd: FW: Activity in Case 3:13	1
Fwd: Letter from Mt. Hood N:	1
Timberline bike park draft.	1
Re: Revised Timberline biop	3
reviewed biop	1
New Timberline BiOp - review	1
Re: New Timberline biop - rev	2
Re: FW: Comments on Draft B	5
Fwd: FW: Draft NMFS BiOp Cc	5
Re: Reminder of Timberline c:	1
Fwd: Letter from Friends of M	1

Fwd: Letter from Friends of M 1

FW: Activity in Case 3:13-cv-0 1

Re: timberline 1

Fwd: Review Requested: Upd: 1

Fwd: Activity in Case 3:13-cv-( 2

Timberline Update 1

RE: Timberline BiOp -- status r 1

Annie's timberline questions 1

Re: Revised Timberline biop 3

reviewed biop 1

New Timberline biop - review 1

RE: Timberline 2

Fwd: Timberline 2

Biop draft for applicant review 1

Fwd: FW: Draft NMFS BiOp Cc 5

Memo re: Aquatic Conservati 6

Memo on ACS issue in Timber 1

Fwd: Timberline Bike Park Re- 1

Re: final BiOp -- Timberline bil 2

AttachmentNames

2016-03-25 ORDER Denying Motion for Summary Judgment.pdf

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2016\_05\_20\_draft\_timberline\_WCR-2016-4259-to DOJ and FS.doc

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1.7.16 Friends of Mount Hood Timberline Bike Park Consultation.pdf

1.7.16 Friends of Mount Hood Timberline Bike Park Consultation.pdf

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TBP draft proposed action\_03-15-16.doc

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ECF 196 Joint Status Report.pdf;ESA.BiOp2.drfin.w\_FS\_USAO\_fdbk.doc

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Final Memo re ACS consistency 8.3.16.pdf



2016\_08-04\_Timberline\_reinitiation\_WCR-2016.pdf

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Robertson et al. 2006\_Suspended Sediment.pdf

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1.7.16 Friends of Mount Hood Timberline Bike Park Consultation.pdf

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TBP draft proposed action\_03-21-16\_for Forest Service review..doc

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Final Memo re ACS consistency 8.3.16.pdf

2016\_08-04\_Timberline\_reinitiation\_WCR-2016.pdf

Final Memo re ACS consistency 8.3.16.pdf

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0.7.1491.15120.8 File	8.2.c Post Storm Inspection Report 11_3
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To

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nmfs to fs

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Merline Mountain Bike Park Implementation Update

Merline Bike Park Restoration Project Update 11-13-2015

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Wanner, Greg -FS <gwanner@fs.fed.us>

Subject	At
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Re-initiation Request for Timberline Ski Area Mountain Bike Project	5
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Supplemental information pertaining to Glade trail work	5
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RE: Timberline	5
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FW: Draft NMFS BiOp Comments	5
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RLK Draft BiOp Comments	4
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Glade trail information	5
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Timberline Bike Park Re-initiation of Consultation additional informatic #	
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Fwd: Timberline Bike Park Re-initiation of Consultation additional infor #

Fwd: FW: Supplemental information pertaining to Glade trail work 5

RE: Review Requested: Updated proposed action for TBP. 4

Re: Review Requested: Updated proposed action for TBP. 4

Re: Review Requested: Updated proposed action for TBP.	4
RE: Review Requested: Updated proposed action for TBP.	5
Geo Grid area at Jeff Flood lift	5
RE: New Timberline BiOp - review draft	4
Comments on Draft Bike Park BiOp	6
Re: turbidity measurements recordings FW: Comments on Draft Bike Park BiOp	5
RE: FW: Comments on Draft Bike Park BiOp	5
FW: Turbidity and Bumblebee information	1
Re: Timberline Bike Park Restoration Project Update 11-13-2015	#

Re: Timberline Bike Park Restoration Project Update 11-13-2015 #

Re: Timberline Bike Park Restoration Project Update 11-13-2015 #

Re: Review Requested: Updated proposed action for TBP. 4



AttachmentNames

image001.png;image002.png;image003.png;image004.png;Signed.pdf

Consult Glade Cross Supp Memo final.docx;image001.png;image002.png;image003.png;image004.png

2015TurbidityReportfromPARKERandWANNER12-10-2015.docx;image001.png;image002.png;image003.png

image001.png;image002.png;image003.png;image004.png;RLK comments 7-15-16 ESA.BiOp2.finalreviewd

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Glade Restoration Memo FINAL (Sept 28 2015).docx;image001.png;image002.png;image003.png;image004

2015 Final Annual Monitoring Report.pdf;8.1 Effective Ground Cover Measurements.pdf;8.10.a RLK Turbidi

2015 Final Annual Monitoring Report.pdf;8.1 Effective Ground Cover Measurements.pdf;8.10.a RLK Turbidi

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GeoGrid area at Jeff Flood.jpg;image001.png;image002.png;image003.png;image004.png

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2016\_05\_20\_draft\_timberline\_WCR-2016-4259-FS comments.doc;image001.png;image002.png;image003

image001.png;image002.png;image003.png;image004.png;Still Creek Restoration 2012 to 2015.pdf

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Forest Responses to Judge Aiken Questions.docx

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FOIA - Non FOIA - Non-responsive item:Not within subject scope

~ - fully withhold

| Comments from Forest Service (per parent email).

Non~~-res; Yes

| NOAA portion releasable, but includes information from USDA Forest Service.

- | Current guidance is to release, even if non-responsive, if a portion of the document is responsive. Mus
- | Current guidance is to release, even if non-responsive, if a portion of the document is responsive. Mus
- | Current guidance is to release, even if non-responsive, if a portion of the document is responsive. Mus
- | Current guidance is to release, even if non-responsive, if a portion of the document is responsive. Mus

~- fully withhold

- | Per Sheila Lynch, GCNW: Marked fully redact because of the unusual level of attorney involvement in t







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:he consultation. There was active litigation at the time the consultation was reinitiated, so I was heavil









y involved, as were our DOJ attorneys. That explains most of the fully withheld documents.;(Tag comm







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nt) All redactions removed

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**From:** Deanna Harwood - NOAA Federal <deanna.harwood@noaa.gov>  
**Sent:** Thursday, March 2, 2017 6:59 PM  
**To:** Ana Liza Malabanan; Barry Thom; Celeste Leroux - NOAA Federal; Gary Stern; Jerry Hornof; John Almeida - NOAA Federal; Judson Feder; Kathryn Kempton; Kimberly Katzenbarger - NOAA FEDERAL; Kristen Gustafson - NOAA Federal; Mark Graff - NOAA Federal; Nicolle Hill - NOAA Federal; Samuel Rauch - NOAA Federal; Shelby L Mendez; Vanatta Alecia; Scott Rumsey  
**Subject:** Fwd: OCE I and OCE II: Order on Fees  
**Attachments:** Order on Fee Application.pdf

**Attorney-Client Privileged**

FYI (b)(5) [Redacted]

Deanna Harwood  
Deputy Chief, Southwest Section  
NOAA, Office of General Counsel  
U.S. Department of Commerce  
501 W. Ocean Blvd., Suite 4470  
Long Beach, CA 90802  
(562) 980-4068

----- Forwarded message -----

**From:** Wall, Robin (USACAN) <[Robin.Wall@usdoj.gov](mailto:Robin.Wall@usdoj.gov)>  
**Date:** Thu, Mar 2, 2017 at 2:32 PM  
**Subject:** OCE I and OCE II: Order on Fees  
**To:** Deanna Harwood - NOAA Federal <[deanna.harwood@noaa.gov](mailto:deanna.harwood@noaa.gov)>, "Lee, Helen" <[HLee@doc.gov](mailto:HLee@doc.gov)>

(b)(5) [Redacted]

- [Redacted]
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- [Redacted]
- [Redacted]
- [Redacted]

(b)(5)  
[Redacted text block]

[Redacted text block]

[Redacted text block]

Please feel free to call if you want to discuss the order and next steps.

Robin M. Wall  
Assistant United States Attorney  
United States Attorney's Office, Northern District of California  
450 Golden Gate Avenue, 9<sup>th</sup> Floor  
San Francisco, CA 94102  
[415.436.7071](tel:415.436.7071)  
[robin.wall@usdoj.gov](mailto:robin.wall@usdoj.gov)

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OUR CHILDREN’S EARTH  
FOUNDATION, et al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES  
SERVICE, et al.,

Defendants.

Case No. [14-cv-01130-WHO](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION FOR  
ATTORNEY’S FEES**

Re: Dkt. No. 82

Plaintiffs seek an award of \$723,202.74 in attorney’s fees and \$3,190.39 in costs for succeeding in part on their consolidated lawsuits filed under the Freedom of Information Act (FOIA) against the federal agency defendants. Dkt. 94. I conclude that plaintiffs are eligible and entitled to an award of attorney’s fees, but at a significantly reduced amount in light of requested hourly rates that are not adequately supported and unnecessary or excessive time billed.

**BACKGROUND**

Plaintiffs Our Children’s Earth Foundation and Ecological Rights Foundation are Bay Area non-profits dedicated to protecting the environment.<sup>1</sup> Plaintiffs sent a series of nine FOIA requests to National Marine Fisheries Service (NMFS) starting in May 2013. The requests concerned NMFS’s oversight of activities by Stanford University and the impact of those activities on the Central California Coast steelhead. Plaintiffs were concerned with Stanford University’s operation of Searsville Lake and Dam, which were built in 1892, and other related water diversions and infrastructure that Stanford uses to provide non-potable water for its campus. Plaintiffs believe that “Lake Water System” adversely affects the steelhead by reducing water

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<sup>1</sup> See Declaration of Annaliese Beaman (Dkt. No. 83) ¶ 2. Plaintiffs are referred to collectively as OCE.

1 flows in San Francisquito Creek and its tributaries and cutting the steelhead off from access to  
 2 upstream spawning habitat. *See* Judge Conti’s March 30, 2015 Order [Dkt. No. 59] at 3-4.  
 3 Plaintiffs attempted to enjoin Stanford’s activities in a separate lawsuit, *Our Children’s Earth*  
 4 *Foundation v. Stanford Univ.*, No. 13-cv-00402-JSW (N.D. Cal.).<sup>2</sup>

5 In response to what OCE contends were deficient responses to its first four FOIA requests,  
 6 plaintiffs filed their first lawsuit (*OCE I*) in April 2014. In that lawsuit, OCE challenged whether  
 7 NMFS’s responses to plaintiffs’ FOIA requests were adequate, whether NMFS had a pattern and  
 8 practice of tardy and incomplete responses, and whether FWS failed to meet its internal deadline  
 9 to respond to NMFS.<sup>3</sup> Plaintiffs filed their second lawsuit (*OCE II*) in September 2014, based on  
 10 the tardy or otherwise deficient responses to their second set of FOIA Requests (FOIA requests 5 -  
 11 8). In *OCE II* plaintiffs alleged that NMFS failed to adequately respond to their additional FOIA  
 12 requests, and reiterated their argument that NMFS had a pattern and practice of tardy and  
 13 incomplete responses to FOIA requests.<sup>4</sup> The lawsuits were related by Judge Conti.<sup>5</sup>

14 In *OCE I*, the parties moved for summary judgment. Plaintiffs argued that: (1) NMFS  
 15 failed to adequately describe its searches or conducted an inadequate search and withheld  
 16 documents without sufficient justification; (ii) they were entitled to a declaratory judgment that  
 17 NMFS violated FOIA’s deadlines in responding to their four requests and in three related internal  
 18 appeals, and FWS violated FOIA’s deadlines in responding to a referral of documents from  
 19 NMFS; and (iii) the alleged violations of the FOIA are a part of a pattern and practice of non-

20 \_\_\_\_\_  
 21 <sup>2</sup> The government contends that plaintiffs’ first FOIA request was filed “as discovery” for the  
 22 Stanford lawsuit. *Oppo*. 6.

23 <sup>3</sup> A second defendant in *OCE I*, Fisheries and Wildlife Service (FWS) was alleged to have failed  
 24 to respond to NMFS’s request that FWS review and release under the FOIA portions of FWS’s  
 25 documents that NMFS had in its possession.

26 <sup>4</sup> The Army Corps of Engineers (Corps) was also named as a defendant in *OCE II*, as having failed  
 27 to appropriately respond to plaintiffs’ FOIA requests.

28 <sup>5</sup> Plaintiffs filed a third lawsuit (*OCE III*) in June 2015, which was also related to 14-1130. In  
*OCE III*, plaintiffs asserted that NMFS had failed to provide a timely final decision in response to  
 OCE’s ninth FOIA request (from April 2015) regarding more “up-to-date information” on the  
 same subject matter. Judge Conti, on plaintiffs’ request and without opposition from NMFS,  
 dismissed *OCE III* as “prudentially moot.” October 2015 SJ Order at 17-18. Plaintiffs are not  
 seeking fees or costs related to that lawsuit. *Mot.* 4, n.1.



1 compliance with the FOIA's mandates, so the Court should enjoin NMFS and order it to comply  
2 with its FOIA obligations. March 30, 2015 Order at 6-7. The government opposed those  
3 arguments.

4 In an Order dated March 30, 2015 [Dkt. No. 59, Case No. 14-1130], Judge Conti: (i) ruled  
5 that NMFS failed to conduct adequate searches in response to OCE's first and third FOIA  
6 requests;<sup>6</sup> (ii) held in abeyance the determination as to whether NMFS adequately invoked FOIA  
7 Exemption (b)(6) to withhold names and contact information from responsive documents pending  
8 further supplementation of the factual record by NMFS (concerning the privacy concerns that  
9 would be implicated by release of that information); (iii) affirmed in part the withholding of some  
10 attorney-client documents, but concluded that NMFS had not met its burden to explain why  
11 certain portions of documents did not contain segregable and releasable information or why one  
12 specific document was withheld as attorney-client privileged and, therefore, held in abeyance the  
13 determination as to NMFS's withholding of those documents was appropriate; and (iv) granted  
14 plaintiffs' request for a declaratory judgment that NMFS failed to comply with the statutorily  
15 mandated response and appeal deadlines with respect to the four FOIA requests at issue. *Id.* at 8-  
16 26.<sup>7</sup> Judge Conti denied plaintiffs' motion and granted defendants' motion regarding  
17 withholdings, redactions, and timeliness. *Id.* at 28.<sup>8</sup>

18 NMFS then provided additional information to the Court concerning its withholdings and  
19 redactions, and plaintiffs submitted responses regarding the same.<sup>9</sup> In an Order dated July 20,

20 \_\_\_\_\_  
21 <sup>6</sup> Judge Conti granted plaintiffs' motion on the adequacy of the search as to the first and third  
22 FOIA requests, and granted defendants' motion as to the adequacy of the searches in response to  
23 the second and fourth requests. *Id.* at 12.

24 <sup>7</sup> Judge Conti, however, expressly did not reach the question of whether plaintiffs had proven that  
25 NMFS had a pattern and practice of untimely responses, because "[t]he pattern and practice and  
26 cutoff date allegations are repeated, with a fuller evidentiary record, in cross-motions for  
27 summary judgment pending in" *OCE II*, and the Judge intended to address them in a subsequent  
28 order. *Id.* at 22.

<sup>8</sup> Plaintiffs point out that in preparing its cross-motion for summary judgment in *OCE I*, NMFS  
uncovered two additional responsive documents and disclosed them in full. *See* Declaration of  
Gary Stern [Dkt. No. 41, 14-1130] ¶ 17.

<sup>9</sup> As part of its supplemental briefing, NMFS decided to release two previously withheld in full  
documents and to release three redacted documents that had previously been withheld in full. It

1 2015, Judge Conti addressed the issues remaining from *OCE I*, as well as the cross-motions filed  
 2 in *OCE II*. Judge Conti characterized the remaining arguments made by plaintiffs as: (i) NMFS  
 3 failed to adequately search for records responsive to two of its requests; (ii) NMFS improperly  
 4 withheld or overly redacted responsive records under two FOIA exemptions; (iii) NMFS was  
 5 defying Department of Commerce (of which NMFS is a part) regulations by cutting off their  
 6 search for responsive records at the date the FOIA request is received rather than the date the  
 7 search begins; and (iv) the request for a declaratory judgment that NMFS's and the Corps'  
 8 responses to plaintiffs' requests were untimely, and grant declaratory and injunctive relief to  
 9 remedy NMFS's alleged pattern and practice of FOIA violations. July 20, 2015 Order [Dkt. No.  
 10 70, Case No. 14-1130] at 3-4. NMFS and the Corps cross-moved for summary judgment, arguing  
 11 that their responses were adequate and declaratory and injunctive relief were unwarranted. *Id.* at  
 12 4.<sup>10</sup>

13 As to the substance of the adequacy of NMFS's responses, Judge Conti found that: (i)  
 14 NMFS had failed to provide sufficient information for the court to determine whether NMFS  
 15 conducted an adequate search, ordered NMFS to supplement the factual record, and held in  
 16 abeyance the issue of summary judgment on NMFS's search; (ii) NMFS had properly withheld  
 17 draft biological opinions under FOIA Exemption (b)(5), but did not adequately justify its  
 18 withholding or non-redaction of an email under (b)(5), and as such NMFS was required to  
 19 supplement the factual record to justify its withholding and non-redaction, and the court held in  
 20 abeyance summary judgment on the withholding of that document; and (iii) granted summary  
 21 judgment to NMFS withholding under FOIA Exemption (b)(7) of names in a report. *Id.* 5-17.

22 As to the issue of untimely responses and pattern and practice of delay and improper cutoff  
 23 dates, Judge Conti: (i) granted plaintiffs' request for declaratory relief that NMFS violated its  
 24 statutory duties with respect to the timeliness of its responses and appeals, but declined to enter

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25  
 26 also stated it was conducting a supplemental search for documents responsive to OCE's first and  
 27 third FOIA requests. Dkt. No. 60 at 4-5; *see also* Dkt. No. 59 at 19, 21.

28 <sup>10</sup> In its cross-motion pleadings in *OCE II*, NMFS decided "upon additional review" to release an  
 additional eleven documents in part and one in full. Dkt. No. 19 (14-4365) ¶ 28; Dkt. No. 18-1  
 (14-4365) ¶ 5.

1 declaratory relief against the Corps; (ii) determined that further facts were needed to address  
 2 plaintiffs' contention that NMFS was using an improper cutoff date when beginning its search for  
 3 documents and ordered supplemental briefing; and (iii) ordered plaintiffs to submit supplemental  
 4 briefing on the status of their pending FOIA requests as to the pattern and practice of delay claim.  
 5 *Id.* at 17-25. Finally, as to plaintiffs' request for injunctive relief, the Judge ordered NMFS "to  
 6 comply with FOIA and its deadlines, due to the Court's finding that the Fisheries Service has  
 7 failed to do so previously and the potential that these offenses might continue. Yet the Court,  
 8 having so ordered and having GRANTED declaratory relief, DENIES WITHOUT PREJUDICE  
 9 further injunctive relief at this time," in part because of "the fact that Plaintiffs appear to be  
 10 repeatedly making large requests in sufficiently rapid succession that the Fisheries Service is  
 11 unable to complete its response to one request before receiving a second" and recognizing  
 12 evidence of good faith and efforts on the part of NMFS to comply with its deadlines and  
 13 significantly improve its future performance. *Id.* at 26-27. The Court held in abeyance the  
 14 motions regarding NMFS's exemption claims, adequacy challenge, cutoff dates, and pattern and  
 15 practice allegations pending the supplementation of the record. *Id.* at 29-30.<sup>11</sup>

16 Following that round of supplementation, in an October 21, 2015 Order, Judge Conti  
 17 addressed the remaining issues and ruled that: (i) NMFS's declarants had addressed the concerns  
 18 over the adequacy of the search and granted NMFS summary judgment on that issue; (ii)  
 19 determined that one record had been appropriately withheld under (b)(5) based on a supplemental  
 20 *Vaughn* index and granted NMFS summary judgment on its withholdings under (b)(5); (iii) found  
 21 that NMFS cured its showing of non-segregability of withheld information based on its  
 22 supplemental *Vaughn* index, except as to one document,<sup>12</sup> and granted NMFS summary judgment  
 23 on segregability as to all documents except that one; and (iv) granted summary judgment to NMFS

24  
 25 <sup>11</sup> As part of its supplemental briefing, NMFS decided to release a redacted document that had  
 26 been withheld in full. Dkt. No. 27 (14-4365) at 2. NMFS also explained its search cut-off policy  
 27 (which OCE contends was "new"), requiring that if one or more subject-matter expert are required  
 28 to search for documents, the date each expert starts his/her search establishes the cut-off date.  
 Dkt. No. 27-4 (14-4365), ¶18(b).

<sup>12</sup> The Court ordered NMFS to produce the document at issue, or explain further why it should be  
 withheld. October 21 2015 Order at 15. NMFS decided to produce the document.

1 based on additional information as to the cutoff dates used for searches. October 21, 2015 Order  
2 [Dkt. No 72, 14-1130] at 4-17.

3 As to the pattern and practice of delay claim, Judge Conti reviewed the evidence and found  
4 that NMFS was curing its processing and response problems and backlog, and therefore denied  
5 injunctive relief. However, in light of the “unmistakable history” of untimeliness and delay, Judge  
6 Conti granted declaratory relief to plaintiffs, concluding that: “(1) that the Fisheries Service has  
7 previously been engaged in a pattern-and-practice of failure to meet FOIA deadlines; (2) that the  
8 Fisheries Service has previously provided responses that were frequently and unreasonably  
9 delayed; (3) that due to these delays the Fisheries Service effectively provided no ability to FOIA  
10 requestors to anticipate when data might be provided; and (4) that due to these delays information  
11 was often provided after a long enough period of time that the data could be out-of-date,  
12 effectively negating its value and effectuating a complete denial of information.” *Id.* at 20-21. He  
13 also granted “limited” injunctive relief to plaintiffs, requiring NMFS to provide any outstanding  
14 production in response to certain of plaintiffs’ requests within 30 days. *Id.* at 21. Any further  
15 injunctive relief was denied without prejudice, but he required NMFS to show cause as to how it  
16 was curing its prior violations and intended to continue its response-time improvements going  
17 forward. *Id.* at 22.

18 After the case was reassigned to me in November 2015, I addressed whether any issues  
19 remained to be decided following Judge Conti’s October and November 2015 Orders as well as  
20 the supplemental briefing filed by the parties regarding NMFS’s efforts to cure its past timeliness  
21 violations and ensure those would not occur in the future. In an order dated January 20, 2016, I  
22 determined that Judge Conti had resolved all pending issues, and concluded that the evidence  
23 regarding NMFS’s substantial reduction of its FOIA-response backlog and the “technical,  
24 administrative, and staffing improvements” NMFS had implemented to ensure timely processing  
25 of FOIA requests on a forward-going basis meant that continuing injunctive relief was not  
26 warranted. January 20, 2016 Order [Dkt. No. 75]. A stipulated judgment was entered on February  
27 16, 2016. Plaintiffs now seek over \$700,000 in attorney’s fees for the hours they spent litigating  
28 *OCE I* and *OCE II*, as well as costs. Defendants oppose plaintiffs’ entitlement to any fees, and

1 challenge the reasonableness of the amount sought.

## 2 LEGAL STANDARD

3 FOIA authorizes courts to “assess against the United States reasonable attorney fees and  
4 other litigation costs reasonably incurred in any case under this section in which the complainant  
5 has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E). This provision “has as its fundamental  
6 purpose the facilitation of citizen access to the courts to vindicate the public’s statutory rights,” as  
7 the fees and costs of bringing suit could otherwise “present a virtually insurmountable barrier  
8 which [would] ba[r] the average person from forcing governmental compliance with the law.”  
9 *Exner v. F.B.I.*, 443 F. Supp. 1349, 1352 (S.D. Cal. 1978).

10 A court may grant an award of attorney’s fees under 5 U.S.C. § 552(a)(4)(E) where the  
11 plaintiff establishes that it is both eligible for and entitled to an award. *See Church of Scientology*  
12 *of California v. U.S. Postal Serv.*, 700 F.2d 486, 489 (9th Cir. 1983); *Rosenfeld v. U.S. Dep’t of*  
13 *Justice*, 903 F. Supp. 2d 859, 865 (N.D. Cal. 2012). To be eligible for an award, the plaintiff must  
14 show that “(1) the filing of the action could reasonably have been regarded as *necessary* to obtain  
15 the information; and (2) the filing of the action had a *substantial causative* effect on the delivery  
16 of the information.” *Church of Scientology*, 700 F.2d at 489 (emphasis in original).

17 If the court determines that the plaintiff is eligible for attorney’s fees, the court may then,  
18 “in the exercise of its discretion, determine that [it] is *entitled* to an award of attorney’s fees.” *Id.*  
19 at 492 (emphasis in original). In making this determination, courts consider “(1) the benefit to the  
20 public, if any, deriving from the case; (2) the commercial benefit to the complainant; (3) the nature  
21 of the complainant’s interest in the records sought; and (4) whether the government’s withholding  
22 of the records sought had a reasonable basis in law.” *Id.*; *accord Long v. U.S. I.R.S.*, 932 F.2d  
23 1309, 1313 (9th Cir. 1991). “These four criteria are not exhaustive, however, and the court may  
24 take into consideration whatever factors it deems relevant in determining whether an award of  
25 attorney’s fees is appropriate.” *Long*, 932 F.2d at 1313 (internal quotation marks omitted). Once  
26 eligibility is established, “[t]he decision to award attorney’s fees is left to the sound discretion of  
27 the trial court.” *Church of Scientology*, 700 F.2d at 492.

**DISCUSSION**

**I. WHETHER PLAINTIFFS SUBSTANTIALLY PREVAILED AND ARE ELIGIBLE FOR ATTORNEY’S FEES**

The government does not contest that plaintiffs substantially prevailed in *OCE I*, but argues that plaintiffs were not successful in *OCE II*, and therefore are not eligible for fees for that portion of the litigation. As noted above, in his July and October 2015 orders, Judge Conti addressed the claims asserted in *OCE II* (as well as issues asserted in *OCE I*). In the July Order, Judge Conti granted plaintiffs’ request for a declaratory judgment that NMFS’s responses to plaintiffs’ FOIA requests 5-8 were untimely. July 2015 Order at 20-21. That by itself constitutes “success,” albeit on a discrete issue. *See Hajro v. United States Citizenship & Immigration Servs.*, 900 F. Supp. 2d 1034, 1045 (N.D. Cal. 2012) (prevailing on summary judgment and obtaining injunctive relief on claim that defendant’s responses were untimely constitutes substantial success), *reversed on other grounds* by 811 F.3d 1086, 1092 (9th Cir. 2016); *Or. Nat. Desert Ass’n v. Gutierrez*, 442 F. Supp. 2d 1096, 1098 (D. Or. 2006) (determination that agency failed to provide a timely response sufficient to create entitlement to fees), *aff’d in pertinent part, rev’d in part on other grounds* by *Or. Nat. Desert Ass’n v. Locke*, 572 F.3d 610 (9th Cir. 2009).

After initially finding that NMFS provided insufficient information in its declarations and *Vaughn* index to demonstrate the adequacy of some of its searches and withholdings, when NMFS provided supplemental briefing and declarations Judge Conti concluded that the searches were adequate and the withholdings justified (except as to one document under Exemption (b)(5), which NMFS decided to release). In addition, after receiving plaintiffs’ summary judgment motion and while preparing its cross-motion pleadings in *OCE II*, NMFS decided “upon additional review” to release an additional eleven documents in part and one in full. Dkt. No. 19 (14-4365) ¶ 28; Dkt. No. 18-1 (14-4365) ¶ 5. Following the next round of supplemental briefing, NMFS decided to release in part yet another document that had been withheld. Dkt. No. 27 (14-4365) at 2. The evidentiary record supports plaintiffs’ contention that these documents were produced as a result of *OCE II*.<sup>13</sup> Plaintiffs, therefore, prevailed, on another discrete portion of their litigation in

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<sup>13</sup> NMFS argues that its responses to Requests 5 through 8 were not produced as a result of the



1 securing these supplemental productions under a catalyst theory. *See, e.g., Dorsen v. United States*  
 2 *SEC*, 15 F. Supp. 3d 112, 120 (D.D.C. 2014) (plaintiff prevailed where FOIA suit prompted  
 3 additional or speedier release of documents); *Judicial Watch, Inc. v. United States DOJ*, 878 F.  
 4 Supp. 2d 225, 232 (D.D.C. 2012) (catalyst theory satisfied where after a final agency response and  
 5 commencement of lawsuit, additional documents were produced).

6 More importantly, in light of the “unmistakable history” of “unreasonable” untimeliness  
 7 and delay, Judge Conti granted plaintiffs’ request for a declaratory judgment that NMFS failed to  
 8 provide them with timely responses and had a past pattern and practice of untimely responses.  
 9 That judgment, along with the limited injunctive relief (requiring NMFS to respond to plaintiffs’  
 10 then-pending FOIA requests by a date certain), confers prevailing party status on plaintiffs as well.  
 11 The government in an attempt to avoid fees for *OCE II* argues that plaintiffs did not secure any  
 12 relief in *OCE II* beyond what they would have been entitled to given the claims asserted in *OCE I*.  
 13 *Oppo*. 7-8. However, Judge Conti specifically held the pattern and practice claim in abeyance in  
 14 *OCE I* to determine it on the more complete evidentiary record presented in *OCE II*. *OCE II*,  
 15 therefore, was a necessary part to the Court’s eventual determination.

16 Similarly, the fact that further, more wide-spread injunctive relief was not granted in  
 17 response to the allegations raised in both *OCE I* and *OCE II* in the October 2015 or January 2016  
 18 Orders was due to the strong showing NMFS made on the steps the agency had taken and was  
 19 continuing to take to extinguish its backlog and implement policies and practices to ensure timely  
 20 responses in the future. The government spends much time in its brief and declarations attempting  
 21 to show that the new policies and practices NMFS implemented in order to reduce the backlog  
 22 discussed by Judge Conti and myself in the October 2015 and January 2016 Orders were not  
 23 conceived in order to respond to, or spurred on by, plaintiffs’ litigation but were underway prior to  
 24 the filing of *OCE I* and *OCE II*. *See, e.g., Oppo*. 9-10. Plaintiffs counter that argument by citing  
 25 to notes and other documents produced by NMFS staff showing that efforts to reduce the backlog

26  
 27 litigation, and cites testimony showing that NMFS began work processing and responding to these  
 28 requests before the *OCE II* complaint was filed. *See Hornof Decl.* ¶ 7. NMFS also argues that the  
 three FOIA requests subject to Judge Conti’s limited order of injunctive relief, were also being  
 processed and responses “underway” before the October 21, 2015 Order. *Id.* ¶¶ 10-11.

1 were just being formulated in June 2015 and were implemented in part to avoid litigation, like the  
2 suits at issue which were the only ones pending at the relevant time. *See, e.g.*, Reply 3-4.

3 However, in order to determine that plaintiffs are eligible for an award of attorney's fees, I  
4 need not resolve this factual dispute. That plaintiffs secured additional documents from NMFS  
5 after *OCE II* was filed and after NMFS took a closer look at its searches and withholdings and,  
6 more importantly, secured another declaratory judgment recognizing that the agency failed to  
7 provide timely responses, had engaged in a pattern and practice of tardy responses, and secured  
8 limited injunctive relief as to then-pending but not sued upon FOIA requests, is success significant  
9 enough to establish plaintiffs' eligibility for fees.<sup>14</sup>

10 In sum, plaintiffs were the prevailing parties on significant portions of both *OCE I* and  
11 *OCE II* and are eligible for an award of attorney's fees and costs.<sup>15</sup> The next step is to determine  
12 if they are entitled to them.

## 13 **II. WHETHER PLAINTIFFS ARE ENTITLED TO ATTORNEY'S FEES**

14 The factors courts consider in determining whether a plaintiff is entitled to attorney's fees  
15 include "(1) the benefit to the public, if any, deriving from the case; (2) the commercial benefit to  
16 the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether  
17 the government's withholding of the records sought had a reasonable basis in law." *Church of*

18 \_\_\_\_\_  
19 <sup>14</sup> That said, the evidence on the whole indicates that NMFS took more concrete, specific, and  
20 immediate steps following Judge Conti's Orders to extinguish its backlog and commit additional  
21 resources to speeding up its response times than the agency might have taken but-for plaintiffs'  
22 suits.

23 <sup>15</sup> Plaintiffs repeatedly imply that they were successful on their improper cut-off date challenges,  
24 arguing that their lawsuits were the catalyst for NMFS's new cut-off date policy. Mot. at 8, 10.  
25 The improper cut-off date issue was raised but not decided by Judge Conti in his March 30 Order,  
26 because the issue was also raised but supported by a fuller factual record in the *OCE II* summary  
27 judgment briefing that was pending. In his July Order, Judge Conti determined that, at most, a  
28 factual dispute existed, and again held the issue in abeyance for supplemental responses. In his  
October Order, Judge Conti found that plaintiffs had not established that NMFS used improper  
cut-off dates, and instead granted summary judgment to NMFS on plaintiffs' improper search cut-  
off date claim as to plaintiffs' *own* FOIA requests. October Order at 17. Later in the October  
Order, Judge Conti recognized that the "NMFS West Coast Region appears to have an updated  
process in place, using modern software, additional personnel, and policy changes (e.g., how the  
cut-off date changes where there are multiple SMEs assigned) to speed up its process. *See* Supp.  
Malabanian Decl. ¶¶ 15-18." *Id.* at 18. Judge Conti, however, never reached the issue of whether  
these lawsuits were the catalyst for NMFS's new, updated, or clarified policy with respect to  
search cut-off dates.



1 *Scientology*, 700 F.2d at 489. I will discuss each in turn.

2 **A. Benefit to the Public**

3 In considering the public benefit factor, courts consider “the degree of dissemination and  
4 the likely public impact that might result from disclosure.” *Church of Scientology*, 700 F.2d at  
5 493. The factor generally weighs in favor of an award where the information is broadly  
6 disseminated to the public. *See, e.g., Electronic Frontier Foundation v. Office of Dir. of Nat.*  
7 *Intelligence*, No. 07-cv-05278-SI, 2008 WL 2331959, at \*3 (N.D. Cal. June 4, 2008) (finding that  
8 the public benefit factor was satisfied where the plaintiff “immediately posted the requested  
9 information on its website” and “created press releases for public access”). Even where the degree  
10 of dissemination is limited, or where the level of public interest in the requested information itself  
11 is minimal, the public benefit factor may still favor an award “as long as there is a public benefit  
12 from the fact of . . . disclosure.” *O’Neill, Lysaght & Sun v. D.E.A.*, 951 F. Supp. 1413, 1423 (C.D.  
13 Cal. 1996).

14 Courts in this circuit have found a public benefit favoring an award, despite an absence of  
15 broad dissemination or a significant level of public interest in the requested information, where (1)  
16 the case “establishe[d] that the government may not withhold certain information pursuant to a  
17 particular FOIA exemption,” *Church of Scientology*, 700 F.2d at 493; (2) the plaintiffs were  
18 environmental nonprofits whose purpose was “to oversee and enforce compliance with the [Clean  
19 Air Act]” and the requested information was “being used to inform [the plaintiffs’] ongoing  
20 oversight and enforcement efforts,” *The Sierra Club v. United States Env’tl. Prot. Agency*, 75 F.  
21 Supp. 3d 1125, 1143-44 (N.D. Cal. 2014); and (3) the requested documents revealed a “long  
22 history of abuse” by a paid DEA informant and “expos[ed] the implications of the government  
23 dealing with untrustworthy paid informants.” *O’Neill*, 951 F. Supp. at 1423-24.

24 Plaintiffs argue that just like the plaintiffs in *Sierra Club* they “utilized the documents  
25 to advance their efforts to promote compliance with environmental laws intended to broadly  
26 benefit the public interest environmental protection. Specifically, they utilized the documents to  
27 organize public support for measures designed to persuade Stanford and NMFS to do more to  
28 protect a threatened fish species and to develop ESA citizen suits claims aiming to help the

1 survival and recovery of this threatened species.” Beaman Decl. ¶¶ 6-8; Mot. 15. Plaintiffs also  
2 disseminated the information they secured to their members, the press, and the public through  
3 messages, website postings, press releases, and interviews. Beaman Decl. ¶¶ 6-8.

4 As NMFS points out, it is unclear what role in that public outreach (if any) the information  
5 actually secured by OCE as a direct result of the filing of these lawsuits or Judge Conti’s Orders  
6 played. Beaman’s declaration is not specific on that point. *See, e.g., Cotton v. Heyman*, 63 F.3d  
7 1115, 1120 (when evaluating the public benefit prong, the court must “evaluate the specific  
8 documents at issue in the case at hand”). NMFS does not argue (or show by declaration) that the  
9 information produced to OCE after the inception of the suits or Judge Conti’s Orders issued was  
10 so ministerial or obscure that it could not have supported plaintiffs’ public interest and public  
11 disclosure goals. The Beaman declaration, while not specifically focused on documents produced  
12 as a result of this litigation, persuasively explains how the documents OCE received through its  
13 FOIA requests and its litigation play a significant role in OCE’s mission to inform the public  
14 about the activities of Stanford and the Central California Coast steelhead. Dkt. Nos. 83, 96.

15 In addition, this lawsuit effectively and publicly disclosed NMFS’s history of untimely  
16 responses and significant backlog as well as the steps NMFS was undertaking to cure those  
17 issues. That shed important light about the agency’s non-compliance with its duty under FOIA, a  
18 situation Judge Conti repeatedly referred to as “clear, undisputed, and troubling.” March 30, 2015  
19 Order at 24; *see also* July 20, 2015 Order at 19 (“In short, even though the Fisheries Service does  
20 not take the FOIA’s deadlines seriously, ‘[t]here can be no doubt that Congress [did]’”). Finally,  
21 plaintiffs secured a significant, contested legal ruling from Judge Conti: that FOIA allows both  
22 declaratory judgment and injunctive relief as remedies for untimely responses. NMFS vigorously  
23 argued that the only available remedy for a violation under FOIA was an order requiring  
24 production of withheld documents; a position that was soundly rejected by Judge Conti. March  
25 30, 2015 Order at 24-26; July 20, 2015 Order at 19-21.

26 On this record, plaintiffs have shown that this litigation through the information released  
27 and the legal principles established conferred a significant benefit on the public.  
28

**B. Commercial Benefit to the Complainant/Nature of Plaintiffs' Interests**

The second and third factors are “the commercial benefit to the complainant” and “the nature of the complainant’s interest in the records sought.” *Church of Scientology*, 700 F.2d at 492. Courts regularly consider these factors together. *See, e.g., id.* at 494; *Am. Small Bus. League v. U.S. Small Bus. Admin.*, No. 08-cv-00829-MHP, 2009 WL 1011632, at \*3 (N.D. Cal. Apr. 15, 2009); *Electronic Frontier Foundation*, 2008 WL 2331959, at \*3.

As a general matter, if a “commercial benefit will inure to the plaintiff from the information,” or if the plaintiff “intends to protect a private interest” through the FOIA litigation, then “an award of attorney’s fees is not recoverable.” *Church of Scientology*, 700 F.2d at 494. On the other hand, where the plaintiff “is indigent or a nonprofit public interest group, an award of attorney’s fees furthers the FOIA policy of expanding access to government information.” *Id.* The Ninth Circuit has instructed that, pursuant to the second and third factors, a court “should generally award fees if the complainant’s interest in the information sought was scholarly or journalistic or public-oriented,” but should not do so “if his interest was of a frivolous or purely commercial nature.” *Long*, 932 F.2d at 1316.

Plaintiffs argue that their non-profit status combined with the lack of any private commercial interest in the information they secured, strongly favors an award under these factors. *See* Beaman Decl. ¶¶ 1, 6-8. The government counters that contrary to plaintiffs’ current assertion that their goal in *OCE I* and *OCE II* was to force NMFS to provide more timely and fulsome responses to their and others’ FOIA requests, the real purpose of these lawsuits was to force NMFS to produce documents that plaintiffs could and did use in their suit against Stanford University. Declaration of Robin M. Wall [Dkt. No. 92-1], Ex. L (“Stanford Summary Judgment Papers,” noting that some of the FOIA production was used on a motion to compel and on a motion for summary judgment in the Stanford case). That purpose, according to the government, is a private one that does not make plaintiffs entitled to fees. *Oppo*. 11-13.

The cases relied on by NMFS considered private litigants who used FOIA to secure evidence in support of their private lawsuits. *See Hersh & Hersh v. U.S. Dept. of Health and Human Services*, No. 06-04234-PJH, 2008 U.S. Dist. LEXIS 110977, at \*7 (N.D. Cal. July 9,

1 2008) (denying an award of attorney’s fees where “plaintiff undertook this FOIA request for  
2 decidedly commercial purposes” when plaintiff was litigating private lawsuit against a defendant  
3 regarding defective medical devices and plaintiff failed to secure disclosure of the “vast majority”  
4 of documents it sought); *Ellis v. United States*, 941 F. Supp. 1068, 1078 (D. Utah 1996) (denying  
5 fees where documents sought for assistance in private tort suit, because while documents produced  
6 under FOIA created “some slight public benefit in bringing the government into compliance with  
7 FOIA and providing information of general interest to the public, the disclosure of the records did  
8 not add to the fund of information necessary to make important political choices”).<sup>16</sup> They do not  
9 address the situation here, where non-profit environmental advocacy organizations bring suit  
10 under FOIA as part of their ongoing efforts to shed light on how an agency is (or is not) protecting  
11 the environment, albeit with respect to a specific project.

12 Moreover, while plaintiffs were undoubtedly motivated in some part to secure documents  
13 from NMFS in order to assist their litigation against Stanford, there was a significant and separate  
14 public benefit sought and secured by plaintiffs shedding light on the actions of NMFS (as  
15 opposed to the actions of Stanford) in carrying out its agency duties and on its handling of  
16 plaintiffs’ and others’ FOIA requests.<sup>17</sup>

17 These factors weigh in favor of plaintiffs’ entitlement to fees.  
18  
19

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20 <sup>16</sup> I recognize that the court in *Sierra Club v. United States EPA*, 75 F. Supp. 3d 1125, 1144 (N.D.  
21 Cal. 2014) rejected an agency’s argument that a non-profit environmental group plaintiff had a  
22 commercial interest in the FOIA litigation because they intended to bring environmental litigation,  
in part because “Plaintiffs were not pursuing a separate private lawsuit against Luminant at the  
time they initiated the FOIA request.” The court, therefore, did not directly reach the issue raised  
here.

23 <sup>17</sup> NMFS’s other cases are inapposite, as they do not address whether use of documents secured  
24 through FOIA in other litigation equals a “commercial” interest in the FOIA litigation, but stand  
25 for the proposition that having a personal interest in the records sought does not increase the  
26 access to those records under FOIA. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143  
27 n.10 (1975) (“Sears’ rights under the Act are neither increased nor decreased by reason of the fact  
28 that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the  
average member of the public. The Act is fundamentally designed to inform the public about  
agency action and not to benefit private litigants.”); *Shannahan v. IRS*, 672 F.3d 1142, 1151 (9th  
Cir. 2012) (requestors’ interest in IRS documents about themselves to use in their civil tax suit  
does not negate applicability of FOIA exemptions preventing disclosure).

**C. Reasonable Basis in Law**

The fourth factor is “whether the government’s withholding had a reasonable basis in law”; in other words, whether the government’s actions appeared to have “a colorable basis in law” or instead appeared to be carried out “merely to avoid embarrassment or to frustrate the requester.” *Church of Scientology*, 700 F.2d at 492, 492 n.6; *see also Rosenfeld*, 903 F. Supp. 2d at 870; *Am. Small Bus. League*, 2009 WL 1011632, at \*4. This factor “is not dispositive” and can be outweighed where the other relevant factors favor an award. *Rosenfeld*, 903 F. Supp. 2d at 870 (internal quotation marks omitted); *see also O’Neill*, 951 F. Supp. at 1425 (noting that the reasonable basis in law factor “in particular should not be considered dispositive”). The burden is on the government to demonstrate that its withholding was reasonable. *Sierra Club*, 75 F. Supp. 3d at 1145.

Here, Judge Conti repeatedly found in no uncertain terms that NMFS failed to provide timely responses under FOIA. *See, e.g.*, March 30, 2015 Order at 24 (with respect to NMFS’s violation of FOIA deadlines “the record is clear, undisputed, and troubling .... In short, even though the Fisheries Service does not take the FOIA’s deadlines seriously, ‘[t]here can be no doubt that Congress [did].’”); July 20, 2015 Order at 19 (“The records in both this and the related case show a clear and undisputed breach of this [FOIA response deadline] requirement.”); October 21, 2015 Order at 18-19 (“the Court has received showing [of] an unmistakable history that the Fisheries Service fails to meet its statutory deadlines under FOIA and causes Plaintiffs (and likely others similarly situated) to suffer unpredictable, unreasonable delays.”).<sup>18</sup>

Judge Conti also found that in litigating this case, NMFS repeatedly failed to explain with sufficient detail the adequacy of its searches and the reasons for its withholdings thereby necessitating additional rounds of briefing by the parties and orders by the court.<sup>19</sup> As such, I

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<sup>18</sup> Judge Conti’s repeated use of strong adjectives like “troubling” and “unreasonable” separates this case from those relied on by NMFS where fees were denied because delayed responses were caused by confusion or “bureaucratic difficulty” in handling requests. *Oppo*. at 14.

<sup>19</sup> I recognize that Judge Conti ultimately found that NMFS had conducted adequate searches and appropriately withheld all documents except one. But those conclusions were reached only after multiple rounds of briefing and decision, necessitated by NMFS’s initially deficient declarations and *Vaughn* indexes.

1 conclude that neither NMFS's general responses to the FOIA requests nor its litigation position  
2 before this Court had a reasonable basis in law.

3 In sum, plaintiffs are entitled to an award of attorney's fees. The next step is to determine  
4 the amount owed.

### 5 **III. REASONABLE AMOUNT OF ATTORNEY'S FEES AND COSTS**

6 "[O]nce the court has determined that the plaintiff is both eligible for and entitled to  
7 recover fees, the award must be given and the only room for discretion concerns the  
8 reasonableness of the amount requested." *Long*, 932 F.2d at 1314. In making this determination,  
9 the court must scrutinize the reasonableness of (i) the hourly rates and (ii) the number of hours  
10 claimed. *Id.* at 1313-14. "If these two figures are reasonable, then there is a strong presumption  
11 that their product, the lodestar figure, represents a reasonable award." *Id.* at 1314 (internal  
12 quotation marks omitted). Nevertheless, a court "may authorize an upward or downward  
13 adjustment from the lodestar figure if certain factors relating to the nature and difficulty of the  
14 case overcome this strong presumption and indicate that such an adjustment is necessary." *Id.*

#### 15 **A. Hourly Rate**

16 NMFS argues plaintiffs' hourly rates are excessively high, and that the Court should apply  
17 the hourly rates set forth in the *Laffey* matrix plus locality adjustments, which would result in a  
18 decrease of 22.9% in the requested lodestar. *Oppo*. at 20-22. As I recognized in  
19 *Public.Resource.org v. United States Internal Revenue Serv.*, No. 13-CV-02789-WHO, 2015 WL  
20 9987018, at \*6 (N.D. Cal. Nov. 20, 2015), "[a]bsent some showing that the rates stated in the  
21 matrix are in line with those prevailing in this community . . . I agree [that] that the matrix is not  
22 persuasive evidence of the reasonableness of its requested rates." As in *Public.Resource.org*, I  
23 will not bind plaintiffs to the *Laffey* matrix, especially as statutory fee awards from this District do  
24 not establish that the *Laffey* matrix rates are in line with prevailing rates for statutory fee cases in  
25 the Bay Area legal community. *See, e.g., Public.Resource.org* (awarding rates from \$205 for  
26 paralegals up to \$645 for senior/lead counsel); *Sierra Club*, 75 F. Supp. 3d at 1152-53 (approving  
27 hourly rates of \$350 to \$650 in FOIA action); *Rosenfeld*, 904 F. Supp. 2d at 1001, 1004  
28 (approving hourly rates of \$460, \$550, and \$700 in FOIA action); *Hajro v. U.S. Citizenship &*



1 *Immigration Servs.*, 900 F. Supp. 2d 1034, 1054 (N.D. Cal. 2012) (approving hourly rates of \$450  
2 to \$625 in FOIA action) *vacated and remanded on other grounds*, 2015 WL 6405473 (9th Cir.  
3 Oct. 23, 2015); *see also Hiken v. Dep't of Def.*, 836 F.3d 1037, 1039 (9th Cir. 2016) (reversing  
4 district court order awarding fees at matrix rate).

5 The rates sought by counsel in this case are, generally, higher than the rates approved in  
6 other recent FOIA cases in this District. They are also, more importantly, significantly higher than  
7 rates that were requested and approved by these *same* counsel in recent cases in this District for  
8 environmental litigation. *See, e.g., OCE v. EPA*, 13-cv-02857 (Dkt. Nos. 82, 99) (awarding fees  
9 from \$435 to \$655/hr for work through early 2015); *San Francisco Baykeeper v. West Bay*  
10 *Sanitary Dist.*, No. 09-5676, 2011 WL 6012936 (N.D. Cal. Dec. 1, 2011) (approving \$585/hr for  
11 Sproul). Plaintiffs argue this upward departure is warranted because in the past they have relied  
12 on the *Laffey* matrix with locality adjustments, but recent cases confirm those rates under-  
13 compensate them. *See, e.g., Declaration of Christopher Sproul* [Dkt. No. 88] ¶ 15; *Declaration of*  
14 *Patricia Weisselberg* [Dkt. No. 86] ¶ 9.

15 Plaintiffs undertook a “market rate” analysis and seek compensation for that research from  
16 *this* case. The analysis was performed primarily by billing attorney Christopher Hudak. Hudak  
17 reviewed fee awards in a number of different types of cases from the Northern District, including  
18 class action litigation (antitrust, wage and hour, consumer protection, and securities) as well as one  
19 anti-SLAPP case and one FOIA case. *See, e.g., Declaration of Christopher Hudak* [Dkt. No. 84]  
20 ¶¶ 11-32. The market rate analysis did not consider more than one FOIA case (despite there being  
21 a number of cases on point) nor did it directly consider cases awarding statutory fees for  
22 environmental litigation.<sup>20</sup>

23 Plaintiffs have not demonstrated that the rates they seek here are reasonable for FOIA  
24

25 \_\_\_\_\_  
26 <sup>20</sup> The OCE attorneys did rely for “data points” on the Declaration of Richard M. Pearl from a  
27 state court case, *Citizens Committee To Complete The Refuge, Inc. v. City of Newark*, Case No.  
28 RG10530015, (CA Superior Ct. County of Alameda). The Pearl declaration focused on attorney’s  
fees rates through 2014, and did review some statutory fee-shifting awards, as opposed to the class  
action attorney’s fee awards focused on by the plaintiffs here. *See, e.g., Weisselberg Decl.* ¶¶ 11-  
16; *Sproul Decl., Ex. 32; Hudak Decl.* ¶ 34.

1 litigation (or environmental fee-shifting litigation). They seek to downplay the fact that in cases  
 2 from 2014 and 2015 *these same attorneys* requested significantly lower attorney’s fee rates. I do  
 3 not believe the case law supports limiting plaintiffs to their prior requested rates, but I do believe  
 4 that any *significant* upward departure should be justified, for example, by declarations explaining  
 5 the increases in light of increased expenses from doing business and practicing in certain markets  
 6 or other factors. I also do not find plaintiffs’ focus as support for their requested hourly rates in  
 7 these cases on large scale, complex class action cases to be persuasive. That is not to say that  
 8 FOIA cases cannot be complex. But the high rates awarded for complex class action cases can be  
 9 explained in large part by the necessity in those cases for plaintiffs’ counsel to incur significant  
 10 cost outlays (for experts, document review systems, travel, depositions, etc.) as well as attorney  
 11 time (to review hundreds of thousands of documents, numerous depositions, etc.) which are not  
 12 typically required in FOIA cases and were not required in these cases.

13 Accordingly, I find that the hourly rates plaintiffs request here are not adequately  
 14 supported and are not reasonable. This conclusion is consistent with *Hiken v. Dep’t of Def.*, 836  
 15 F.3d 1037, 1044–46 (9th Cir. 2016), where the Ninth Circuit confirmed that a “reasonable rate” is  
 16 the rate prevailing “in the community” for “similar work” performed by attorneys of comparable  
 17 skill and experience and based on record evidence of prevailing historical rates. I do not find that  
 18 plaintiffs’ survey is based on the performance of “similar work” by attorneys of comparable skill  
 19 and experience.

20 Plaintiffs shall recalculate their lodestar based on hourly rates that are consistent with the  
 21 rates they requested in prior FOIA or environmental cases for the same time periods. For  
 22 example, time spent on these cases in 2015 should be sought at the same rate previously sought  
 23 and/or awarded by a court for time spent in 2015. For time in 2016 as to which plaintiffs may  
 24 have not had an hourly rate approved by another court plaintiffs are entitled to a 10% increase  
 25 over their 2015 approved-rates, absent specific justification supported by a declaration explaining  
 26 why a particular attorney or paralegal should be granted a higher percentage increase.<sup>21</sup>

27 \_\_\_\_\_  
 28 <sup>21</sup> For any biller in these cases who has not had a prior-court-submitted or approved billing rate, plaintiffs shall use a prior-court-approved billing rate for an attorney or paralegal of comparable



**B. Hours Expended**

NMFS also argues that the hours sought by plaintiffs cover time and tasks that were neither necessary nor reasonable for the prosecution of these suits and asks me to reduce the requested fee amount for the following:

- A \$188,381.47 reduction for plaintiffs’ work on the claims they lost;
- A \$26,686.22 reduction for work on pleadings and other papers that were never filed;
- A \$89,442.20 reduction for work performed at the administrative stage and review of documents produced;
- A reduction for work unrelated to *OCE I* and *OCE II*; and
- A 30-50% reduction generally for excessive, redundant, and unnecessary work.<sup>22</sup>

**1. Claims Lost**

NMFS argues that plaintiffs are not entitled to \$188,381.47 in fees (calculated at the hourly rates that NMFS objects to) for “distinct” claims they lost: (i) claims against FWS and the Corps; (ii) claims regarding the adequacy of the searches in *OCE II* (based on a frivolous argument that NMFS’s declarant’s testimony was “hearsay”); (iii) unsuccessful challenges to NMFS’s withholdings; (iv) claims regarding actual and pattern and practice search cut-off dates; and (v) plaintiffs’ response to the October 21 2015 Order to Show Cause as to whether further injunctive relief was necessary.<sup>23</sup>

With respect to the \$3,506.18 incurred with *OCE III*, plaintiffs admit they do not seek to recover for that time. So there is no longer a dispute as to that time/amount. The only other unsuccessful legal theory/claim NMFS “breaks out” time for is the \$23,032.40 plaintiffs charge

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experience.

<sup>22</sup> Plaintiffs explain that before submitting their request, most billers took 10% of the time billed “off the top” to account for any potential inefficiencies or redundancies in their work. Sproul Decl. ¶¶ 92, 97; Weisselberg Decl. ¶ 41; Isaacs Decl. ¶¶ 6-7; Costa Decl. ¶ 6; Hudak Decl. ¶ 35 (worked over 100 hours, but seeking payment for approximately 30 hours).

<sup>23</sup> NMFS breaks down the \$188,381.47 (or more accurately \$188,381.48) as follows: \$23,032.40 for 37.1 hours spent on the opposition to NMFS’s showing in response to Judge Conti’s OSC; \$161,842.90 as a 50% reduction from the \$323,685.79 plaintiffs billed for pleadings, summary judgment, supplemental briefing and the joint submission; and \$3,506.18 incurred with *OCE III*.

1 for 37.1 hours spent responding to NMFS's showing in response to Judge Conti's Order to Show  
2 Cause. Oppo. 17. However, I find that that time was reasonable and necessary. Judge Conti's  
3 OSC raised significant questions regarding the steps NMFS was taking to address its FOIA  
4 backlog, and NMFS filed a detailed response, supported by declarations. Plaintiffs filed a brief to  
5 contest some of the assertions made by NMFS, but that pleading was helpful and relied on by me  
6 in determining whether any live issues remained in the litigation, even though I denied plaintiffs'  
7 request for further injunctive relief as to the backlog.

8 NMFS does not break out the time spent on the other "unsuccessful" issues because  
9 plaintiffs' billing records do not allow them to. NMFS instead argues the 595.6  
10 hours/\$323,685.79 plaintiffs billed to pleadings for the summary judgment, supplemental briefing,  
11 and the joint submission required by the October 2015 Order should be reduced by 50% to  
12 account for plaintiffs' other losing claims/theories. Oppo. 17-18; Wall Decl., Ex. B (Summary  
13 Fee Analysis). I disagree.

14 As to claims against FWS and the Corps for their alleged part in causing repeated delays in  
15 NMFS's FOIA responses, while plaintiffs were not ultimately successful in their claims against  
16 those entities, the claims made were part and parcel of the impermissible and excessive delay  
17 claims against NMFS. This time is compensable.

18 As to claims regarding the adequacy of the searches in *OCE II* (based in part on the  
19 argument that NMFS's declarant's testimony was hearsay), while plaintiffs eventually lost this  
20 claim, Judge Conti forced NMFS to submit supplemental briefing explaining the adequacy of its  
21 searches. NMFS's initial explanations, therefore, were deficient and plaintiffs' successfully  
22 argued that deficiency to Judge Conti in their initial and supplemental briefing. This time is  
23 compensable.

24 As to the unsuccessful challenges to NMFS's withholdings, plaintiffs eventually lost all  
25 but one of these claims. But in the process of the initial and supplemental rounds of briefing,  
26 NMFS agreed to produce more documents and NMFS had to explain its actions in greater detail  
27 due to deficiencies in their initial briefing and declarations. This time is compensable.

28 And as to the eventually unsuccessful claim regarding NMFS's pattern and practice of

1 applying improper search cut-off dates, while plaintiffs did not secure an order from Judge Conti  
2 finding that NMFS had an illegal pattern or practice, the record supports at least an inference that  
3 during this litigation NMFS implemented a new or clarified policy. Even assuming it was simply  
4 a clarified policy, that clarification produced a public benefit for future FOIA requestors. This  
5 time is compensable.

## 6 **2. Pleadings and Papers Never Filed**

7 NMFS argues that plaintiffs should not be compensated for 49.1 hours/\$26,686.22 for  
8 work on pleadings that were never filed, including draft amended complaints in *OCE I* and *OCE*  
9 *II*, a motion for reconsideration, and a motion for relief. Wall Decl., Ex. G (Unfiled Papers).

10 In reply, Sproul explains: (i) the work done on the unfiled SAC in May 2014 in *OCE I* was  
11 used on the motion for summary judgment in *OCE I* and is therefore compensable (Sproul Reply  
12 Decl. ¶ 5); (ii) the 3.16 hours billed in February 2015 for a “motion for relief” was in fact work  
13 done for the Notice Regarding Submitted Matter and Request For Ruling filed on March 2, 2015  
14 (*id.* ¶ 6); (iii) 13.19 hours of work in October 2014 was for a pleading filed in *OCE II*, Dkt. 58 (*id.*  
15 ¶ 7); (iv) 1.32 hours of time billed in May 2015, was cut from the request on plaintiffs’ Reply (and  
16 not currently sought); and (iv) the remaining hours that were spent on the unfiled motion for  
17 reconsideration in January 2016 are compensable because that unfiled motion was used as  
18 leverage to get NMFS to agree to a form of judgment and produce additional documents. *Id.* ¶ 8.  
19 Weisselberg also, on review, cut 0.56 of time from her entries challenged in Wall’s Ex. G, because  
20 those entries represented work on what was to become *OCE III*. Weisselberg. Reply Decl. ¶ 11.

21 Considering the declarations, I find that all of the challenged time except the time spent on  
22 the unfiled motion for reconsideration is compensable. Plaintiffs have adequately identified how  
23 the time identified by NMFS was spent or used for pleadings actually filed in this action.  
24 However, the time spent on the unfiled motion for reconsideration in January 2016 was created  
25 voluntarily by plaintiffs and used for “leverage” but was never necessary or useful for any  
26 contested decision made by me.

## 27 **3. Administrative Efforts**

28 NMFS wants a further reduction for 157.7 hours/\$89,442.20 that plaintiffs spent drafting

1 FOIA requests, working on the agency administrative appeals, and reviewing the documents  
 2 produced. Wall Decl., Ex. I. Generally, “work performed during the pre-litigation administrative  
 3 phase of a FOIA request is not recoverable under FOIA.” *Elec. Privacy Info. Ctr. v. United States*  
 4 *Dep't of Homeland Sec.*, 811 F. Supp. 2d 216, 237 (D.D.C. 2011); *but see Public.Resource.org*,  
 5 2015 WL 9987018, at \*8 (allowing recovery for two time entries on letters seeking agency  
 6 reconsideration “given the clear overlap in subject matter between the letter and this litigation, the  
 7 letter’s explicit contemplation of a lawsuit, and the proximity in time between the letter and the  
 8 filing of” the complaint).

9 In their Reply and supporting declarations, plaintiffs cut some of the contested time for  
 10 work on the FOIA requests and administrative appeals, but kept the time spent on two specific  
 11 FOIA requests in. As explained by lead counsel Sproul:

12 I and my co-counsel have been mindful that we are not entitled to  
 13 recover for drafting all our FOIA requests and reviewing all the  
 14 documents obtained for the purpose of learning the substantive  
 15 content of those documents for the Plaintiffs’ citizen suit litigation  
 16 against Stanford or larger public advocacy campaign related to  
 17 Stanford and the San Francisquito Creek watershed. However, we  
 18 have concluded that we may recover for time spent drafting FOIA  
 19 requests specifically intended to garner information for use in this  
 20 litigation and reviewing documents for such litigation purposes. I  
 21 and my co-counsel have carefully segregated the time spent drafting  
 22 FOIA requests reviewing documents such that we are seeking  
 23 recovery only for the latter time. With respect to drafting FOIA  
 24 requests, we are seeking to recover for time spent drafting (or  
 25 appealing responses concerning) only two of the multiple FOIA  
 26 requests at issue in this proceeding that Plaintiffs specifically used to  
 27 gather information used as evidence against NMFS in this case:  
 28 FOIA requests sent on April 3, 2014 and November 24, 2015. (the  
 latter is Exhibit M to the Wall Declaration, (OCE I, Dkt. 92-1). The  
 April 3, 2014 FOIA sought documents concerning the searches done  
 by NMFS and the responses provided by NMFS to Plaintiffs in  
 response to their FOIA requests with the aim of developing evidence  
 that NMFS’s searches have not complied with FOIA. Plaintiffs’  
 November 24, 2015 FOIA request sought documents with the  
 specific intent of trying to garner evidence that Plaintiffs’ litigation  
 had catalyzed NMFS to respond more promptly to Plaintiffs’ FOIA  
 requests. The aim was to develop evidence in support of catalyst  
 theory arguments for purposes of attorney fees recovery in  
 settlement and, if necessary, a fees motion. Plaintiffs’ November 24,  
 2015 FOIA Request sought documents related to NMFS’s assertions  
 that it had instituted several FOIA reforms also with the specific  
 intent of trying to garner evidence that Plaintiffs’ litigation had  
 catalyzed NMFS to institute these reforms. Again, our aim was to  
 develop evidence in support of catalyst theory arguments for

1 purposes of attorney fees recovery in settlement and, if necessary, a  
2 fees motion. As discussed in the Reply Declaration of Patricia  
3 Weisselberg, Plaintiffs have in fact used documents obtained in  
4 response to their FOIA requests as exhibits supporting the catalyst  
theory arguments they are advancing in their Fees Motion and  
5 plaintiffs agree to reduce some of their time spent on drafting the  
FOIA requests and the administrative appeals.

6 Sproul Reply Decl. ¶ 10.

7 Accordingly, Michael Costa cut 11.91 hours/\$6,148.98 for drafting FOIA requests and  
8 appeals, except for the work he did on the April 3, 2014 and November 24, 2015 FOIA requests  
9 that were aimed at gathering information for this lawsuit. Costa Reply Decl. ¶ 3. Jodene Isaacs  
10 cut 11.21 hours/\$5,599.40 for drafting FOIA requests and appeals. Isaacs Reply Decl. ¶ 2.  
Weisselberg cut 8.74 hours spent on FOIA appeals, included in Wall's Ex. I. Weisselberg Reply  
11 Decl. ¶ 13.

12 The bulk of the remaining time appears to be for document review conducted primarily by  
13 Costa and Isaacs. NMFS argues that document review is simply not compensable. *See, e.g.,*  
14 *Sierra Club v. United States EPA*, 75 F. Supp. 3d 1125, 1149 (N.D. Cal. 2014) ("As Plaintiffs  
15 received, at least in part, the relief they sought when the EPA produced the documents, the time  
16 they expended reviewing the documents was is properly characterized as post-relief activity,  
17 separate from the litigation."); *Citizens for Responsibility & Ethics v. United States DOJ*, 825 F.  
18 Supp. 2d 226, 231 (D.D.C. 2011) ("Plaintiff would have had to expend this time had DOJ timely  
19 produced the documents without litigation; the cost of reviewing documents produced in response  
20 to a FOIA request is simply the price of making such a request.").

21 Plaintiffs respond that in this case, where the adequacy of NMFS's searches and  
22 withholdings were central claims, plaintiffs needed to spend significant amounts of time reviewing  
23 the documents to support those claims in litigation. That might be true but plaintiffs'  
24 withholding claims were almost totally rejected (except for one document) and plaintiffs'  
25 inadequate search claims were likewise mostly unsuccessful (except for two narrow wins in *OCE*  
26 *I*). Plaintiffs also do not cite any case law allowing for recovery of time spent reviewing document  
27 productions where that review is necessary for a plaintiff to be able to challenge the adequacy of  
28 an agency's search or the propriety of withholdings.

1 Based on the declarations, I find that the Costa time spent on the two identified FOIA  
2 requests is compensable, given the overlap in subject matter between requests and this litigation as  
3 well as the proximity in time between those requests and the filing of pleadings in this case. The  
4 time spent reviewing the documents produced is not compensable.

5 **4. Work Unrelated to *OCE I* and *OCE II***

6 NMFS argues that plaintiffs should not be compensated for 8.9 hours/\$4,461.23 billed by  
7 Sproul, Weisselberg, Isaacs, and Costa that it contends is unrelated to *OCE I* and *OCE II*,  
8 including litigation with Stanford and entries related to FWS and the Corps. Wall Decl., Ex. H  
9 (Unrelated Matters). In Reply, Weisselberg explains the relevance of her entries listed on Exhibit  
10 H to *OCE I* and *OCE II*. Weisselberg Reply Decl. ¶ 12. Sproul also addresses the 8.9 hours listed  
11 in Exhibit H, and other than two mistakes accounting for 0.35/hours (which were cut in the Reply)  
12 adequately explains that those hours billed were necessary for *OCE I* and *OCE II*. Sproul Reply  
13 Decl. ¶ 9; *see also* Costa Reply Decl. ¶ 16. This time is compensable.

14 NMFS also argues that plaintiffs have (perhaps inadvertently) claimed time for work on  
15 *OCE III*, despite their claim that they are not seeking that time. In its Opposition and supporting  
16 declaration, NMFS identified 5.9 hours/\$3,506.18 it contends was incurred on *OCE III*. *See* Wall  
17 Decl., Ex. D. As noted above, this time is not compensable.

18 **5. Reduction for Excessive or Redundant Work**

19 NMFS asks the Court to reduce by 30-50% any fee award to account for excessive,  
20 cumulative, and inefficient billing. *Oppo.* at 24. NMFS specifically challenges: (i) the 158 hours  
21 spent on the opening attorney's fees motion and declarations; (ii) 249 hours on summary judgment  
22 and supplemental briefing in *OCE I*; (iii) 263.8 hours on summary judgment and supplemental  
23 briefing in *OCE II*; (iv) 157.7 hours on the "administrative phase" including record review; and (v)  
24 the fact that five attorneys worked on the case, which NMFS contends is excessive given the  
25 nature of these cases and is demonstrated by the 173.7 hours/\$107,885.73 billed for telephone  
26 calls and email correspondence between counsel for "coordination" purposes. Wall Decl., Ex. F  
27 (Coordination Activities).

28 In their Reply declarations, two of the billing attorneys exercised "more" billing judgment



1 to cut hours in light of potential redundancy. *See* Costa Reply Decl. ¶ 4 (cutting 4.05  
2 hours/\$2,136.38); Isaacs Reply Decl. ¶ 3 (cutting just over 14 hours/\$7,087.91). No other  
3 reductions for excessive or redundant work appear to have been made, other than the 10%  
4 “off the top” that each of the billing attorneys took off their time initially.

5 The time spent on the opening attorney’s fees motion and declarations is excessive and  
6 unreasonable. In particular, plaintiffs should not be compensated for the time Hudak spent  
7 (unsuccessfully as addressed above) surveying cases in order to determine what billing rates  
8 should be used for plaintiffs in this fee motion. Moreover, the time spent in drafting the fee  
9 motion which itself does not raise any unique issues or issues of first impression is excessive.  
10 Plaintiffs purport to be experienced FOIA and environmental litigators; submission of fee petitions  
11 is a regular part of that work. I recognize that reviewing the time records, exercising billing  
12 judgment, and creating supporting declarations will take significant time in each case no matter  
13 how experienced counsel is. But the time spent on the *brief* appears to be excessive in and of  
14 itself. A 25% reduction in the time spent on the opening attorney’s fees motion is appropriate, as  
15 is elimination of the time Hudak spent on his inapposite attorney’s fees survey.

16 As to time spent on the Reply brief and declarations (which NMFS did not have the  
17 opportunity to attack), I conclude that the time spent on the brief itself is reasonable, but not the  
18 time spent reviewing the time slips and submitting supplemental declarations, because much of  
19 *that* time was spent accounting for errors pointed out by NMFS and then making additional  
20 reductions for improper or otherwise redundant billing. Only 50% of the time spent on the  
21 declarations in support of the Reply is compensable.

22 As to the 249 hours spent on summary judgment and supplemental briefing in *OCE I* as  
23 well as the 263.8 hours spent on summary judgment and supplemental briefing in *OCE II*, I find  
24 that the time is reasonable and compensable. The summary judgment briefing was extensive,  
25 detailed and addressed a number of issues where there was little precedent. In these circumstances  
26 I cannot say the time spent was unreasonable.

27 As to the 157.7 hours on the “administrative phase” including record review, as noted  
28 above, plaintiffs have voluntarily cut all time on drafting the FOIA requests, except for time Costa

1 spent on two, and I have already found that time spent reviewing the documents produced is not  
2 compensable.

3 Finally, as to the time spent on coordination between counsel, I find that 173.7 hours is  
4 excessive. While this case was complex in the sense that there were a large number of FOIA  
5 requests at issue, at least three lawsuits filed, and multiple rounds of summary judgment and  
6 additional briefing required, the sheer number of attorneys involved many of whom it appears  
7 were involved in part because of the Stanford litigation meant that there was an excessive  
8 amount of “coordination.” A 25% reduction in the amount of time spent on coordination is  
9 appropriate.

10 **C. Costs**

11 Plaintiffs seek \$3,190.39 in costs. Dkt. No. 94. NMFS does not oppose the amount of  
12 costs, but argues instead that in light of the limited nature of plaintiffs’ success and the agency’s  
13 good faith, costs are not warranted. Oppo. at 24-25. Having concluded that plaintiffs are  
14 substantially prevailing and that the agency’s defenses were without a reasonable basis in law, an  
15 award of costs is appropriate. Plaintiffs are awarded \$3,190.39 in costs.

16 **CONCLUSION**

17 For the foregoing reasons, plaintiffs will be awarded attorney’s fees, but at a significantly  
18 reduced amount, and are awarded \$3,190.39 in costs.

19 Within twenty days of the date of this Order, plaintiffs shall, after meeting and conferring  
20 with defense counsel, submit a *joint* supplemental brief and proposed judgment containing a  
21 revised request for attorney’s fees that excludes all of the time I have identified above as not being  
22 compensable. The parties shall make all reasonable efforts to reach agreement on the time to be  
23 included in light of the time that has been excluded by this Order. If the parties cannot agree, any  
24 remaining disputes shall be explained in no more than two pages.

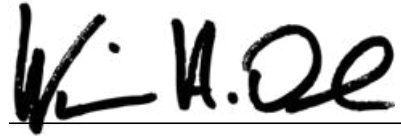
25 Plaintiffs must also recalculate their lodestar, using hourly rates that were approved for  
26 them in past years and using a rate for 2016 that is no more than 10% above their 2015 rates,  
27 unless otherwise justified. At the time the joint supplemental brief and proposed judgment is filed,  
28 plaintiffs shall submit a declaration explaining and identifying: (i) the rates for each biller for each



1 year billed; (ii) the case(s) for which each biller's rates have been requested and approved; (iii) the  
2 basis for the 2016 hourly rates sought; and (iv) the basis for any hourly rate sought for a biller who  
3 has not had her or his time approved by a prior court order.

4 **IT IS SO ORDERED.**

5 Dated: March 1, 2017

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8 William H. Orrick  
9 United States District Judge  
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United States District Court  
Northern District of California

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Wednesday, February 15, 2017 5:32 PM  
**To:** Stephen Lipps - NOAA Federal; John Almeida - NOAA Federal; Holmes, Colin; Robert Moller - NOAA Federal; Scott Smullen - NOAA Federal; Jeff Dillen - NOAA Federal; Kristen Gustafson - NOAA Federal  
**Cc:** Tom Taylor; Kimberly Katzenbarger - NOAA FEDERAL; Charles; Dennis Morgan - NOAA Federal; Stacey Nathanson - NOAA Federal; Robert Swisher - NOAA Federal; Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate; Lola Stith - NOAA Affiliate; Zachary Goldstein - NOAA Federal; Douglas Perry - NOAA Federal; Nkolika Ndubisi - NOAA Federal; Jeri Dockett - NOAA Affiliate; Cc: OCIO/OPPA  
**Subject:** Weekly FOIA Incoming and High Visibility Requests  
**Attachments:** Weekly FOIA Incoming and High Visibility Requests 02.08.17 - 02.15.17.xls

Good Evening,

Attached is this weeks report. Please note the request submitted by Judicial Watch seeking all communications over an 8 year period between Dr. Tom Karl and the Director of OSTP, John Holdren (DOC-NOAA-2017-000580). (b)(5)

Similarly, Emily Yehle, with Environment & Energy Publishing, has sought all communications from NOAA principal scientist John Bates concerning the study authored by Dr. Karl (DOC-NOAA-2017-000579). Lastly, another request was received, this time from New Republic, seeking all communications between NOAA Employees and President Trump's Transition Team (DOC-NOAA-2017-000617). (b)(5)

In litigation (b)(5). The underlying request seeks all questionnaires submitted to NOAA by President Trump's Transition Team (b)(5)

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

Confidentiality Notice: This e mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.

<b>Tracking Number</b>	<b>Type</b>	<b>Requester</b>
DOC-NOAA-2017-000631	Request	Benjamin P. Simpson
DOC-NOAA-2017-000580	Request	Bill Marshall
DOC-NOAA-2017-000573	Request	Jason Plautz
DOC-NOAA-2017-000601	Request	Michael G. Zolfo
DOC-NOAA-2017-000616	Request	Leandra Gallego
DOC-NOAA-2017-000589	Request	Marshall Morales
DOC-NOAA-2017-000579	Request	Emily Yehle
DOC-NOAA-2017-000577	Request	Alexis M. Thomas
DOC-NOAA-2017-000614	Request	Kendra Pierre-Louis
DOC-NOAA-2017-000617	Request	Emily C. Atkin
DOC-OS-2017-000555	Request Detail Task	Adam Kengor
DOC-OS-2017-000554	Other	Adam Kengor
DOC-OS-2017-000329	Other	Michael Best
DOC-OIG-2017-000453	Request Detail Task	Barry Harrell

Requester Organization	Submitted	Assigned To
Recirculating Farms Coalition	02/15/2017	NOAA
Judicial Watch	02/08/2017	OCIO
National Journal	02/07/2017	NWS
Doherty & Progar	02/13/2017	NWS
Stetson University College of Law	02/09/2017	NOS
Riddell Williams	02/10/2017	NOS
Environment & Energy Publishing	02/08/2017	Maria S. Williams
Animal Rights Hawaii	02/08/2017	Tawand Hodge Tonic
Popular Science	02/14/2017	NOAA
New Republic	02/14/2017	NOAA
Mr.	02/15/2017	NOAA
Mr.	02/15/2017	NOAA
	02/08/2017	NOAA
	02/08/2017	OCAO

Case File Assigned To	Perfected?	Due	Closed Date	Status
NOAA	No	TBD	TBD	Submitted
OCIO	Yes	03/10/2017	TBD	Assignment Determination
NWS	Yes	03/10/2017	TBD	Assignment Determination
NWS	Yes	03/14/2017	TBD	Assignment Determination
NOS	Yes	03/15/2017	TBD	Assignment Determination
NOS	Yes	03/14/2017	TBD	Assignment Determination
Maria S. Williams	Yes	03/10/2017	TBD	Assignment Determination
Tawand Hodge Tonic	Yes	03/10/2017	TBD	Assignment Determination
NOAA	No	TBD	TBD	Submitted
NOAA	No	TBD	TBD	Submitted
Harriette Boyd	No	03/03/2017	TBD	Open
Harriette Boyd	No	03/03/2017	TBD	Open
Harriette Boyd	No	02/14/2017	TBD	Open
Laura Main	Yes	02/15/2017	02/15/2017	Closed

**Detail**

Recirculating Farms Coalition requests the following records from the National Marine Fisheries Service: • The most recent stock assessment data for the Barataria Bay Estuarian System Stock of Common Bottlenose Dolphins. • All data concerning unusual mortality events in Atlantic bottlenose dolphins in the Gulf of Mexico from 2009 to present. • All information regarding the LOF designation for the Gulf menhaden (*Brevoortia patronus*) and Technology Policy John Holdren. The time frame for the requested records is January 20, 2009 through January 20, 2017.

I am requesting all emails between the address "john.bates@noaa.gov" and any email address with the domain name "mail.house.gov"; between the dates October 1, 2015 and January 31, 2016.

approval to be a "StormReady" city. I am interested in Wood Dale's application documents, Wood Dale's StormReady plan, and any communication between Wood Dale and NOAA or NWS. I also would like any

Petersburg's bay areas; in particular Treasure Island and Madeira Beach (if available). If possible, I would like to receive a breakdown of the contributions of things like car wash soap and litter to marine pollution over the past

Assessment for natural resources damages in the Multnomah Channel and Lower Columbia River. The document relates to the Portland Harbor Superfund site and purports to describe how hazardous releases from

Karl that appears in the June 2015 issue of Science (now titled "Possible artifacts of data biases in the recent global surface warming hiatus"). Please include e-mails, letters, hand-written notes, memorandums,

permits issued to Indianapolis Zoo between the years of 1985 and 1990. Wild-capture permits issued to National Aquarium between the years of 1985 and 1990. Wild-capture permits issued to Shedd Aquarium between the

Administration (NOAA) employee Jack Bates, associated with his tenure at the National Climatic Data Center.

This is to include but not be limited to the following personnel records, yearly performance reviews, professional certifications, awards for accomplishments, disciplinary paperwork associated with the employee, and documents

agency, including but not limited to documents distributed to NOAA employees from transition officials. Please also include communications between NOAA employees that cite instructions from Trump transition team

qualifications and anything in writing or electronic format such as resumes and supporting documents, that shows these qualifications of successful, selected applicants to announcement BIS-OEE-2014-0013, BIS-OEE-2014-

qualifications and anything in writing or electronic format such as resumes and supporting documents, that shows these qualifications of successful, selected applicants to announcement BIS-OEE-2014-0003, and BIS-OEE-2014-

Records from 2015 and 2016 relating to or mentioning Wilbur Ross, including communications received from or

I request that a copy of the following documents be provided to me: OIG Case Notification 16-1404.

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**From:** Sarah Brabson - NOAA Federal <sarah.brabson@noaa.gov>  
**Sent:** Monday, February 6, 2017 10:48 AM  
**To:** Mark Graff - NOAA Federal  
**Subject:** Fwd: Signature Needed  
**Attachments:** 2017 NOAA8861 - Privacy Threshold Analysis Rev 2.pdf; bill lapenta.vcf

Mark, I reviewed before NWS gathered signatures and just checked again. No changes from last year. This will be one for which NWS will need to submit that letter before April

(I started compiling a list of pending ATOs for which we'll need the waiver letter, will finish today or tomorrow).

thx Sarah

----- Forwarded message -----

**From:** Chris Ortiz - NOAA Federal <[chris.ortiz@noaa.gov](mailto:chris.ortiz@noaa.gov)>  
**Date:** Mon, Feb 6, 2017 at 10:35 AM  
**Subject:** Fwd: Signature Needed  
**To:** Sarah Brabson <[sarah.brabson@noaa.gov](mailto:sarah.brabson@noaa.gov)>

For your review and forward to NOAA Privacy Officer. No changes this year from last year.

**Chris Ortiz - CISSP & CAP**

[\(303\) 497-3930](tel:3034973930) (Office)

[\(b\)\(6\)](tel:(b)(6)) (Cell)

**Information Systems Security Officer**

[Aviation Weather Center \(AWC\)](#)

[Storm Prediction Center \(SPC\)](#)

[Space Weather Prediction Center \(SWPC\)](#)

(b) (5)



(b) (5)

(b) (5)

(b) (5)

(b) (5)

**Bill Lapenta**  
**Director**  
**NOAA / NWS**  
**National Centers for Environmental Prediction**

5830 University Research Ct.  
NOAA Center for Weather and Climate Prediction  
College Park, MD 20740

301-683-1315 ( Work )  
(b)(6) ( Cell )

bill.lapenta@noaa.gov ( Internet )

**Formatted Name**  
Bill Lapenta

**Name**  
*Family:* Lapenta  
*First:* Bill  
*Middle:*  
*Prefix:*  
*Suffix:*

**Organization**  
NOAA / NWS  
National Centers for Environmental Prediction

**Address** ( Domestic )  
*P.O. Address:* 5830 University Research Ct.  
*Extended Address:*  
*Street:* NOAA Center for Weather and Climate Prediction  
*Locality:* College Park  
*Region:* MD  
*Postal Code:* 20740  
*Country:*

**Electronic Mail Address** ( Internet )  
bill.lapenta@noaa.gov

**Title**  
Director

**Telephone Number** ( Work )  
301-683-1315

**Telephone Number** ( Cell )  
202-251-3966

**Version**  
2.1

---

**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Monday, February 6, 2017 11:27 AM  
**To:** Sarah Brabson - NOAA Federal  
**Subject:** Re: Signature Needed  
**Attachments:** 2017 NOAA8861 - Privacy Threshold Analysis Rev 2 mhg.pdf

No changes since last year, no issues. Signed and attached.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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On Mon, Feb 6, 2017 at 10:47 AM, Sarah Brabson - NOAA Federal <[sarah.brabson@noaa.gov](mailto:sarah.brabson@noaa.gov)> wrote:  
Mark, I reviewed before NWS gathered signatures and just checked again. No changes from last year. This will be one for which NWS will need to submit that letter before April

(I started compiling a list of pending ATOs for which we'll need the waiver letter, will finish today or tomorrow).

thx Sarah

----- Forwarded message -----

**From:** Chris Ortiz - NOAA Federal <[chris.ortiz@noaa.gov](mailto:chris.ortiz@noaa.gov)>  
**Date:** Mon, Feb 6, 2017 at 10:35 AM  
**Subject:** Fwd: Signature Needed  
**To:** Sarah Brabson <[sarah.brabson@noaa.gov](mailto:sarah.brabson@noaa.gov)>

For your review and forward to NOAA Privacy Officer. No changes this year from last year.

**Chris Ortiz - CISSP & CAP**  
[\(303\) 497-3930](tel:3034973930) (Office)  
(b)(6) (Cell)

**Information Systems Security Officer**  
[Aviation Weather Center \(AWC\)](#)  
[Storm Prediction Center \(SPC\)](#)  
[Space Weather Prediction Center \(SWPC\)](#)





**U.S. Department of Commerce  
National Oceanic and Atmospheric Administration  
National Weather Service**



**Privacy Threshold Analysis  
for the  
Aviation Weather Center (NOAA8861)**

**U.S. Department of Commerce Privacy Threshold Analysis  
National Oceanic and Atmospheric Administration  
National Weather Service/Aviation Weather Center (NOAA8861)**

**Unique Project Identifier: NOAA8861**

**Introduction:** This Privacy Threshold Analysis (PTA) is a questionnaire to assist with determining if a Privacy Impact Assessment (PIA) is necessary for this IT system. This PTA is primarily based from the Office of Management and Budget (OMB) privacy guidance and the Department of Commerce (DOC) IT security/privacy policy. If questions arise or further guidance is needed in order to complete this PTA, please contact your Bureau Chief Privacy Officer (BCPO).

**Description of the information system and its purpose:**

The Aviation Weather Center (AWC), located in Kansas City, MO, enhances aviation safety by issuing accurate warnings, forecasts and analyses of hazardous weather for aviation interests. The Center identifies existing or imminent weather hazards to aircraft in flight and creates warnings for transmission to the aviation community. The Center also originates operational forecasts of weather conditions predicted to affect domestic and international aviation interests during the next 24 hours. The AWC collaborates with universities, governmental research laboratories, Federal Aviation Administration facilities, international meteorological watch offices and other National Weather Service components to maintain a leading edge in aviation meteorology hazards training, operations and forecast technique development.

Warnings of flight hazards, such as turbulence, icing, low clouds and reduced visibility remain most critical for the protection of life and property over the United States from the earth's surface up to Flight Level (FL) 240. Above FL 240, the AWC provides warnings of dangerous wind shear, thunderstorms, turbulence, icing, and volcanic ash for the Northern Hemisphere from the middle of the Pacific Ocean eastward to the middle of the Atlantic Ocean. Additionally, above FL 240, the AWC forecasts jet stream cores, thunderstorms, turbulence and fronts for the Northern Hemisphere from the east coast of Asia eastward to the west coast of Europe and Africa. Through international agreement, the AWC also has responsibility to back up other World Area Forecast Centers with aviation products distributed through the World Area Forecast System.

The AWC supports requirements for products and services established by national and international agreements. The Center coordinates closely with the aviation community to identify new standards in support of Federal Aviation Administration (FAA) national requirements and International Civil Aviation Organization (ICAO) international requirements.

The E-Government Act of 2002 defines "information system" by reference to the definition section of Title 44 of the United States Code. The following is a summary of the definition: "Information system" means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information. See: 44. U.S.C. § 3502(8).

**Questionnaire:**

## 1. What is the status of this information system?

This is a new information system. *Continue to answer questions and complete certification.*

This is an existing information system with changes that create new privacy risks.  
*Complete chart below, continue to answer questions, and complete certification.*

Changes That Create New Privacy Risks (CTCNPR)					
a. Conversions		d. Significant Merging		g. New Interagency Uses	
b. Anonymous to Non-Anonymous		e. New Public Access		h. Internal Flow or Collection	
c. Significant System Management Changes		f. Commercial Sources		i. Alteration in Character of Data	
j. Other changes that create new privacy risks (specify):					

This is an existing information system in which changes do not create new privacy risks. *Skip questions and complete certification.*

## 2. Is the IT system or its information used to support any activity which may raise privacy concerns?

NIST Special Publication 800-53 Revision 4, Appendix J, states "Organizations may also engage in activities that do not involve the collection and use of PII, but may nevertheless raise privacy concerns and associated risk. The privacy controls are equally applicable to those activities and can be used to analyze the privacy risk and mitigate such risk when necessary." Examples include, but are not limited to, audio recordings, video surveillance, building entry readers, and electronic purchase transactions.

Yes. *Please describe the activities which may raise privacy concerns.*

No

## 3. Does the IT system collect, maintain, or disseminate business identifiable information (BII)?

As per DOC Privacy Policy: "For the purpose of this policy, business identifiable information consists of (a) information that is defined in the Freedom of Information Act (FOIA) as "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." (5 U.S.C.552(b)(4)). This information is exempt from automatic release under the (b)(4) FOIA exemption. "Commercial" is not confined to records that reveal basic commercial operations" but includes any records [or information] in which the submitter has a commercial interest" and can include information submitted by a nonprofit entity, or (b) commercial or other information that, although it may not be exempt from release under FOIA, is exempt from disclosure by law (e.g., 13 U.S.C.)."

Yes, the IT system collects, maintains, or disseminates BII about: *(Check all that apply.)*

Companies

Other business entities

No, this IT system does not collect any BII.

4. Personally Identifiable Information

4a. Does the IT system collect, maintain, or disseminate personally identifiable information (PII)?

As per OMB 07-16, Footnote 1: "The term 'personally identifiable information' refers to information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc... alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc..."

Yes, the IT system collects, maintains, or disseminates PII about: *(Check all that apply.)*

- DOC employees
- Contractors working on behalf of DOC
- Members of the public

No, this IT system does not collect any PII.

***If the answer is "yes" to question 4a, please respond to the following questions.***

4b. Does the IT system collect, maintain, or disseminate PII other than user ID?

Yes, the IT system collects, maintains, or disseminates PII other than user ID.

No, the user ID is the only PII collected, maintained, or disseminated by the IT system.

4c. Will the purpose for which the PII is collected, stored, used, processed, disclosed, or disseminated (context of use) cause the assignment of a higher PII confidentiality impact level?

Examples of context of use include, but are not limited to, law enforcement investigations, administration of benefits, contagious disease treatments, etc.

Yes, the context of use will cause the assignment of a higher PII confidentiality impact level.

No, the context of use will not cause the assignment of a higher PII confidentiality impact level.

***If any of the answers to questions 2, 3, 4b, and/or 4c are "Yes," a Privacy Impact Assessment (PIA) must be completed for the IT system. This PTA and the approved PIA must be a part of the IT system's Assessment and Authorization Package.***

### CERTIFICATION

X I certify the criteria implied by one or more of the questions above **apply** to the NOAA8861-Aviation Weather Center and as a consequence of this applicability, I will perform and document a PIA for this IT system.

\_\_\_\_\_ I certify the criteria implied by the questions above **do not apply** to the NOAA8861-Aviation Weather Center and as a consequence of this non-applicability, a PIA for this IT system is not necessary.

Name of Information System Security Officer (ISSO) or System Owner (SO): Christopher John Ortiz (AWC ISSO)

Signature of ISSO or SO: ORTIZ.CHRISTOPHER.J.1154749175  
Digitally signed by ORTIZ.CHRISTOPHER.J.1154749175  
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=ORTIZ.CHRISTOPHER.J.1154749175  
Date: 2017.01.31 12:59:10 Date: \_\_\_\_\_

Name of Information Technology Security Officer (ITSO): Beckie Bolton (NWS ITSO)

Signature of ITSO: KOONGE.BECKIE.A.1408306880  
Digitally signed by KOONGE.BECKIE.A.1408306880  
Date: 2017.02.02 10:53:05 Date: \_\_\_\_\_

Name of Authorizing Official (AO): Dr. William M. Lapenta

Signature of AO: LAPENTA.WILLIAM.M.1370194030  
Digitally signed by LAPENTA.WILLIAM.M.1370194030  
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=LAPENTA.WILLIAM.M.1370194030  
Date: 2017.02.06 06:38:45 -05' Date: \_\_\_\_\_

Name of Bureau Chief Privacy Officer (BCPO): Mark H. Graff (NOAA)

Signature of BCPO: GRAFF.MARK.HYRUM.1514447892  
Digitally signed by GRAFF.MARK.HYRUM.1514447892  
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=GRAFF.MARK.HYRUM.1514447892  
Date: 2017.02.06 11:26:41 -05' Date: \_\_\_\_\_

---

**From:** Tommy Thompson Sr. - NOAA Federal <tommy.thompson@noaa.gov>  
**Sent:** Friday, March 3, 2017 3:44 PM  
**To:** Mark Graff - NOAA Federal  
**Cc:** Beckie Koonge - NOAA Federal; John Soule - NOAA Affiliate; Sarah Brabson - NOAA Federal; Robert Swisher - NOAA Federal  
**Subject:** Re: NOAA8205 PTA  
**Attachments:** NOAA8205 PTA 20170131-2 (Partially signed).pdf

Mr. Graff,

I apologize for the delay in returning this document earlier. (b)(5)

Attached is the PTA signed by all NWS POCs, only needing your signature as BCPO.

Please remember to send a fully signed copy back to me for the system records and appropriate posting in CSAM.

Respectfully,

**Tommy Thompson, Sr.**, CISSP, CAP, CISA, CISM, CRISC, FITSI M/A, ITIL v3  
Information Services Project Manager  
Information Services Branch  
System Owner for NOAA8205 NWS HQ Network  
National Weather Service  
Office of the Assistant Chief Information Officer  
National Oceanic and Atmospheric Administration  
SSMC2 Room 17454  
1325 East West Highway  
Silver Spring, MD 20910-3281  
(301) 427-6987

Mail to: [Tommy.Thompson@noaa.gov](mailto:Tommy.Thompson@noaa.gov)

On Tue, Feb 28, 2017 at 1:11 PM, Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)> wrote:  
Hi Guys,

I wanted to follow up on the status of the signed PTA. It will be one of the required artifacts for approval of

the NOAA8205 PIA, so I wanted to make sure it hasn't fallen through the cracks. What do you need on our end to push this through?

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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(b) (5)



(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

---

**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Monday, February 6, 2017 11:43 AM  
**To:** Sarah Brabson - NOAA Federal  
**Subject:** Re: NOAA6101 PIA and PTA signed at NOS level, etc  
**Attachments:** NOAA6101 PTA 2017 mhg.pdf

Here is the PTA signed.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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On Mon, Feb 6, 2017 at 10:32 AM, Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)> wrote:

Here is NOAA6101 signed and good to go (b)(5) ?

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
[\(301\) 628-5658](tel:3016285658) (O)  
(b)(6) (C)

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On Mon, Feb 6, 2017 at 8:35 AM, Sarah Brabson - NOAA Federal <[sarah.brabson@noaa.gov](mailto:sarah.brabson@noaa.gov)> wrote:

Mark (b)(5)

I believe I sent you the signed memo but here it is again also, along with the Word version of the PIA and the self-assessment. After you send all this to DOC I'll request PIA review from the DOC OCIO.

thx Sarah

thx Sarah

----- Forwarded message -----

From: **John D. Parker - NOAA Federal** <[john.d.parker@noaa.gov](mailto:john.d.parker@noaa.gov)>

Date: Mon, Feb 6, 2017 at 8:23 AM

Subject: Re: NOAA6101 PIA and PTA signed

To: Sarah Brabson - NOAA Federal <[sarah.brabson@noaa.gov](mailto:sarah.brabson@noaa.gov)>

Cc: Jeff Payne - NOAA Federal <[jeff.payne@noaa.gov](mailto:jeff.payne@noaa.gov)>, Chuck Baxley - NOAA Federal <[chuck.baxley@noaa.gov](mailto:chuck.baxley@noaa.gov)>, Vickie Forrest <[vickie.forrest@noaa.gov](mailto:vickie.forrest@noaa.gov)>, James Boyd <[james.boyd@noaa.gov](mailto:james.boyd@noaa.gov)>

Sarah,

I have approved and attached both the PIA and PTA.

Please proceed to Mark for his review.

Thanks,

John

John D. Parker, CISSP, CISA <[John.D.Parker@noaa.gov](mailto:John.D.Parker@noaa.gov)>

NOS IT Security Officer

DOC/NOAA/NOS IMO

[240 533 0832](tel:2405330832) (office)

[301 466 6674](tel:3014666674) (mobile)

Email NOS IT security inquires: [NOS.ITSP@noaa.gov](mailto:NOS.ITSP@noaa.gov)

**U.S. Department of Commerce**  
**[Bureau Name]**



**Privacy Threshold Analysis**  
**for**  
**NOAA6101**



## U.S. Department of Commerce Privacy Threshold Analysis

### NOAA6101

#### **Unique Project Identifier: [Number]**

**Introduction:** This Privacy Threshold Analysis (PTA) is a questionnaire to assist with determining if a Privacy Impact Assessment (PIA) is necessary for this IT system. This PTA is primarily based from the Office of Management and Budget (OMB) privacy guidance and the Department of Commerce (DOC) IT security/privacy policy. If questions arise or further guidance is needed in order to complete this PTA, please contact your Bureau Chief Privacy Officer (BCPO).

#### **Description of the information system and its purpose:**

System NOAA61 OJ is a general support system used to ensure that the Office for Coastal Management's (OCM's) scientific and internal administrative I operational needs are met. The system is an integrated collection of subsystems designed to provide general office automation, infrastructure, and connectivity services to the National Oceanic and Atmospheric Administration's (NOAA) Office for Coastal Management (OCM) located in Charleston, SC, Silver Spring, MD, Honolulu, HI, Stennis Space Center, MS, additional OCM field offices, and remote staff. The system enables OCM to achieve its mission, which is to support the environmental, social, and economic well-being of the coast by linking people, information, and technology. OCM assists the nation's coastal resource Management community by providing access to information, technology, and training, and by producing new tools and approaches that often can be applied nationwide.

Two of the component subsystems are the file servers and Web Application Subsystem (WAS). While the file servers store and serve up administrative and operational data, the WAS hosts and serves data-driven Web-based applications. Applications served from an internal Web server are accessible only to NOAA employees and contractors operating from within the NOAA network. These internal applications track information related to OCM's operations I administration. Applications served from public-facing Web servers may be intended for OCM and other subsets of OCM, NOAA, other federal agencies, customers, partners, and/or the public.

**Questionnaire:**

1. What is the status of this information system?

- This is a new information system. *Continue to answer questions and complete certification.*
- This is an existing information system with changes that create new privacy risks. *Complete chart below, continue to answer questions, and complete certification.*

<b>Changes That Create New Privacy Risks (CTCNPR)</b>			
a. Conversions		d. Significant Merging	g. New Interagency Uses
b. Anonymous to Non-Anonymous		e. New Public Access	h. Internal Flow or Collection
c. Significant System Management Changes		f. Commercial Sources	i. Alteration in Character of Data
j. Other changes that create new privacy risks (specify):			

- This is an existing information system in which changes do not create new privacy risks. *Continue to answer questions, and complete certification.*

2. Is the IT system or its information used to support any activity which may raise privacy concerns?

NIST Special Publication 800-53 Revision 4, Appendix J, states “Organizations may also engage in activities that do not involve the collection and use of PII, but may nevertheless raise privacy concerns and associated risk. The privacy controls are equally applicable to those activities and can be used to analyze the privacy risk and mitigate such risk when necessary.” Examples include, but are not limited to, audio recordings, video surveillance, building entry readers, and electronic purchase transactions.

- Yes. *Please describe the activities which may raise privacy concerns.*

Activities are focused on internal administrative efforts (employee information), web-based inquiries and information sharing, and business specific information (contracts, proposals, etc...). All are protected in ways detailed in the Privacy Impact Assessment (PIA) for NOAA 6101.

- No

3. Does the IT system collect, maintain, or disseminate business identifiable information (BII)?

As per DOC Privacy Policy: "For the purpose of this policy, business identifiable information consists of (a) information that is defined in the Freedom of Information Act (FOIA) as "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." (5 U.S.C.552(b)(4)). This information is exempt from automatic release under the (b)(4) FOIA exemption. "Commercial" is not confined to records that reveal basic commercial operations" but includes any records [or information] in which the submitter has a commercial interest" and can include information submitted by a nonprofit entity, or (b) commercial or other information that, although it may not be exempt from release under FOIA, is exempt from disclosure by law (e.g., 13 U.S.C.)."

Yes, the IT system collects, maintains, or disseminates BII about: *(Check all that apply.)*

- Companies
- Other business entities

No, this IT system does not collect any BII.

4. Personally Identifiable Information

4a. Does the IT system collect, maintain, or disseminate personally identifiable information (PII)?

As per OMB 07-16, Footnote 1: "The term 'personally identifiable information' refers to information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc... alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc..."

Yes, the IT system collects, maintains, or disseminates PII about: *(Check all that apply.)*

- DOC employees
- Contractors working on behalf of DOC
- Members of the public

No, this IT system does not collect any PII.

***If the answer is "yes" to question 4a, please respond to the following questions.***

4b. Does the IT system collect, maintain, or disseminate PII other than user ID?

Yes, the IT system collects, maintains, or disseminates PII other than user ID.

No, the user ID is the only PII collected, maintained, or disseminated by the IT system.

4c. Will the purpose for which the PII is collected, stored, used, processed, disclosed, or disseminated (context of use) cause the assignment of a higher PII confidentiality impact level?

Examples of context of use include, but are not limited to, law enforcement investigations, administration of benefits, contagious disease treatments, etc.

Yes, the context of use will cause the assignment of a higher PII confidentiality impact level.

No, the context of use will not cause the assignment of a higher PII confidentiality impact level.

***If any of the answers to questions 2, 3, 4b, and/or 4c are “Yes,” a Privacy Impact Assessment (PIA) must be completed for the IT system. This PTA and the approved PIA must be a part of the IT system’s Assessment and Authorization Package.***

### CERTIFICATION

I certify the criteria implied by one or more of the questions above **apply** to the [IT SYSTEM NAME] and as a consequence of this applicability, I will perform and document a PIA for this IT system.

I certify the criteria implied by the questions above **do not apply** to the [IT SYSTEM NAME] and as a consequence of this non-applicability, a PIA for this IT system is not necessary.

Name of Information System Security Officer (ISSO) or System Owner (SO): **Chuck Baxley (ISSO)**

Signature of ISSO or SO: BAXLEY.CHARLES.A.III.1058676264  
8676264 Digitally signed by BAXLEY.CHARLES.A.III.1058676264  
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=BAXLEY.CHARLES.A.III.1058676264  
Date: 2017.02.03 15:22:41 -05'00' Date: \_\_\_\_\_

Name of Information Technology Security Officer (ITSO): **John D. Parker (ITSO)**

Signature of ITSO: PARKER.JOHN.D.1365835914  
PARKER.JOHN.D.1365835914 Digitally signed by PARKER.JOHN.D.1365835914  
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=PARKER.JOHN.D.1365835914  
Date: 2017.02.06 08:20:40 -05'00' Date: \_\_\_\_\_

Name of Authorizing Official (AO): **Jeffrey L. Payne (AO)**

Signature of AO: PAYNE.JEFFREY.L.DR.1365833881  
881 Digitally signed by PAYNE.JEFFREY.L.DR.1365833881  
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=OTHER, cn=PAYNE.JEFFREY.L.DR.1365833881  
Date: 2017.02.03 15:29:07 -05'00' Date: \_\_\_\_\_

Name of Bureau Chief Privacy Officer (BCPO): MARK GRAFF

Signature of BCPO: GRAFF.MARK.HYRU  
M.1514447892 Digitally signed by GRAFF.MARK.HYRU.1514447892  
DN: c US, o U.S. Government, ou DoD, ou PKI, ou OTHER, cn GRAFF.MARK.HYRU.1514447892  
Date: 2017.02.06 10:37:27 -05'00' Date: \_\_\_\_\_

---

**From:** Demian Schane - NOAA Federal <demian.schane@noaa.gov>  
**Sent:** Thursday, February 16, 2017 6:27 PM  
**To:** Deborah Ben-David; Stacey.Nathanson@noaa.gov; Almeida, John (Federal); Chua, Alvin (Federal); Jones, Levi (Federal); Mark Graff - NOAA Federal  
**Cc:** Ellen Sebastian  
**Subject:** draft cover letter to Friends of the Animals - responses for items 3 and 4  
**Attachments:** FOA-AKR-Response 3&4 Ltr.docx

Attached is the standard letter we use as a cover letter (b)(5) [redacted]  
[redacted]  
[redacted]  
[redacted]

[redacted]  
[redacted]  
[redacted]  
[redacted]

Thank you.  
  
Demian

----- Forwarded message -----  
**From:** Ellen Sebastian - NOAA Federal <[ellen.sebastian@noaa.gov](mailto:ellen.sebastian@noaa.gov)>  
**Date:** Thu, Feb 16, 2017 at 2:04 PM  
**Subject:** Friends of the Animals Response for items 3 and 4 Draft Letter- Need Your Help  
**To:** Demian Schane <[demian.schane@noaa.gov](mailto:demian.schane@noaa.gov)>

Hi Demian (b)(5) [redacted]  
[redacted]  
[redacted]  
[redacted]  
[redacted]  
[redacted]

--  
Ellen Sebastian  
FOIA & Records Coordinator  
Information Services Division  
NOAA Fisheries, Alaska Region  
[\(907\) 586-7152](tel:(907)586-7152)

*Nourish and sustain your sense of joy.*

--

Demian A. Schane  
NOAA, Office of General Counsel, Alaska Section  
U.S. Department of Commerce  
P.O. Box 21109  
Juneau, AK 99802  
907-586-7027 (direct)  
907-586-7263 (facsimile)  
<http://www.fakr.noaa.gov/>

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Image not available for this document, ID: 0.7.3707.5124 000001



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**From:** Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>  
**Sent:** Monday, March 6, 2017 11:29 AM  
**To:** Beverly Smith - NOAA Federal  
**Cc:** Mark Graff - NOAA Federal  
**Subject:** Re: HEADS UP RE: FEE WAIVER REQUEST Fwd: FOIA REQUEST #DOC-NOAA-2017-000631 SIMPSON

Hi Bev (b)(5). Mark will be back in the office tomorrow and can weigh in on this. I defer to his guidance regarding this matter.

Lola

On Mon, Mar 6, 2017 at 9:25 AM, Beverly Smith - NOAA Federal <[beverly.smith@noaa.gov](mailto:beverly.smith@noaa.gov)> wrote:  
Lola,

The requester in 2017-000631 seeks a fee waiver. (b)(5)

----- Forwarded message -----

**From:** Marianne Cufone <[mcufone@recirculatingfarms.org](mailto:mcufone@recirculatingfarms.org)>  
**Date:** Sat, Mar 4, 2017 at 11:55 AM  
**Subject:** Re: FOIA REQUEST #DOC-NOAA-2017-000631 SIMPSON - REQUEST FOR SCOPE CLARIFICATION CONFERENCE CALL  
**To:** [beverly.smith@noaa.gov](mailto:beverly.smith@noaa.gov)  
**Cc:** Benjamin Simpson <[benjamin@my.loyno.edu](mailto:benjamin@my.loyno.edu)>, Emily Posner <[emilyposnerlaw@gmail.com](mailto:emilyposnerlaw@gmail.com)>, Jason Galjour <[jmgaljou@my.loyno.edu](mailto:jmgaljou@my.loyno.edu)>

Hi Ms. Smith: This is Marianne Cufone. I am the Prof of the Environmental Policy Lab that the students working on the Barataria Bay issue are in this semester. I'd like to join in the call Monday. Is it possible for me to call in separately? I will not be in the same location as the rest of the participants. Please advise.

Thank you,  
Marianne

On Fri, Mar 3, 2017 at 11:35 PM, Benjamin Simpson <[benjamin@my.loyno.edu](mailto:benjamin@my.loyno.edu)> wrote:

Begin forwarded message:

**From:** Beverly Smith - NOAA Federal <[beverly.smith@noaa.gov](mailto:beverly.smith@noaa.gov)>  
**Subject:** Re: FOIA REQUEST #DOC-NOAA-2017-000631 SIMPSON - REQUEST FOR SCOPE CLARIFICATION CONFERENCE CALL

**Date:** March 2, 2017 at 3:01:41 PM CST  
**To:** Benjamin Simpson <[benjamin@my.loyno.edu](mailto:benjamin@my.loyno.edu)>  
**Cc:** Jason Galjour <[jmgaljou@my.loyno.edu](mailto:jmgaljou@my.loyno.edu)>, Sophia Howard <[sophia.howard@noaa.gov](mailto:sophia.howard@noaa.gov)>, Beverly Smith <[beverly.smith@noaa.gov](mailto:beverly.smith@noaa.gov)>

Dear Mr. Simpson:

Thank you for the quick reply. I will set the conference call for **Monday, March 6, 1:30-2:30 p.m. (Eastern Standard Time)**. I will call you, therefore, via e-mail reply please provide a telephone number.

Sincerely,  
Beverly

On Thu, Mar 2, 2017 at 3:46 PM, Benjamin Simpson <[benjamin@my.loyno.edu](mailto:benjamin@my.loyno.edu)> wrote:  
Dear Ms. Smith,

Thank you for your prompt attention to this matter. We will be available to discuss the scope of our request on Monday March 6, from 1:00-3:00pm if that still works for you. We will also be joined in the call by the supervising attorneys for our Environmental Policy Lab. Thank you again for your assistance.

Sincerely,  
Ben Simpson

On Mar 2, 2017, at 10:10 AM, Beverly Smith - NOAA Federal <[beverly.smith@noaa.gov](mailto:beverly.smith@noaa.gov)> wrote:

Benjamin P. Simpson  
Loyola University New Orleans  
College of Law | Juris Doctor Candidate 2018  
[Benjamin@my.loyno.edu](mailto:Benjamin@my.loyno.edu)

Jason M. Galjour  
Loyola University New Orleans  
College of Law | Juris Doctor Candidate 2018  
[jmgaljou@my.loyno.edu](mailto:jmgaljou@my.loyno.edu)

RE: Freedom of Information Act (FOIA) Request #DOC-NOAA-2017-000631

Dear Messrs. Simpson and Galjour:

I am the Freedom of Information Act (FOIA) Coordinator for NOAA's National Marine Fisheries Service, Southeast Region (SER), and I am in receipt of your FOIAonline FOIA request #DOC-NOAA-2016-000631 that was received by our office on February 21, 2017. You seek information on behalf of Recirculating Farms Coalition regarding the impact that the Gulf menhaden purse seine fishery has on bottlenose dolphins in Barataria Bay. You specifically seek the following records:

- The most recent stock assessment data for the Barataria Bay Estuarian System Stock of Common Bottlenose Dolphins.
- All data concerning unusual mortality events in Atlantic bottlenose dolphins in the Gulf of Mexico from 2009 to present.
- All information regarding the LOF designation for the Gulf menhaden (*Brevoortia patronus* hereinafter "Gulf menhaden") purse seine fishery.
- All data recorded by independent observers on Gulf menhaden fishing boats from 1992 to present.
- Any information pertaining to takings of Common Bottlenose Dolphins in and around Barataria Bay.
- Visual representations and GPS data on Gulf menhaden landings from recent years.
- All reported incidental takings of Common Bottlenose Dolphins around Barataria Bay.
- All reported bycatch data from the Gulf menhaden purse seine fishery.
- All communications concerning the Gulf menhaden fishery (including memos, documents, emails, text messages, phone conversations, and all correspondence)

This is to request a conference call with you to discuss the scope of your request. We want to ensure that we are accurately interpreting the terms of your request before we commence a search for records. Further, our discussion may provide us with an idea of the volume of responsive records at issue.

I anticipate that the conference call will include Sophia Howard, FOIA Coordinator, Southeast Fisheries Science Center (SEFSC) and myself, as well as subject matter expert scientists from SEFSC and SER.

Via e-mail reply, please let me know a date and time (Eastern Standard Time,

EST; for a duration of one hour) that you are available during the week of March 6-10, 2017, as follows:

Monday, March 6: 1-3 p.m.

Wednesday, March 8: 1-3 p.m.

Friday, March 10: 1-3 p.m.

**REQUEST TOLLING**

Pursuant to 5 U.S.C. 552(a)(6)(A), our time to respond is tolled until we concluded the scope clarification process and we agree on what it is that you seek. This does not start your time running again from the beginning, but it does stop the clock until we conclude the scope clarification process.

If we do not hear from you within 30 calendar days from the date of this e-mail, we will assume that you do not wish to proceed and your request will be administratively closed.

If you have any questions, please do not hesitate to contact me at [727-551-5762](tel:727-551-5762) or [beverly.smith@noaa.gov](mailto:beverly.smith@noaa.gov), or the NOAA FOIA Public Liaison Robert Swisher at [301-628-5755](tel:301-628-5755).

Sincerely,  
Beverly J. Smith  
FOIA Coordinator  
Southeast Region  
NOAA's National Marine Fisheries Service  
[727-551-5762](tel:727-551-5762)

--

Beverly J. Smith  
FOIA Coordinator  
Southeast Region  
NOAA's National Marine Fisheries Service  
[727-551-5762](tel:727-551-5762)

--

Marianne Cufone  
Executive Director  
Recirculating Farms Coalition  
[www.recirculatingfarms.org](http://www.recirculatingfarms.org)

Check us out on [Facebook](#) and [Twitter](#)!

--

Beverly J. Smith  
FOIA Coordinator  
Southeast Region  
NOAA's National Marine Fisheries Service  
[727-551-5762](tel:727-551-5762)

--

Lola Stith  
Contractor - The Ambit Group, LLC  
NOAA Office of the Chief Information Officer (OCIO)  
(c (b)(6) [REDACTED])  
[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Tuesday, February 7, 2017 7:48 AM  
**To:** John Almeida - NOAA Federal  
**Cc:** Rodney Vieira - NOAA Federal  
**Subject:** Re: Transition FOIAs  
**Attachments:** FOIA Listing 2017-02-02 (1) (1).xls

Of course--

Rod (b)(5)

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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On Tue, Feb 7, 2017 at 7:43 AM, John Almeida - NOAA Federal <[john.almeida@noaa.gov](mailto:john.almeida@noaa.gov)> wrote:

Mark (b)(5)

Thanks!

BOU	Tracking Number	Type	Requester
	DOC-NOAA-2017-000331	Request	Adam J. Rappaport
	DOC-NOAA-2017-000346	Request	Anthony V. Schick
	DOC-NOAA-2017-000362	Request	Jaclyn Prange
	DOC-NOAA-2017-000497	Request	Rachel Clattenburg
	DOC-NOAA-2017-000351	Request	Yogin Kothari
<b>DOC REQUESTS - ASSIGNED TASKS TO NOAA</b>			

	DOC-OS-2017-000267	TASK	Stephen S. Braun
	DOC-OS-2017-000308	TASK	Michael Best



Requester Organization	Submitted	Assigned To	Perfected	Due
Citizens for Responsibility and Ethics in Washington	12/16/2016	LA	YES	01/24/2017
Oregon Public Broadcasting	12/19/2016	Ana Liza Malabanan	YES	02/23/2017
	12/22/2016	USEC	YES	02/09/2017
Public Citizen	01/25/2017	USEC	YES	03/02/2017
UCS	12/20/2016	USEC	YES	

Associated Press	12/19/2016	NOAA/USEC	YES	01/11/2017
	01/26/2017	NOAA/USEC	YES	02/27/2017

Closed Dat	(b)(5)	Dispositions
TBD		TBD
TBD		TBD
TBD		TBD
TBD		TBD
TBD		TBD

**(b)(5)**

TBD

TBD

TBD

TBD

**Detail**

CREW requests copies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump's transition team, including representatives of Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect.

I request copies of any communications from regional staff in Oregon, Washington or Idaho since July 2016 involving both of the following keywords: 'Trump', 'President'. Scope modified to limit search by NMFS West Coast Region "Supervisory" staff located in Oregon, Washington or Idaho.

Please produce records in possession, custody, or control that are, include, or reflect communications between National Oceanic and Atmospheric Administration's (NOAA's) staff and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Wilbur Ross, Ray Washburne, David Bohigian, Joan Maginnis, George Sifakis, William Gaynor, A. Mark Neuman, and Tom Leppert.

On behalf of Public Citizen, Inc., and pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. s. 552, I request:

1. All records of communications from or on behalf of the Trump Administration and/or the Trump Transition Team to the National Oceanic and Atmospheric Administration (NOAA) providing guidance on which agency matters NOAA employees may or may not publicly discuss and/or regulating how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request. Background discussion of the concerns motivating this request is provided in the January 24, 2017, article in Politico by Andrew Restuccia, Alex Guill&eacute;n, and Nancy Cook, entitled Information lockdown hits Trump's federal agencies, available at <http://www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122>.
2. All records of communications disseminated internally to NOAA employees to provide guidance on which agency matters NOAA employees may or may not publicly discuss and/or to regulate how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and on behalf of the Union of Concerned Scientists, I write to request access to and copies of all communications and attachments between National Oceanic and Atmospheric Administration staff and the following individuals from November 14, 2016 to present:

1. Anyone with the following email domain: @ptt.gov
2. Anyone with the following email domain: @donaldjtrump.com

copies of All emails sent to or sent from your agency employees in which the Internet domains "trump.com", "trumporg.com", "ptt.gov", "donaldjtrump.com" or "donaldtrump.com" are in email addresses in the To, From, CC,BCC, Subject or Body fields of the message. The time frame for this request is June 3, 2016 through December 5, 2016. for the following Officials: Secretary of Commerce Penny Pritzker Deputy Secretary Bruce H. Andrews Chief of Staff Jim Hock General Counsel Kelly R. Welsh Undersecretary for National Oceanic and Atmospheric Administration Dr Kathryn Sullivan Acting Undersecretary for International Trade Kenneth E. Hyatt Undersecretary for Industry and Security Eric L. Hirschhorn Director of the U.S. Census Bureau John Thompson Assistant Secretary for Economic Development Jay Williams

Under the Freedom of Information Act, I hereby request any emails produced or received by your agency to or from any member or part of the transition team, as well as any emails which include any or all of the following terms or phrases: • Trump • Transition • President-Elect • New administration • New boss

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**From:** Sarah Brabson - NOAA Federal <sarah.brabson@noaa.gov>  
**Sent:** Monday, March 6, 2017 9:00 AM  
**To:** Rob Swisher  
**Cc:** Mark Graff - NOAA Federal  
**Subject:** Fwd: NOAA82056 PIA, and PTA for signature  
**Attachments:** NOAA8205 PTA 20170131-2 (Partially signed).pdf

Rob, since Mark is on leave today (which I didn't realize), could you sign the attached PTA? I'd like to get the revised package, with detailed description of the changes to the PIA, to DOC today.

thx Sarah

(b) (5)



(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

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**From:** Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>  
**Sent:** Monday, February 6, 2017 4:05 PM  
**To:** Mark Graff - NOAA Affiliate  
**Subject:** January 2017 FOIA Monthly Report (DRAFT FOR YOUR REVIEW/APPROVAL)  
**Attachments:** FOIA Monthly Status Report 01-31-2017.xlsx; FOIA Monthly Status Report 01-31-2017.pdf; Incoming - 012017.xls; Closed - 012017.xls; Backlog - 012017.xls

Hi Mark - Please find a draft of the final FOIA monthly report for January attached for your review/approval. Also attached are the supporting files used to compile the monthly report attached for your review.

R/

--

Lola Stith  
Contractor - The Ambit Group, LLC  
NOAA Office of the Chief Information Officer (OCIO)  
(c (b)(6) [REDACTED])  
[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)

Tracking Number	Type	Requester	Submitted	Assigned To
DOC-NOAA-2017-000344	Request	Bob Kucharuk	12/19/2016	AGO
DOC-NOAA-2017-000298	Request	Charles Mouton	11/30/2016	AGO
DOC-NOAA-2017-000300	Request	Dina Ar&eacute;valo	11/30/2016	AGO
DOC-NOAA-2017-000241	Request	Manuel B. Trujillo	12/01/2016	AGO
DOC-NOAA-2016-001760	Request	Thomas Knudson	09/14/2016	AGO
DOC-NOAA-2016-001241	Request	Shomari B. Wade	05/18/2016	AGO
DOC-NOAA-2015-001484	Request	Richard Knudsen	06/29/2015	AGO
DOC-NOAA-2015-001485	Request	Richard Knudsen	06/29/2015	AGO
DOC-NOAA-2015-001487	Request	Richard Knudsen	06/29/2015	AGO
DOC-NOAA-2017-000331	Request	Adam J. Rappaport	12/16/2016	LA
DOC-NOAA-2017-000297	Request	Patsy Tyler	11/30/2016	LA
DOC-NOAA-2017-000169	Request	MICHAEL PEPSON	11/09/2016	LA
DOC-NOAA-2017-000101	Referral	John Fox	10/25/2016	NESDIS
DOC-NOAA-2016-000351	Request	Bill Marshall	10/30/2015	NESDIS
DOC-NOAA-2017-000294	Request	Sukee Bennett	11/30/2016	NMFS
DOC-NOAA-2017-000257	Request	Christopher Hudak	12/06/2016	NMFS
DOC-NOAA-2017-000349	Referral	Amber Crooks	12/08/2016	NMFS
DOC-NOAA-2017-000240	Request	Alicia Chang	11/28/2016	NMFS
DOC-NOAA-2017-000244	Request	Jennie Frost	12/02/2016	NMFS
DOC-NOAA-2017-000170	Request	MICHAEL PEPSON	11/09/2016	NMFS
DOC-NOAA-2017-000195	Request	Thomas Knudson	11/17/2016	NMFS
DOC-NOAA-2016-001807	Request	Rachel Silverstein	09/23/2016	NMFS
DOC-NOAA-2017-000113	Request	Catherine Kilduff	10/24/2016	NMFS
DOC-NOAA-2016-001824	Request	Lee Zurik	09/28/2016	NMFS
DOC-NOAA-2016-001762	Request	Thomas Knudson	09/14/2016	NMFS
DOC-NOAA-2017-000050	Request	Marie A. Alailima	10/12/2016	NMFS
DOC-NOAA-2016-001833	Request	Margaret Townsend	09/29/2016	NMFS
DOC-NOAA-2016-001751	Request	Thomas Knudson	09/14/2016	NMFS
DOC-NOAA-2016-001763	Request	Thomas Knudson	09/14/2016	NMFS
DOC-NOAA-2016-001701	Request	Margaret Townsend	09/01/2016	NMFS
DOC-NOAA-2016-001390	Request	Jennie Frost	07/05/2016	NMFS
DOC-NOAA-2016-001537	Request	Emily Yehle	07/28/2016	NMFS
DOC-NOAA-2016-001533	Request	J W August	07/27/2016	NMFS
DOC-NOAA-2016-001270	Request	scott A. doyle	06/08/2016	NMFS
DOC-NOAA-2016-001326	Request	Thomas Knudson	06/21/2016	NMFS
DOC-NOAA-2016-001215	Request	Cassie Burdyslaw	05/27/2016	NMFS
DOC-NOAA-2016-001299	Request	Thomas Knudson	06/15/2016	NMFS
DOC-NOAA-2016-001080	Request	Jeff Ruch	04/29/2016	NMFS
DOC-NOAA-2016-001053	Request	Thomas Knudson	04/26/2016	NMFS
DOC-NOAA-2016-000959	Request	Office Administrator	04/12/2016	NMFS
DOC-NOAA-2016-000423	Request	Ryan P. Mulvey	12/21/2015	NMFS
DOC-NOAA-2016-000807	Request	Basil Scott	03/16/2016	NMFS
DOC-NOAA-2015-001860	Request	Delcianna Winders	09/04/2015	NMFS
DOC-NOAA-2016-000775	Request	Jason Domark	03/08/2016	NMFS
DOC-NOAA-2016-000603	Request	Margaret Townsend	02/10/2016	NMFS
DOC-NOAA-2016-000094	Request	Josh Schopf	10/14/2015	NMFS
DOC-NOAA-2015-000295	Request	Office Administrator	11/21/2014	NMFS
DOC-NOAA-2015-000190	Request	Miyo Sakashita	11/02/2014	NMFS
DOC-NOAA-2017-000299	Request	Chris Hogan	11/30/2016	NOAA FOIA
DOC-NOAA-2017-000204	Request	Belinda Brannon	11/21/2016	NOAA FOIA
DOC-NOAA-2016-001775	Request	Ehsan Naranji	09/19/2016	NOAA FOIA

DOC-NOAA-2016-001743	Request John Greenewald	09/12/2016	NOAA FOIA
DOC-NOAA-2017-000343	Request Gary Moses	12/14/2016	NOS
DOC-NOAA-2017-000292	Request Evan D. Johns	12/13/2016	NOS
DOC-NOAA-2017-000263	Request Richard Hall	12/08/2016	NOS
DOC-NOAA-2017-000118	Request Michael L. Brown	10/27/2016	NOS
DOC-NOAA-2016-001795	Request Michael L. Brown	09/22/2016	NOS
DOC-NOAA-2016-001599	Request Machel R. Hall	08/12/2016	NOS
DOC-NOAA-2016-001531	Request Stacy Hernandez	07/27/2016	NOS
DOC-NOAA-2016-001082	Request Cameron Cole	04/25/2016	NOS
DOC-NOAA-2016-000192	Request John Ferro	11/03/2015	NOS
DOC-NOAA-2015-000706	Request Megan R. Wilson	02/18/2015	NOS
DOC-NOAA-2017-000186	Request Elizabeth Nowicki	11/16/2016	NWS
DOC-NOAA-2016-001403	Request Ivria Fried	07/07/2016	NWS
DOC-NOAA-2017-000058	Request Christopher T. Clack	10/13/2016	OAR
DOC-NOAA-2017-000187	Request Elizabeth Nowicki	11/16/2016	WFMO
DOC-NOAA-2016-001472	Request A. Marques Pitre	07/20/2016	WFMO
DOC-NOAA-2016-001346	Request Tammy Murphy	06/10/2016	WFMO
DOC-NOAA-2016-001094	Request Anthony Arguez	05/02/2016	WFMO
DOC-NOAA-2016-001043	Request Steven McIntosh	04/24/2016	WFMO



<b>Due</b>	<b>Days Backlogged</b>
01/24/2017	6
01/13/2017	12
01/13/2017	12
01/05/2017	18
10/28/2016	63
06/30/2016	146
10/08/2015	328
10/08/2015	328
07/31/2015	376
01/24/2017	6
01/13/2017	12
01/05/2017	18
12/02/2016	40
01/14/2016	263
01/30/2017	2
02/10/2017	4
01/20/2017	8
02/28/2017	11
01/05/2017	12
01/05/2017	18
12/30/2016	21
11/08/2016	40
12/02/2016	40
12/29/2016	44
11/10/2016	54
11/09/2016	55
11/08/2016	56
10/28/2016	63
10/27/2016	64
10/03/2016	73
10/14/2016	83
09/13/2016	95
08/29/2016	105
08/03/2016	123
07/26/2016	129
07/20/2016	133
07/20/2016	133
06/08/2016	143
06/10/2016	158
05/25/2016	164
02/04/2016	165
05/04/2016	173
10/23/2015	177
04/06/2016	181
03/15/2016	215
02/18/2016	249
12/24/2014	519
12/05/2014	532
01/13/2017	12
12/30/2016	14
11/01/2016	61

10/13/2016	74
01/24/2017	6
01/17/2017	11
01/11/2017	14
12/02/2016	21
11/04/2016	58
09/29/2016	59
08/29/2016	81
06/03/2016	164
12/04/2015	290
10/13/2015	470
12/15/2016	31
08/12/2016	116
11/25/2016	1
12/15/2016	31
09/02/2016	101
08/31/2016	103
07/20/2016	133
06/02/2016	165

Tracking Number	Type	Requester
DOC-NOAA-2017-000255	Request	Mindy o. Block
DOC-NOAA-2017-000242	Request	Rose Santos
DOC-NOAA-2017-000301	Request	Eleanor Chernoff
DOC-NOAA-2017-000347	Request	Erin Lundy
DOC-NOAA-2017-000333	Request	Thomas Knudson
DOC-NOAA-2017-000271	Request	Sarah B. Brady
DOC-NOAA-2017-000237	Request	John R. Leek
DOC-NOAA-2017-000236	Request	Taylor Bailey
DOC-NOAA-2017-000293	Request	Emma Hiolski
DOC-NOAA-2017-000203	Request	Robert Moore
DOC-NOAA-2017-000201	Request	Amber R. Matej
DOC-NOAA-2017-000141	Request	Russ Rector
DOC-NOAA-2017-000056	Request	Shane McCoin
DOC-NOAA-2016-001718	Request	Jordan Waltz
DOC-NOAA-2016-001560	Request	Marjorie F. Ziegler
DOC-NOAA-2016-001479	Request	Christopher Hudak
DOC-NOAA-2016-001453	Request	Stephen S. Schwartz
DOC-NOAA-2016-001214	Request	bruce weyhrauch
DOC-NOAA-2016-000439	Request	Alan Stein
DOC-NOAA-2015-001898	Request	Emily Posner
DOC-NOAA-2017-000492	Request	Michael Ravnitzky
DOC-NOAA-2017-000484	Request	Darren Council
DOC-NOAA-2017-000514	Request	Cody Elliott
DOC-NOAA-2017-000513	Request	Elizabeth N. Moran
DOC-NOAA-2017-000397	Request	Karen Troutman
DOC-NOAA-2017-000202	Request	Steven Shaw
DOC-NOAA-2016-001404	Request	Antionette Rodriguez
DOC-NOAA-2017-000321	Request	Lauren Daniel
DOC-NOAA-2017-000213	Request	Marshall Morales
DOC-NOAA-2017-000171	Request	Cody Rosenfield
DOC-NOAA-2017-000111	Request	Lara Kolinchak
DOC-NOAA-2017-000322	Request	Charles J. Gower
DOC-NOAA-2017-000269	Request	Kirsti Jespersen
DOC-NOAA-2017-000185	Request	Elizabeth Nowicki
DOC-NOAA-2015-000905	Request	Alan David
DOC-NOAA-2017-000334	Request	Thomas Knudson
DOC-NOAA-2017-000119	Request	Ryan P. Martin

Requester Organization	Submitted	Assigned To	Perfected?
Quality Parks	12/06/2016	AGO	Yes
FOIA GROUP INC	12/01/2016	AGO	Yes
	11/30/2016	AGO	Yes
	12/19/2016	NMFS	Yes
Center for Investigative Reporting	12/16/2016	NMFS	Yes
Delaware Riverkeeper Network	12/09/2016	NMFS	Yes
San Diego Council of Divers	12/01/2016	NMFS	Yes
	12/01/2016	NMFS	Yes
Science journalist	11/30/2016	NMFS	Yes
	11/21/2016	NMFS	Yes
	11/18/2016	NMFS	Yes
	11/03/2016	NMFS	Yes
ELLISON, SCHNEIDER & HARRIS L.L.P.	10/04/2016	NMFS	Yes
	09/07/2016	NMFS	Yes
Conservation Council for Hawai'i	08/03/2016	NMFS	Yes
Environmental Advocates	07/20/2016	NMFS	Yes
Cause of Action Institute	07/14/2016	NMFS	Yes
law office of bruce b weyhrauch llc	05/27/2016	NMFS	Yes
	01/10/2016	NMFS	Yes
Recirculating Farms Coalition	09/10/2015	NMFS	Yes
	01/24/2017	NOAA FOIA	No
Edgepoint	01/24/2017	NOAA FOIA	No
ADAMS BROADWELL JOSEPH & CARDOZO	01/11/2017	NOAA FOIA	Yes
The Law Offices of Gary M. Gilbert & Associates, P.C.	01/11/2017	NOAA FOIA	No
Dewey Publications, Inc.	01/04/2017	NOAA FOIA	No
	11/19/2016	NOAA FOIA	Yes
	07/07/2016	NOAA FOIA	Yes
ARNOLD & PORTER LLP	12/12/2016	NOS	Yes
Riddell Williams	11/22/2016	NOS	Yes
Consumer Watchdog	11/08/2016	NOS	Yes
Claremont Graduate University	10/13/2016	NOS	Yes
	12/14/2016	NWS	Yes
Judicial Watch	11/29/2016	NWS	Yes
	11/16/2016	NWS	Yes
Trustee for C.T.O.	03/14/2015	OAR	Yes
Center for Investigative Reporting	12/16/2016	OGC	Yes
	10/27/2016	WFMO	Yes

Due	Closed Date	Status	Dispositions
02/10/2017	01/30/2017	Closed	Full grant
02/10/2017	01/26/2017	Closed	Partial grant/partial denial
01/13/2017	01/18/2017	Closed	Request withdrawn
01/24/2017	01/26/2017	Closed	Full grant
02/07/2017	01/10/2017	Closed	Full denial based on exemptions
01/11/2017	01/26/2017	Closed	Full grant
02/17/2017	01/26/2017	Closed	Request withdrawn
01/05/2017	01/10/2017	Closed	Full grant
01/13/2017	01/10/2017	Closed	Request withdrawn
12/30/2016	01/26/2017	Closed	Fee-related reason
12/30/2016	01/04/2017	Closed	Full grant
01/04/2017	01/04/2017	Closed	Full grant
01/13/2017	01/10/2017	Closed	Full grant
10/13/2016	01/12/2017	Closed	Full grant
09/26/2016	01/10/2017	Closed	Partial grant/partial denial
09/22/2016	01/18/2017	Closed	Partial grant/partial denial
08/30/2016	01/17/2017	Closed	Partial grant/partial denial
01/31/2017	01/31/2017	Closed	Partial grant/partial denial
02/24/2016	01/11/2017	Closed	Partial grant/partial denial
10/27/2015	01/17/2017	Closed	Partial grant/partial denial
TBD	01/31/2017	Closed	Not an agency record
TBD	01/30/2017	Closed	Duplicate request
02/24/2017	01/30/2017	Closed	Duplicate request
TBD	01/30/2017	Closed	Duplicate request
TBD	01/11/2017	Closed	Duplicate request
12/30/2016	01/04/2017	Closed	Other - Admin close - no response from requester
08/22/2016	01/04/2017	Closed	Other - Admin close - no response from requester
01/13/2017	01/06/2017	Closed	Full grant
01/31/2017	01/13/2017	Closed	Request withdrawn
12/20/2016	01/18/2017	Closed	Full grant
11/25/2016	01/03/2017	Closed	Partial grant/partial denial
01/20/2017	01/26/2017	Closed	Other - Publicly available information
01/10/2017	01/11/2017	Closed	No records
12/15/2016	01/19/2017	Closed	Full grant
04/17/2015	01/23/2017	Closed	Other - Admin close - no response from requester
02/07/2017	01/11/2017	Closed	Partial grant/partial denial
12/02/2016	01/30/2017	Closed	Other - Admin close - no response from requester

## Detail

Request copies of project narrative (not the budget narrative) of the following grants proposals that were submitted

1. Copy of the NOAA contract officer's Justification for Other Than Full and Open Competition ("JFOC");
2. Copy of Copies of all grant application documents regarding the NOAA CELCP Siskiwit River Estuary Protection Project da

Requesting information on ages, status of, history and origin of captive cetaceans in the United States, especially t

A National Marine Fisheries Service investigation for creation of a hostile work environment for a fisheries observe

Any and all requests for technical assistance for projects or initiatives that would impact the Atlantic sturgeon in the

MODIFIED REQUEST DESCRIPTION 12/12/16: The document request is any correspondence or filing or email c

I am interested in National Marine Mammal Inventory Database records from Marineland of the Pacific (Palos Ver

Pursuant to the federal Freedom of Information Act, 5 U.S.C. &sect; 552, I request access to and copies of any an

My request is for information regarding the Western Pacific Sustainable Fisheries Fund. It is my understanding tha

I am requesting a copy of the Marine Mammal Inventory Report with all cetaceans, living and deceased, from all fa

Please send me the FULL AND COMPLETE MMIR on record at NMFS. Provide every field (shared/unshared) and

1. Correspondence, communications, and documents exchanged or transmitted from December 19, 2013 through

- A complete necropsy report of Makapuu (NOA0000187}, False Killer Whale, Sea Life Park Hawaii, died 2/17/199

8/15 Revised Description: Records search time frame is December 1, 2015 to August 15, 2016. Conservation Co

Note: all requests set forth below are for documents generated on or after January 1, 2009 through the date that N

All documents related to the appointment or reappointment of members of the New England Fishery Management

Please provide copies of the following documents (including emails and letters):

- All communications and docume

COMPLETE REVISED SCOPE IS IN CORRESPONDENCE IN THE FIRST INTERIM RESPONSE--and is upload

Requests the opportunity to inspect and copy any public records from the period of April 2010 to the present that a

A copy of the home page for <http://intranet.mcmurdo.usap.gov> A copy of each page connected to that home page

Edge Point Contracting, Inc. hereby requests a copy of the following in electronic format and/or whatever format ex

On behalf of California Unions for Reliable Energy ("CURE") and pursuant to the Freedom of Information Act ("FOI

Requested Documents:

- Copies of any and all documents and c01mnunications related to Vacancy Announceme

Pursuant to the Freedom of Information Act, you are requested to provide the name, title, and work email and mail

Any information on self.

I was given the following request number: DOC-NOAA-2016-000479

UPDATED REQUEST DESCRIPTION: Funding Agreements Relative to Hudson River PCB Superfund Site," have

1. The index for the administrative record for the Portland Harbor natural resource damage assessment.
2. For all

I'm requesting information regarding the testing of Tar Balls from California's coast in June of 2015 conducted by N

I am seeking information and supporting documentation regarding the percentage of the budget for the Office of N

I request access to all records created by NOAA personnel documenting the state of the Hess Refinery located on

1. Copies of all contracts with and receipts for advertisement and image management services from Twitter, Facet

Please accept this FOIA request as my request for all e-mails that you sent or received that informed your estimate

I request a copy of any index or list of Reports received by the Secretary of Commerce or the Dept. of Commerce i

Copies of the following: 1.) NMFS NOVA #SW0902995 Malesa \$5,000 2010 2.) NMFS Written Warning #NE0702

I wish to retain all performance evaluations and any disciplinary actions while employed at NOAA Office for Law Er

[REDACTED]

l to NOAA: Riverhead Foundation receives funding for the following grants: 1) NY - Riverhead Foundatic  
f the agency record providing the total estimated dollar value of the AWIPS Extension solicitation (if not  
ited October 2016.

hose at Sea Life Park in Hawaii.

r in regard to an incident that occurred in Dutch Harbor, AK on April 10, 2014.

Delaware River; Any and all requests for informal consultation for projects or initiatives that would impa  
r any such record to come to the attention of either Michael Milstein or Jim Milbury mentioning any scier  
les, California), which operated from 1954 to 1987. I am not sure if records exist before 1970, but recor  
d all documents pertaining to California Governor Jerry Brown's request (February 09, 2016 letter to Sec  
t this Fund receives funds paid as a part of the tuna fishing quota-sharing program involving the longline  
cilities you have MMIR's for.

everything on record. Specifically, I would like every field of information available of the MMIR to the p  
the present between NOAA Fisheries West Coast Region staff in the Arcata and Yreka, California office  
1; • A complete necropsy report of Mamo (NOA0000210), Hybrid Tursiops truncatus x Steno bredanens  
uncil for Hawai'i requests the following information: (1) all documents and communications received by I  
MFS responds to this request. 1. Any reports, memoranda, correspondence, or other documents (includ  
Council from November 1, 2015 to the present. This request includes all communications, both inside th  
nts from January 1, 2015 to date that were sent to or received by any employee of NOAA/Dep't of Comr  
æd as a supporting file (first interim response). That scope is based off of the incoming revisions from th  
re in your agency's possession related to the following: any and all records pertaining to your agency's c  
by one click (i.e. each page one level down). This is a noncommercial individual request.

ists: 1. An accounting of all uncashed checks/warrants (checks that have been issued by your governm  
A"),1 we request that NOAA and the Monterey Bay National Marine Sanctuary make available public rec  
nt Number NSDIS-OSP0-2016-0037, Physical Scientist, ZP-1301 -4 (DE/CR), position located in Suitlan  
ing address for persons in the following positions in your agency: 1. Human Relations Directors 2. Civil F

been date qualified from 2005 through 2016. -----

documents or records as described below that were created, received, or obtained on or after January 1  
NOAA. Multiple articles stated that NOAA would be conducting testing. As part of the request, I would lik  
ational Marine Sanctuary which is relegated to the National Marine Sanctuary of American Samoa.

St. Croix, U.S. Virgin Islands after Hurricane Hugo hit in late September, 1989. I am particularly interest  
book, MySpace, SnapChat, LinkedIn, Reddit, Foursquare, Mashable, YouTube, Vimeo, Flickr, Pintrest, (c  
æ of fifty hours. I would like the e-mail or text or form or whatever it is that you sent your FOIA contact ad  
regarding Weather Modification activities since 1958, pursuant to reporting requirements of US Public L:  
329 Rose Marie 2010 3.) NMFS NOVA #NE0801030 American Dream \$11,000 2010 4.) NMFS NOVA #  
forcement.

[REDACTED]  
on for Marine Research and Preservation Development and deployment of an Incident Management Team  
contained in the JFOC) BACKGROUND: On or about November 17, 2016, NOAA posted a new solicitation

to protect the Atlantic sturgeon in the Delaware River; NMFS/NOAA responses to requests for informal consultation  
scientific paper or scientific facts or legal opinion justifying the #sharetheshore program contents. To limit the  
data files filed after MMPA may show data on captures before 1970. I am interested in: both cetaceans and pin  
Secretary of Commerce Penny Pritzker) that a federal fishery disaster be declared following extended closure  
of the fishing industry (largely in and around Hawaii) and U.S. possessions including, but limited to, the CNMI

present. Also, I would like the record(s) in Excel format and correlate the information by date. Reference  
to the Klamath Riverkeeper or the Karuk Tribe or their representatives and/or their consultants, including  
the Sea Life Park Hawaii, died 9/27/1975; • A complete necropsy report of Auwaha (NOA0000270), Spin  
NOAA including the Office of NOAA Administrator, Dr. Kathryn Sullivan and the National Marine Fisheries  
including electronic mail messages) concerning any Endangered Species Act ("ESA") section 7 consultations  
with the government and with outside parties, including .gov e-mail, personal e-mail, text messaging, and any  
agency and any representative of any of the Northwest United States Treaty Tribes that are subject to the  
requester and is too large to enter here in free text.

compliance with the National Environmental Policy Act ("NEPA") following the Deepwater Horizon Oil Spill

ent agency and remain outstanding) for six (6) months or more as of the date of this letter. Please only include  
records regarding the Monterey Peninsula Water Supply Project ("Project") proposed by California American  
Maryland, from January 1, 2014 to present, including, but not limited to: communications regarding all  
Rights Directors 3. Equal Employment Opportunity Directors 4. Labor Relations Directors 5. Workers' Compensation

----- ORIGINAL REQUEST DESCRIPTION: All funding agreements (original and any amendments)  
1, 2000: (a) All agreements (including contracts, settlements, memoranda of understanding, memoranda  
and any test results that were received, and any information about the determination by your department and

ed in photographs of the Hess Refinery. There is a single image in the NOAA Photo Library that depicts  
Google, Instagram, Project Wonderful, and/or BuzzFeed. Temporal scope for this request is from September  
visiting of this fifty hour estimate. I would like all e-mails or other messages exchanged between you and  
Law 85-510 of 1958, & all subsequent amendments and Laws regarding Weather Modification; I request  
NO805007 Princess Laura \$20, 500 2010



[REDACTED]

im (IMT) through the continued support of the Specially Trained Animal Response Team (START) - NA  
tion entitled the "AWIPS Extension" (Solicitation Number: 1DG133W05CQ1067), in which they announce

ation for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River; Any and all  
he scope, if nothing can be found with a quick search in their documentation records then "Not found" w  
nipedes, records on all animals at the institution (alive or dead, captive-bred/wild-caught/imported), and I  
ire of West Coast Dungeness crab fisheries. This includes but is not limited to communications, reports  
and the American Samoa. I am specifically requesting a) copies or access to any and all deposits into a

the MMIRs produced back in 1980s/1990s - in addition to everything else, include fields such as: Date  
ig Craig Tucker, Russell "Buster" Attebery, Bill Tripp, Toz Soto, Konrad Fisher, Larry Lestelle, Gabriel R  
ner Dolphin, Sea Life Park Hawaii, died 4/2/1977; • A complete necropsy report of LUC (NOA0005035 c  
s Service (NMFS) Pacific Islands Regional Office including Administrator Michael Tosatto from Kitty Sim  
(16 U.S.C. § 1536) that have been initiated or proposed, including Biological Opinions, Biological Asses  
other methods of communication. This request specifically includes communications to or from the pers  
• US Canada Salmon Treaty. • All communications and documents from January 1, 2015 to date that we

ll Disaster ("DWH") for the Fishery Management Plan for Regulating Offshore Marine Aquaculture in the

nclude items that can still be claimed by the payee and have not been escheated to the state. • Please i  
an Water ("Applicant") since the date of our last request on July 2, 2015. The Project includes a desalin  
ry and all vacancies subject to the aforementioned vacancy announcement; any and all c01munication  
mpensation Directors 6. Training Directors 7. Within Personnel Offices/Employee Relations Offices/Lat

ments) by and between USEPA and NOAA related to NOAA's participation in the selection, implementati  
of agreement, administrative orders on consent, consent decrees, and amendments thereto) involving c  
s to the origin of the tar balls - or any other information garnered from the testing. As well as this testing

a collapsed oil tank at the Hess Refinery in the aftermath of Hurricane Hugo. The photographer is a Dr.  
mber 2015 to September 2016. 2. All documents and e-mail concerning budget, expenditure, and paym  
others in order to come up with or regarding this FIFTY hour estimate. I would like all e-mails or other m  
a copy of any index or list of reports made by the Secretary of Commerce or the Dept. of Commerce to

15NMF4390022 - \$50,000 2) Riverhead Foundation for Marine Research and Preservation Support for Funded a non-competitive award to the existing AWIPS contractor (Raytheon Technical Services Company L

requests for formal consultation for projects or initiatives that would impact the Atlantic sturgeon in the C ill be the answer. ----- This is to request up I am specifically interested in date/location of capture and the date of death. and records about the fishery disaster, both within the Department of Commerce and between the DOC and payments from the Fund since the creation of the Fund; b) any and all records related to payments f

of location Capture Date Capture Place Origination of the animals Rossi, and Scott McBain, related to Montague Water Conservation District's Conservation and Habitat En or HS PC8705), False Killer Whale, Navy, U.S. (SPAWAR), died 12/28/1988. onds, Executive Director of Western Pacific Regional Fishery Management Council ("Wespac") concern sments, or informal consultations, pertaining to the implementation of the National Flood Insurance Proj sional and official e-mail accounts of the following persons and entities: 1. The Office of the Secretary of re sent to or received by any employee of the US Department of Justice and any representative of the U

: Gulf of Mexico (docket number NOAA-NMFS-2008-0233). Records include, but are not limited to, any/:

nclude the payee name, date, amount and check number. • If it is less time consuming and more cost e ation facility, subsurface intake wells along the Monterey Bay coast, and discharge pipelines within the M s regarding the application, review, and consideration of Thomas E. Smith, Jr. for the position; the appli or Relations Offices a. Chiefs of Staffing/Classification b. Chiefs of Labor Relations c. Chiefs of Employ

on, modification, amendment or supplementation of the CERCLA remedy for the Hudson River PCBs Su the Portland Harbor Natural Resource Trustee Council or referring to the Portland Harbor natural resou data - I'd like the results of any other tar ball tests conducting in California over the last 5 years.

Joseph Golden, and it appears that Dr. Golden snapped this photo during a fly-by. I anticipate that Dr. C ent for advertisement in social media. Temporal scope for this request is from September 2014 to Nove essages that you exchanged regarding Brent Wachter complying with my pending FOIA request.

the President of the United States of America, regarding Weather Modification Activities, etc., as requ

[REDACTED]  
activity Operation to Maintain Response, Treatment and Data Collection of Live and Dead Marine Mammals (LC), for the period May 17, 2017 through February 16, 2018.

Delaware River; NMFS/NOAA responses to requests for formal consultation for projects or initiatives that created information similar to FOIA 2016-001187 which resulted in a spreadsheet of social media postings

; and external agencies. I would like to receive the information in a digital format. Please send these files from the Fund to the Western Pacific Regional Fisheries Council; c) any and all records of payments to

enhancement and Restoration Project (CHERP); 2. Correspondence, communications, and documents ex

ing Papahānaumokuākea Marine National Monument ("PMNM"); (2) All documents and communications program ("NFIP") by the Federal Emergency Management Agency ("FEMA") at the California statewide level Commerce 2. The Office of Dr. Kathryn Sullivan, Administrator of NOAA and Under Secretary of Commerce JS Department of Justice related to the US Canada Salmon Treaty.

all information about the development of the supplemental final programmatic environmental impact stat

ffective, please only provide amounts which equal \$1,000.00 or more • If possible, please include the last Monterey Bay National Marine Sanctuary, among other components. Specifically, we seek any and all recommendations; qualifications; selection criteria; interviews; notes; ratings and/or rankings; referral list(s); selectee Relations 8. Within General Counsel Offices, Assistant or Deputy General Counsels for: i. Litigation i

perfund Site, including any progress reports issued pursuant thereto or otherwise required thereunder. force damage assessment. This request includes any funding agreements and cooperative assessment a

Golden (or others associated with Dr. Golden) may have taken other photographs that do not appear in the member 2016.

governed by Public Law 85-510 of 1958, & any subsequent Law regarding Weather Modification;

[REDACTED]  
als in New York State NA15NMF4390052 - \$100,000 Source: 2015 Funded Prescott Prescott Grant Pro

ould impact the Atlantic sturgeon in the Delaware River; Biological opinions issued by NMFS/NOAA for  
NMFS referenced as background material for the NMFS West Coast Region's <https://www.facebook.co>

s via email or FTP upload.

individuals or organizations for travel purposes related to the quota-sharing compliance or activities.

changed or transmitted from December 19, 2013 through the present between NOAA Fisheries West C

s received by NOAA including Office of NOAA Administrator, Dr. Kathryn Sullivan and the NMFS Pacific I  
el or relating to any of the following California counties and/or towns/cities/unincorporated territories there  
erce for Oceans and Atmosphere 3. Lois J. Schiffer, NOAA General Counsel 4. Eileen Sobeck, Assista

ement ("FPEIS") and the draft supplemental information report ("DSIR"). For the purposes of this requ

st known address of the payee. 2. An accounting of any unclaimed funds which have not been escheate  
ords related to NOAA's and the Monterey Bay National Marine Sanctuary's environmental review and a  
on; and emails drafted, sent, received, and/or maintained by Employee Relations, Human Resources, s  
i. Administrative Law iii. EEO/Civil Rights iv. Labor and Employment Law 9. Chief Equal Employment O

reements. (b) All agreements (including contracts, settlements, memoranda of understanding, memor

he Photo Library.

posals - <http://www.nmfs.noaa.gov/pr/health/prescott/2015funded.html>

or projects or initiatives that would impact the Atlantic sturgeon in the Delaware River; All reports received  
m/NOAAFisheriesWestCoast/photos/a.218176738299054.47917.187396671377061/95724068772598

Coast Region staff in the Arcata and Yreka, California offices and Klamath Riverkeeper or the Karuk Trib

lands Regional Office including Administrator Michael Tosatto from Kitty Simonds, Executive Director c  
ain: Humboldt, Santa Cruz, Monterey, Ventura, Santa Barbara, San Luis Obispo, San Mateo, Marin, and  
nt Administrator for Fisheries 5. Samuel D. Rauch III, Deputy Assistant Administrator for Regulatory Proq

st "records" includes any and all correspondence, letters, hand-written notes, phone conversations, faxe

d to the state. • Please include the payee name, date, amount, and any additional information if available  
uthorization for the Project pursuant to the National Environmental Policy Act ("NEPA"). This request inc  
election panel, selecting official, deciding official for the position, and any other employee of the Agency.  
portunity Counselors We would prefer this information in digital form via email (troutman.deweypublicat

anda of agreement, administrative orders on consent, consent decrees, and amendments thereto) with c

[REDACTED]

d by NMFS of Atlantic sturgeon takes, kills, or injuries within the Delaware River system; and Any and all 5/?type=3&theater. That program is supposed to be over for 2016. I am requesting the original spre

e or their representatives and/or their consultants, including Craig Tucker, Russell "Buster" Attebery, Bill

of Wespac concerning the Pacific Remote Islands Marine National Monument (PRIMNM) and the 2014 e  
Sonoma Counties. 2. Any reports, memoranda, correspondence, or other documents (including electro  
grams 6. Dr. Alan D. Risenhoover, Director, Office of Sustainable Fisheries 7. John Bullard, Northeast R

s, reports, logbooks, documents, inter and intra agency memorandums, summaries, and notes of meeti

3. • If it is less time consuming and more cost effective, please only provide amounts which equal \$1,000  
cludes any draft documents, internal memos, and correspondence, including emails, by and between NC  
• Any and all documentation and conunications which refer or relate to potentially placing Thomas E.  
ions@gmail.com). If digital versions are not available, printed material may be mailed to: Dewey Publica

or involving the Confederated Tribes and Bands of the Yakama Nation (including abbreviated references

[REDACTED]

1 NMFS/NOAA comments on environmental assessment  
Worksheet FOIA DOC-NOAA-2016-001187\_Marine Mammal Communications- Social Media Posts Featu

Tripp, Toz Soto, Konrad Fisher, Larry Lestelle, Gabriel Rossi, and Scott McBain, related to anadromous  
expansion of PMNM; (3) All documents and communications received by the NMFS Pacific Islands Regi  
nic mail messages) concerning any ESA section 10 permits that have been applied for or issued, pe  
Regional Administrator 8. Michael Pentony, Assistant Regional Administrator for Sustainable Fisheries

ings and conversations, or e-mails (sent, received, attachments and deleted files). As well, pleas

0.00 or more • If possible, please include the last known address of the payee. Edge Po  
NOAA, the Monterey Bay National Marine Sanctuary, the Applicant, and/or any federal or California state  
Smith, Jr. in the Physical Scientist, ZP-1301-4 (DE/CR), position, Vacancy Announcement  
tions, Inc. 1840 Wilson Blvd, Ste 203, Arlington, VA 22201. Response can also be sen

s to the “Yakama Nation,” “Yakama Tribe,” or “Yakama”) where the agreement refers to Portland Harbor



r

s fish

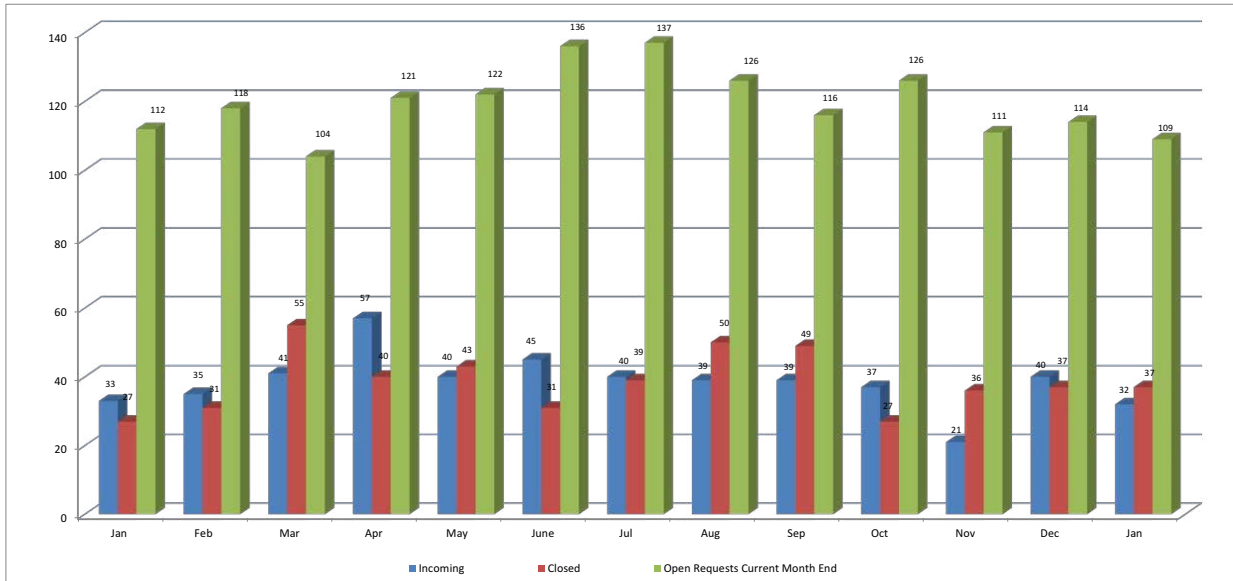
onal Office including

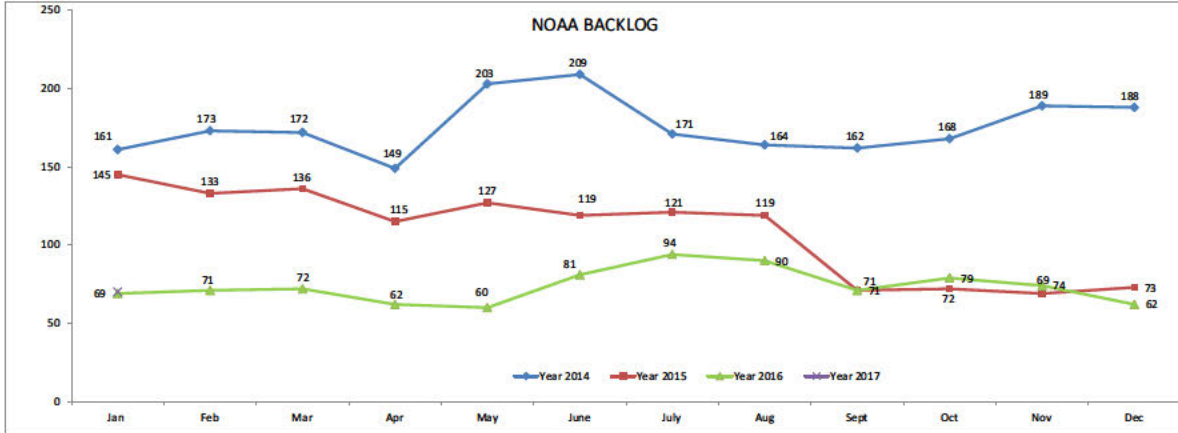
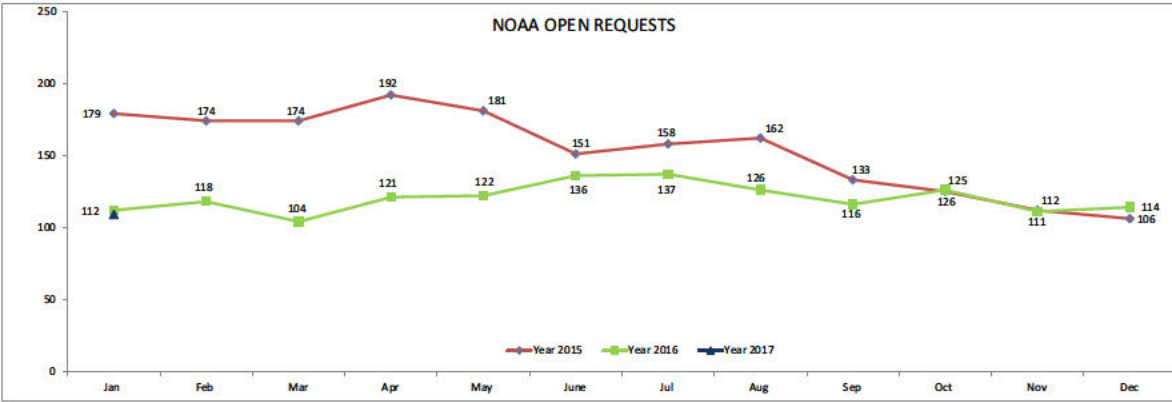
; the Columbia



FOIA Monthly Status Report 01 31 2017

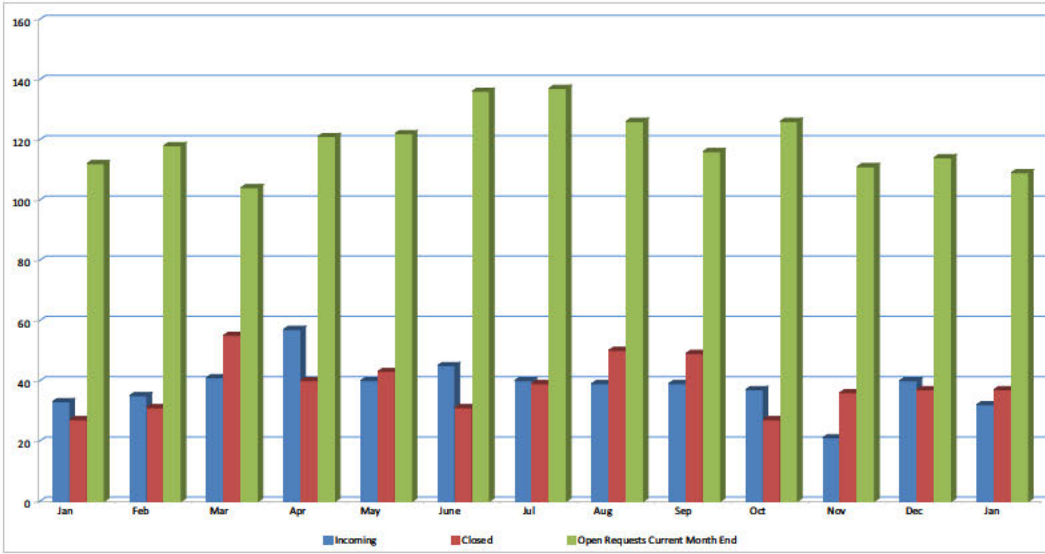
Organization	Open Requests Previous Month End	Incoming Requests	Closed Requests	Open Requests Current Month End	Backlog 21-120 days	Backlog 121-364 days	Backlog 365 or more days	Total Backlog
AGO	6	4	3	7	5	3	1	9
CAO	0	0	0	0	0	0	0	0
CFO	0	0	0	0	0	0	0	0
CIO	1	0	0	1	0	0	0	0
CIO/FOIA	27	6	7	26	4	0	0	4
GC	3	1	1	3	0	0	0	0
IA	0	0	0	0	0	0	0	0
LA	2	0	0	2	3	0	0	3
NESDIS	13	1	0	14	1	1	0	2
NMFS	25	8	17	16	19	13	2	34
NOS	19	6	4	21	7	2	1	10
NWS	10	3	3	10	2	0	0	2
OAR	2	0	1	1	1	0	0	1
OMAO	0	0	0	0	0	0	0	0
OC	0	0	0	0	0	0	0	0
PPI	0	0	0	0	0	0	0	0
USAO	0	2	0	2	0	0	0	0
WFMO	6	1	1	6	3	2	0	5
<b>NOAA Totals</b>	<b>114</b>	<b>32</b>	<b>37</b>	<b>109</b>	<b>45</b>	<b>21</b>	<b>4</b>	<b>70</b>

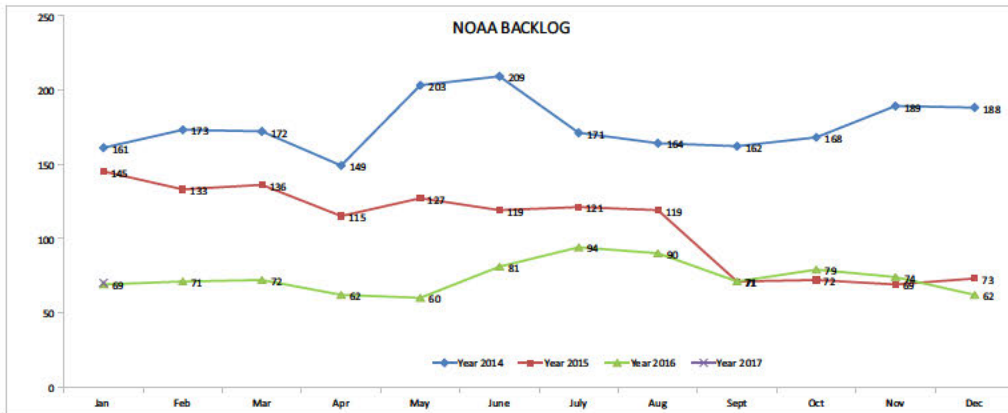
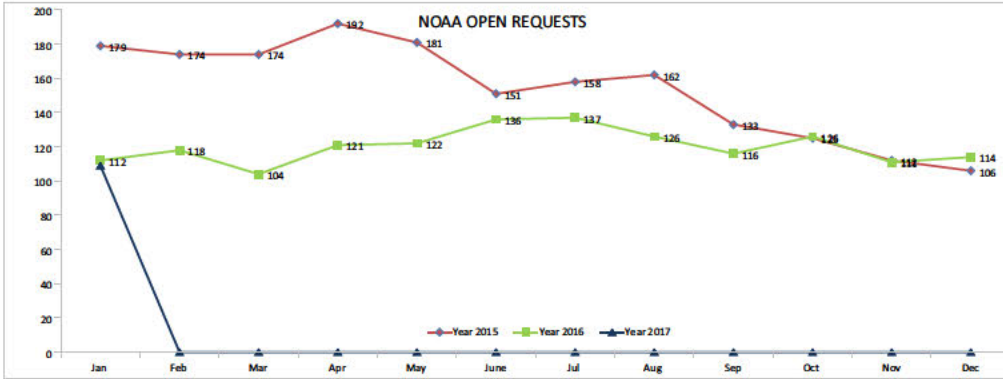




4.xlsx

Organization	Open Requests Previous Month End	Incoming Requests	Closed Requests	Open Requests Current Month End	Backlog 21-120 days	Backlog 121-364 days	Backlog 365 or more days	Total Backlog
AGO	6	4	3	7	5	3	1	9
CAO	0	0	0	0	0	0	0	0
EFO	0	0	0	0	0	0	0	0
EIO	1	0	0	1	0	0	0	0
EIO/FOIA	27	6	7	26	4	0	0	4
GC	3	1	1	3	0	0	0	0
IA	0	0	0	0	0	0	0	0
LA	2	0	0	2	3	0	0	3
NESDIS	13	1	0	14	1	1	0	2
NMFS	25	8	17	16	19	13	2	34
NOS	19	6	4	21	7	2	1	10
NWS	10	3	3	10	2	0	0	2
OAR	2	0	1	1	1	0	0	1
OMAO	0	0	0	0	0	0	0	0
OC	0	0	0	0	0	0	0	0
PPI	0	0	0	0	0	0	0	0
USAO	0	2	0	2	0	0	0	0
WFMO	6	1	1	6	3	2	0	5
<b>NOAA Totals</b>	<b>114</b>	<b>32</b>	<b>37</b>	<b>109</b>	<b>45</b>	<b>21</b>	<b>4</b>	<b>70</b>





Tracking Number	Type	Requester
DOC-NOAA-2017-000511	Request	Bill Thomas
DOC-NOAA-2017-000512	Request	Bill Thomas
DOC-NOAA-2017-000442	Request	Kati Weis
DOC-NOAA-2017-000374	Request	Tim Bergen
DOC-NOAA-2017-000441	Request	Elizabeth N. Moran
DOC-NOAA-2017-000536	Request	Peter R. Ehrhardt
DOC-NOAA-2017-000510	Request	Russ Rector
DOC-NOAA-2017-000499	Request	Zeenat Mian
DOC-NOAA-2017-000473	Request	David Hutt
DOC-NOAA-2017-000467	Request	Shannon M. Cremeans
DOC-NOAA-2017-000466	Request	Shannon M. Cremeans
DOC-NOAA-2017-000411	Request	Sarah J. Edwards
DOC-NOAA-2017-000440	Request	PAUL A. KAMPMEIER
DOC-NOAA-2017-000492	Request	Michael Ravnitzky
DOC-NOAA-2017-000484	Request	Darren Council
DOC-NOAA-2017-000438	Request	Claudia Lucio
DOC-NOAA-2017-000513	Request	Elizabeth N. Moran
DOC-NOAA-2017-000514	Request	Cody Elliott
DOC-NOAA-2017-000397	Request	Karen Troutman
DOC-NOAA-2017-000534	Request	Robert C. Stober
DOC-NOAA-2017-000533	Request	Lynn Manolopoulos
DOC-NOAA-2017-000535	Request	John Ullom
DOC-NOAA-2017-000414	Request	Arnold & Porter Kaye Scholer LLP
DOC-NOAA-2017-000439	Request	Cody Elliott
DOC-NOAA-2017-000384	Request	Marshall Morales
DOC-NOAA-2017-000530	Request	Raymond Tubb
DOC-NOAA-2017-000532	Request	Corin Hoggard
DOC-NOAA-2017-000410	Request	Jacob H. Pratt
DOC-NOAA-2017-000528	Request	Paul Muniz
DOC-NOAA-2017-000497	Request	Rachel Clattenburg
DOC-NOAA-2017-000408	Request	Jeremy Singer-Vine
DOC-NOAA-2017-000474	Request	Steven McIntosh

Requester Organization	Submitted	Assigned To	Perfected?
	01/19/2017	AGO	Yes
	01/19/2017	AGO	Yes
	01/11/2017	AGO	Yes
McAllister & Quinn	01/03/2017	AGO	Yes
GARY GILBERT & ASSOCIATES, P.C.	01/11/2017	NESDIS	Yes
Atty at Law	01/30/2017	NMFS	Yes
	01/26/2017	NMFS	Yes
	01/25/2017	NMFS	Yes
Morris James LLP	01/20/2017	NMFS	Yes
	01/18/2017	NMFS	Yes
	01/18/2017	NMFS	Yes
	01/08/2017	NMFS	Yes
Kampmeier & Knutsen, PLLC	01/04/2017	NMFS	Yes
	01/24/2017	NOAA FOIA	No
Edgepoint	01/24/2017	NOAA FOIA	No
Brayton Purcell LLP	01/11/2017	NOAA FOIA	Yes
The Law Offices of Gary M. Gilbert & Associates, P.C.	01/11/2017	NOAA FOIA	No
ADAMS BROADWELL JOSEPH & CARDOZO	01/11/2017	NOAA FOIA	Yes
Dewey Publications, Inc.	01/04/2017	NOAA FOIA	No
Hershoff, Lupino & Yagel, LLP	01/27/2017	NOS	Yes
Davis Wr.ght Tremain LLP	01/27/2017	NOS	Yes
	01/18/2017	NOS	Yes
Arnold & Porter Kaye Scholer LLP	01/09/2017	NOS	Yes
Adams Broadwell Joseph & Cardozo	01/05/2017	NOS	Yes
Riddell Williams	01/03/2017	NOS	Yes
WGXA ABC16/FOX24	01/27/2017	NWS	Yes
ABC30 Action News	01/27/2017	NWS	Yes
	01/07/2017	NWS	Yes
Donovan Hatem LLP	01/23/2017	OGC	Yes
Public Citizen	01/25/2017	USEC	Yes
BuzzFeed News	01/06/2017	USEC	Yes
	01/22/2017	WFMO	Yes

Due	Closed Date	Status	Dispositions
03/01/2017	TBD	Assignment Determination	
03/01/2017	TBD	Assignment Determination	
02/24/2017	TBD	Assignment Determination	
02/09/2017	TBD	Assignment Determination	
02/24/2017	TBD	Assignment Determination	
03/02/2017	TBD	Assignment Determination	
02/28/2017	TBD	Assignment Determination	
02/23/2017	TBD	Assignment Determination	
03/15/2017	TBD	Assignment Determination	
03/01/2017	TBD	Assignment Determination	
03/01/2017	TBD	Assignment Determination	
02/21/2017	TBD	Final Preparation of Response	Full grant
02/21/2017	TBD	Assignment Determination	
TBD	01/31/2017	Closed	Not an agency record
TBD	01/30/2017	Closed	Duplicate request
02/24/2017	TBD	Assignment Determination	
TBD	01/30/2017	Closed	Duplicate request
02/24/2017	01/30/2017	Closed	Duplicate request
TBD	01/11/2017	Closed	Duplicate request
02/27/2017	TBD	Assignment Determination	
02/28/2017	TBD	Assignment Determination	
02/27/2017	TBD	Assignment Determination	
03/07/2017	TBD	Assignment Determination	
02/21/2017	TBD	Assignment Determination	
02/24/2017	TBD	Assignment Determination	
03/02/2017	TBD	Assignment Determination	
03/02/2017	TBD	Assignment Determination	
02/21/2017	TBD	Assignment Determination	
02/27/2017	TBD	Assignment Determination	
03/02/2017	TBD	Assignment Determination	
02/21/2017	TBD	Assignment Determination	
03/01/2017	TBD	Assignment Determination	

## Detail

We are requesting a copy of the below solicitations and any other documents relative to the government solicitation

We are requesting a copy of the below solicitations and any other documents relative to the government solicitation

I am requesting copies of public records pertaining to five NOAA grants awarded to the National Maritime Museum

I am requesting 2 documents with all their attachments under the Freedom of Information Act. I respectfully request

The Law Offices of Gary M. Gilbert & Associates, P.C. represents Thomas Smith. Pursuant to the Freedom of Information Act

All documents in the possession or control of NOAA related or pertaining in any way to Charter Halibut Permit CHF

Provide all MMIR transfer information (shared/unshared) available to the present. Also, I would like the record(s) in

Please provide information of HMMA's Hawaiian monk seal duties as specified on the cooperative grant with NOAA

All records, including correspondence, related to or mentioning the sea vessel "Island Girl, II" or its captain

I am writing to request a list/table of all changes to the Marine Mammal Inventory Report / National Inventory of Marine Mammals

I am writing to request a copy of the Marine Mammal Inventory Report (MMIR). I would like this copy to include all information

Marine Mammal Inventory Report on *Orcinus orca* at SeaWorld Parks at Orlando, San Diego, and San Antonio.

Please provide copies of all documents and information that were received or generated by NOAA Fisheries or the

A copy of the home page for <http://intranet.mcmurdo.usap.gov> A copy of each page connected to that home page

Edge Point Contracting, Inc. hereby requests a copy of the following in electronic format and/or whatever format exists

We are trying to obtain some records relating to the construction of a Survey ship that was built for the National Oceanic and Atmospheric Administration

Requested Documents:

- Copies of any and all documents and communications related to Vacancy Announcement

On behalf of California Unions for Reliable Energy ("CURE") and pursuant to the Freedom of Information Act ("FOIA")

Pursuant to the Freedom of Information Act, you are requested to provide the name, title, and work email and mail address

Request all records associated with the Reportable Marine Incident that occurred on 13MAR2015 involving the USCGC

On behalf of Quendall Terminals, please accept this letter as a formal request pursuant to the Freedom of Information Act

1: The permit issued for the 2015-2016 Season 2: The permit issued for the 2016-2017 Season 3: All written communications

We request the following agency records relative to the Hudson River PCBs Superfund Site (NYD980763841): Technical

We request that NOAA and the Monterey Bay National Marine Sanctuary make available public records regarding

We request that a copy be provided, in digital format, of the following documents (or documents containing the following information)

I request that a copy of the following documents [or documents containing the following information] be provided to

This is a request under the Freedom of Information Act. I am requesting every email sent to the National Weather Service

I am requesting all database records of NWS statements, watches, warnings, advisories, etc. Specifically, I would like

Please consider this to be a request pursuant to the Freedom of Information Act for all correspondence, including electronic

On behalf of Public Citizen, Inc., and pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. s. 552, I request

All emails (and associated attachments) to, from, cc'ing, or bcc'ing NOAA Administrator Kathryn Sullivan between 1/1/2014 and 12/31/2014

I am requesting the following information from NOAA: Copies of the resumes of the applicants who were successful



[REDACTED]

ns listed below. Also please confirm what the solicitation ID is? Solicitation: Contracting Office Agency N  
ns listed below. Also please confirm what the solicitation ID is? Solicitation: Contracting Office Agency N  
of the Gulf of Mexico from 2006 to 2009. Specifically, I am requesting any and all grant proposals subm  
st: 1. The Maritime Museum of Norwalk's 2016: ELG for Community Resilience to Extreme Weather Eve  
of Information Act, 5 U.S.C. &sect; 552a(d)(1), we request the following information. • Copies of any and  
? permit No.4751C issued to Tom Floyd et al and Crooked Creek Guide and RV Park  
Excel format and correlate the information by date

A.

tain, Kenneth Kaiss, from January 1, 2016 through the present. This request includes, but is not limited  
rine Mammals reported to OPR in the last six months. I would like this list to note all reported births, dea  
marine mammals (pinnipeds, cetaceans). I would like it to include all living and dead animals and includ

National Marine Fisheries Service after January 1, 2012. and that relate to Columbia River Carbonates'  
by one click (i.e. each page one level down). This is a noncommercial individual request.

ists: 1. An accounting of all uncashed checks/warrants (checks that have been issued by your governm  
ceanic and Atmospheric Administration in 1960 at National Steel and Ship Building Corp (Nassco now pe  
nt Number NSDIS-OSP0-2016-0037, Physical Scientist, ZP-1301 -4 (DE/CR), position located in Suitlan  
A"),1 we request that NOAA and the Monterey Bay National Marine Sanctuary make available public rec  
ing address for persons in the following positions in your agency: 1. Human Relations Directors 2. Civil F  
V LITTLE BULLY. A copy of the Captain of the Port Order 15-002 is attached. The undersigned attorney  
tion Act (FOIA) for copies of any documents relevant to the natural resource damages assessment refer  
nunications, documents, memos, and emails regarding the surf contest. Limit response to Oct 1, 2016 f  
hical Presentations: 1 a) Relative to the May 19, 2015, NOAA Power Point® Presentation titled, "ReVis  
the Monterey Peninsula Water Supply Project ("Project") proposed by California American Water ("Appl  
owing information) that are in the possession or control of your agency. This request is subject to the fol  
me: We would like a list or documents reflecting or showing the days that the Department of Defense C  
Service from a whitehouse.gov email address between Jan. 20, 2017, and Jan. 23, 2017. I prefer to rec  
like all of the following information, if possible. Type of notice , when the notice was issued, planned star  
emails and faxes, dated after January 1, 2014, between the Agency (including but not limited to NOAA F  
:: <br /> <br /> 1. All records of communications from or on behalf of the Trump Administration and/or the  
Dec. 10, 2016 and Dec. 23, 2016. I request these records in their native digital formats, where possible,  
ully hired by NOAA's Office of Law Enforcement under USAJOBS announcements: Enforcement Officer

[REDACTED]  
Name: NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION Contracting Office Name: EAST  
Name: NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION Contracting Office Name: EAST  
Submitted by the nonprofit to NOAA, including all supporting documents for those proposals (i.e. annual audits and Environmental Hazards application with all attachments. 2. The Museum of Science and Industry  
all documents and communications related to Vacancy Announcement Number NSDIS-OSP0-2016 -00

to, any records of communications with the Delaware Department of Natural Resources and Environmental  
Methods and transfers submitted within the last six months.

at every facility. Please sort/organize this request first by holder/facility then chronologically. A PDF copy

proposal to build a barge terminal at 1903 Dike Road in Woodland. Washington. This request includes a

ent agency and remain outstanding) for six (6) months or more as of the date of this letter. Please only in  
part of General Dynamics). Under the Freedom of Information Act, we would like to obtain these documents  
d, Maryland, from January 1, 2014 to present, including, but not limited to: communications regarding all  
records regarding the Monterey Peninsula Water Supply Project ("Project") proposed by California American  
Rights Directors 3. Equal Employment Opportunity Directors 4. Labor Relations Directors 5. Workers' Compensation  
/ has been retained by SeaTow Islamorada. SeaTow Islamorada was contracted to provide services to the  
referred in paragraph 116 (concerning Quendall Terminals, located at 4503 Lake Washington Boulevard  
forward to the day this request is responded to.

Submitting Model Projections of Lower River Fish PCBs Using Model Emulation And Recent Data" (Field, J.) (a  
licant") since the date of our last request on July 2, 2015. The Project includes a desalination facility, sub  
following definitions and limitations: The "Lower Columbia River" as used herein means the Co  
Doppler Radar sites operated by the WFO at Atlanta/Peachtree City, GA and located in Jeffersonville, Ge  
give records in electronic form both for convenience and cost concerns.

start and end datetime, actual end datetime (if cancelled early), geofence data, population in geofence - Iss  
inance), and/or either Robert Roberge and/or Jesse Drinkwater concerning, referring and/or related to the  
the Trump Transition Team to the National Oceanic and Atmospheric Administration (NOAA) providing guidance  
rather than on paper or converted to PDF files.

; ZA-1801-2 (DE/CR), NMFS OLE 2016-0002, Opened 4/27/16. Closed 6/3/16. Enforcement Officer, ZA

ERN ACQUISITION DIVISION Referenced IDV ID: GS00Q12NRD4009 Award ID: DOCEA133W13NCC  
ERN ACQUISITION DIVISION Referenced IDV ID: GS00Q12NRD4009 Award ID: DOCEA133W14NCC  
ts, tax records), as well as any and all follow-up financial reports submitted by the National Maritime Mus  
ry's 2016: ELG for Community Resilience to Extreme Weather Events and Environmental Hazards appli  
37 Physical Scientist, ZP-1301-4 (DE/CR), position located in Suitland , Maryland, from January I , 2014

ntal Control (including its employees, attorneys and agents); the case package and any other information  
is preferred

all documents and information in whatever form or location it has been recorded or retained, including but

nclude items that can still be claimed by the payee and have not been escheated to the state. • Please i  
its 1. All Insurance Certificates or any other documents identifying the liability insurance carrier or insura  
ry and all vacancies subject to the aforementioned vacancy announcement; any and all c01munication  
an Water ("Applicant") since the date of our last request on July 2, 2015. The Project includes a desalin  
mpensation Directors 6. Training Directors 7. Within Personnel Offices/Employee Relations Offices/Lat  
.LITTLE BULLY and its barge while grounded.

North, Renton, WA (&quot;Quendall Site&quot;)) of the enclosed Proof of Claim of the United States of

available at: [https://casedocuments.darrp.noaa.gov/northeast/ HUDSON/pdf/HRF2015 MA YI 9 L HR\\_Fish\\_](https://casedocuments.darrp.noaa.gov/northeast/ HUDSON/pdf/HRF2015 MA YI 9 L HR_Fish_)  
surface intake wells along the Monterey Bay coast, and discharge pipelines within the Monterey Bay Na  
lumbia River from river mile 0 to river mile 146--i.e., below the Bonneville Dam. The &quot;Willamette R  
eorgia and covering Robins Air Force Base, and the site operated by the WFO at Jacksonville, FL, locat

uing office. Thank you.

he civil penalties for which they are jointly and severally liable and which are referenced in Attorney Hecl  
dance on which agency matters NOAA employees may or may not publicly discuss and/or regulating ho

1801-2 (MAP), NMFS OLE 2016-0001, Opened 4/27/16. Closed 6/3/16. This information should be ma

[REDACTED]  
153 Solicitation ID: EA-133W-13-RQ-0108 /EA133W13RQ0108 Vendor Name: SEGOVIA, INC. Date Signed (mm/dd/yyyy): 03/26/2014 Our comparison of the Gulf of Mexico to NOAA to show how the grant money was used. Further, if the nonprofit submission with all attachments.

to present including, but not limited to: communications regarding any and all vacancies subject to the

received from the Delaware's Department of Natural Resources and Environmental Control from its books

not limited to: correspondence sent or received; memoranda; informal and formal policy guidance; notices

include the payee name, date, amount and check number. • If it is less time consuming and more cost effective coverage for M. SLAYEN ("M. SLAYEN") shall refer to M. Slayen & Associates, Missouri regarding the application, review, and consideration of Thomas E. Smith, Jr. for the position; the application facility, subsurface intake wells along the Monterey Bay coast, and discharge pipelines within the Monterey Relations Offices a. Chiefs of Staffing/Classification b. Chiefs of Labor Relations c. Chiefs of Employment

America. This request includes but is not limited to a request for the habitat equivalency analysis (HEA)

\_DIST.pdf (last visited February 1, 2016)): i) The database referred to and/or reflected in the bar chart of the National Marine Sanctuary, among other components. We also request that NOAA waive fees for processing the application; as used herein refers to the Willamette River from river mile 0 to river mile 28--i.e., below Willamette in South Stockton, GA, and covering Moody AFB, were inoperable. We are interested in the period from

wolf's email below. For clarification, I am seeking any and all documents evidencing any effort whatsoever or whether NOAA employees may speak about any agency matter with individuals or organizations outside

is available because of the precedent set forth in Core v. USPS, which finds there is "no substantial

[REDACTED]  
signed (mm/dd/yyyy):01/31/2013 Our company is willing to pay up to \$20.00 for the FOIA request without  
y is willing to pay up to \$20.00 for the FOIA request without advance notification.

mitted any extensions, or sent back any of the grant funds, I would like copies of those documents, as  
aforementioned vacancy announcement; any and all communications regarding the application, review

arding of Island Girl, II on December 4, 2016; and any determination made regarding Kenneth Kaiss.

merical data; telephone conversation notes; meeting attendance lists; meeting notes; maps; agreements;

ffective, please only provide amounts which equal \$1,000.00 or more • If possible, please include the las  
rie Slayen aka Morris Slayen, an insulation subcontractor based in San Diego, California) for any work p  
cations; qualifications; selection criteria; interviews; notes; ratings and/or rankings; referral list(s); selecti  
lonterey Bay National Marine Sanctuary, among other components. Specifically, we seek any and all rec  
ee Relations 8. Within General Counsel Offices, Assistant or Deputy General Counsels for: i. Litigation i

referenced in paragraph 116. In addition, please provide all information that documents the unreimburse

rown on Slide 9 titled, "Surface Sediment PCBs: Mechanistic Model Predicted vs. Measured Post-ROD"  
ng our request. Specifically, we seek any and all records related to NOAA's and the Monterey Bay Natic  
lamette Falls. This request, however, excludes documents that relate to any of the following, unless the  
om January 01, 2012 to January 31, 2017, although if this information is compiled on a fiscal year we w

ver by the Agency to collect amounts owed to the government by Mr. Roberge and/or Mr. Drinkwater. TI  
tside the agency, for the period from January 20, 2017, through the date of processing this request. Bac

tial invasion of privacy in information identifying successful federal job applicants.&quot; I understand th

[REDACTED]  
t advance notification.

well. For your reference, the recipient DUNS number is 360733732.

and consideration of Thomas E. Smith, Jr. for the position; the application s; qualifications; selection crit

s; contracts; electronic mail and attachments; assessments; spreadsheets; analyses; reports; draft docu

st known address of the payee. 2. An accounting of any unclaimed funds which have not been escheate  
performed on the SURVEYOR, Nassco Hull 316, MARAD Hull # 54, Delivered April 29, 1960. 2. All cont  
on; and emails drafted, sent, received, and/or maintained by Employee Relations, Human Resources, s  
ords related to NOAA's and the Monterey Bay National Marine Sanctuary's environmental review and a  
i. Administrative Law iii. EEO/Civil Rights iv. Labor and Employment Law 9. Chief Equal Employment O

ed past costs for natural resource damage assessment activities at the Quendall Site for the National O

(pre- and post-dredge). This request includes the database used to create the bar chart on Slide 9 and  
nal Marine Sanctuary's environmental review and authorization for the Project pursuant to the National  
documents also refer to Portland Harbor: the Mosier oil spill, the Hanford Superfund site, the Astoria M  
ould could work off of data reported from October 01, 2011 until January 31, 2017.

ne Agency may redact all personal financial information.

background discussion of the concerns motivating this request is provided in the January 24, 2017, article i

at information such as social security numbers, addresses, email, phone numbers, dates of birth and su

[REDACTED]

eria; interviews; notes; ratings and/or rankings; referral list(s); selection; and emails drafted, sent, receive

ments; recommendations; electronic data; and any other responsive documents. This request includes

d to the state. • Please include the payee name, date, amount, and any additional information if available  
acts and writings related to or showing work performed by M. Slayen on the SURVEYOR.

election panel, selecting official, deciding official for the position, and any other employee of the Agency.  
uthorization for the Project pursuant to the National Environmental Policy Act (“NEPA”). This request inc  
portunity Counselors We would prefer this information in digital form via email (troutman.deweypublicat

ceanic Atmospheric Administration and the Department of Interior, as referenced in paragraph 118 of the

the assumptions used to derive the values shown in the figures. ii) With reference to the Table on Slide  
Environmental Policy Act (“NEPA”). This request includes any draft documents, internal memos, and co  
arine cleanup, or the Bradford Island cleanup. 1. The most recent index for the administrative record for

n Politico by Andrew Restuccia, Alex Guill&eacute;n, and Nancy Cook, entitled Information lockdown hits

ervisor's name are not releasable under FOIA and I am not requesting that information. I understand th

[REDACTED]

ed, and/or maintained by Employee Relations, Human Resources, selection panel, selecting official, dec

all documents and information at any other office of NOAA Fisheries or the National Marine Fisheries St

3. • If it is less time consuming and more cost effective, please only provide amounts which equal \$1,000

- Any and all documentation and communications which refer or relate to potentially placing Thomas E. ludes any draft documents, internal memos, and correspondence, including emails, by and between NC ions@gmail.com). If digital versions are not available, printed material may be mailed to: Dewey Publica

3 attached Proof of Claim. Please forward copies of this information to me, along with your invoice for th

10, titled "Empirical Estimate of Natural Recovery," the data sources and the calculations or assumption rrespondence, including emails, by and between NOAA, the Monterey Bay National Marine Sanctuary, th the Portland Harbor natural resource damage assessment. 2. All external correspondence (including let

3 Trump's federal agencies, available at <http://www.politico.com/story/2017/01/federal-agencies-trump-in>

1at personally protected information will be blacked out on the applicants resumes. However, informatior



[REDACTED]

oiding official for the position, and any other employee of the Agency. • Any and all docu

ervice.

),00 or more • If possible, please include the last known address of the payee. Edge Po

Smith, Jr. in the Physical Scientist, ZP-1301-4 (DE/CR), position, Vacancy Announcement  
AA, the Monterey Bay National Marine Sanctuary, the Applicant, and/or any federal or California state  
itions, Inc. 1840 Wilson Blvd, Ste 203, Arlington, VA 22201. Response can also be sen

e costs incurred in responding to this request, and I will see that you are promptly reimbur

s used to determine the stated exponential decay rate, including the Data Summary Report re  
e Applicant, and/or any federal or California state agency regarding the Project. This request excludes  
ters, emails, and memoranda) created or received between January 1, 2007,

formation-lockdown-234122. <br /> <br /> 2. All records of communications disseminated inte

on the resume such as work experience, previous work experience, skills, education, and knowledge i:



s generally

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**From:** McPhail, Katherine (Federal) <KMcPhail@doc.gov>  
**Sent:** Tuesday, February 21, 2017 3:55 PM  
**To:** Graff, Mark (Federal)  
**Subject:** RE: FOIA Request from PEER  
**Attachments:** DOC-2017-000544 - Laura Dumais PEER - NOAA.pdf; DOC-OS-2017-000544 - Laura Dumais PEER - Log-OSY.xlsx

Mark,

Please find attached the OSY responses. Let me know if you have any questions/concerns.

Thanks,  
Kate

**Kate McPhail**  
Program Analyst  
Plans, Programs & Compliance Division  
U.S. Department of Commerce, Office of Security  
Desk: (202) 482-0106  
Email: [kmcphail@doc.gov](mailto:kmcphail@doc.gov)

[Security is Everyone's Responsibility](#)

**From:** Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]  
**Sent:** Tuesday, February 21, 2017 11:35 AM  
**To:** McPhail, Katherine (Federal) <KMcPhail@doc.gov>  
**Subject:** Re: FOIA Request from PEER

No (b)(5) [REDACTED]  
[REDACTED] . (b)(5) [REDACTED]  
[REDACTED].

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) [REDACTED] (C)

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On Tue, Feb 21, 2017 at 11:29 AM, McPhail, Katherine (Federal) <[KMcPhail@doc.gov](mailto:KMcPhail@doc.gov)> wrote:

Hi Mark,

Thanks (b)(5)

Let me know if you are thinking otherwise.

Thanks,

Kate

**Kate McPhail**

Program Analyst

Plans, Programs & Compliance Division

U.S. Department of Commerce, Office of Security

Desk: [\(202\) 482-0106](tel:2024820106)

Email: [kmcphail@doc.gov](mailto:kmcphail@doc.gov)

[Security is Everyone's Responsibility](#)

**From:** Mark Graff - NOAA Federal [mailto:[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)]

**Sent:** Tuesday, February 21, 2017 11:12 AM

**To:** McPhail, Katherine (Federal) <[KMcPhail@doc.gov](mailto:KMcPhail@doc.gov)>

**Subject:** Re: FOIA Request from PEER

Hi Kate--

I just sent an email (b)(5) [REDACTED]  
[REDACTED]  
[REDACTED]. I'll let you know when he responds. I know he's in the office today.

Out of curiosity (b)(5) [REDACTED]  
[REDACTED]  
[REDACTED] (b)(5) [REDACTED]  
[REDACTED]?

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) [REDACTED] (C)

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On Tue, Feb 21, 2017 at 11:02 AM, McPhail, Katherine (Federal) <[KMcPhail@doc.gov](mailto:KMcPhail@doc.gov)> wrote:

Mark,

I hope this email finds you well. I just wanted to follow up regarding the PEER FOIA. Have you had a chance to speak with Mike Toland?

If so, let me know and I can send you the consolidated OSY response.

Thanks,

Kate

**Kate McPhail**

Program Analyst

Plans, Programs & Compliance Division

U.S. Department of Commerce, Office of Security

Desk: [\(202\) 482-0106](tel:2024820106)

Email: [kmcphail@doc.gov](mailto:kmcphail@doc.gov)

[Security is Everyone's Responsibility](#)

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**From:** McPhail, Katherine (Federal)  
**Sent:** Monday, February 13, 2017 11:20 AM  
**To:** Graff, Mark (Federal) <[Mark.Graff@noaa.gov](mailto:Mark.Graff@noaa.gov)>  
**Subject:** Re: FOIA Request from PEER

Mark,

I hope you had a nice weekend. We seem yo be playing phone tag! Can you please let me know if you are working today?

I will be on leave the rest of the week and would love to touch base before I leave.

Thanks,  
Kate  
[202-482-0106](tel:2024820106)

---

**From:** McPhail, Katherine (Federal)  
**Sent:** Tuesday, February 7, 2017 3:22:25 PM  
**To:** Graff, Mark (Federal)  
**Subject:** FOIA Request from PEER

Mark,

I hope this email finds you well. I am the FOIA Officer for the Office of Security and we have received a FOIA request regarding NOAA. When you get a chance can you call me at the number below to discuss?

Thanks,

Kate

**Kate McPhail**

Program Analyst

Plans, Programs & Compliance Division

U.S. Department of Commerce, Office of Security

Desk: [\(202\) 482-0106](tel:2024820106)

Email: [kmcphail@doc.gov](mailto:kmcphail@doc.gov)

[Security is Everyone's Responsibility](#)



MEMORANDUM FOR Mark Graff  
NOAA FOIA Officer

FROM: Kate McPhail  
Management Analyst  
Office of Security

SUBJECT: Response to DOC-OS 2017-000544  
(Laura Dumais PEER)  
Freedom of Information Act (FOIA) Request

FOIA Request number DOC-OS 2017-000544 from Laura Dumais PEER was forwarded to this office on Wednesday, February 1, 2017 by Harriette Boyd, OPOG. The request states “Each year, PEER submits FOIA requests to federal agencies about the incidence of violence and threats against their employees. PEER now asks that you provide information for calendar year 2016. Specifically, we request the following records concerning acts of violence or threats against NOAA employees and professional observer contractor employees as follows: A summary of all incidents of violence, threats, or harassment against NOAA employees that occurred in calendar year 2016. The summary should include the date, location, and nature of the incident or threat together with a summary of what, if any, outcomes stemmed from the incident or threat (e.g., arrest, conviction, ongoing investigation). A summary of all incidents of violence, threats, or harassment against professional observers, including government contractors, that occurred in calendar year 2015. The summary should include incidents against observers aboard NOAA vessels or while otherwise carrying out their duties as NOAA contractors, and include the date, location, and nature of the incident or threat together with a summary of what, if any, outcomes stemmed from the incident or threat (e.g., arrest, conviction, ongoing investigation). In the past, there was confusion over whether NOAA or DOC should handle our request as to professional observers. Thus, I am sending this request to both NOAA and DOC, and I trust that the respective FOIA officers will work out the most expeditious way of responding, involving NMFS if necessary. Please note that past responses have indicated severe inaccuracies. For example, for our CY 2013 request, DOC reported only once responsive incident involving professional observers, yet a report by the NMFS Office for Law Enforcement’s Alaska Division stated that observers had reported 38 incidents of violence, threats, or harassment in the first two quarters of 2013 in Alaska alone. We ask your cooperation in ensuring a complete and accurate response.”

(b)(5)





If you have any questions, please don't hesitate to contact me at 202-482-0601 or [kmcp hail@doc.gov](mailto:kmcp hail@doc.gov).

Attachments

(b) (5)

---

**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Tuesday, February 21, 2017 4:00 PM  
**To:** Lola Stith - NOAA Affiliate  
**Cc:** Robert Swisher - NOAA Federal  
**Subject:** Fwd: FOIA Request from PEER  
**Attachments:** DOC-2017-000544 - Laura Dumais PEER - NOAA.pdf; DOC-OS-2017-000544 - Laura Dumais PEER - Log-OSY.xlsx

Hey Lola--

This is a referral from DOC/OSY. (b)(5)

Please let me know if you need anything on this one. Thank you!!

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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----- Forwarded message -----

**From:** **McPhail, Katherine (Federal)** <[KMcPhail@doc.gov](mailto:KMcPhail@doc.gov)>  
**Date:** Tue, Feb 21, 2017 at 3:54 PM  
**Subject:** RE: FOIA Request from PEER  
**To:** "Graff, Mark (Federal)" <[Mark.Graff@noaa.gov](mailto:Mark.Graff@noaa.gov)>

Mark,

Please find attached the OSY responses. Let me know if you have any questions/concerns.

Thanks,

Kate

**Kate McPhail**

Program Analyst

Plans, Programs & Compliance Division

U.S. Department of Commerce, Office of Security

Desk: [\(202\) 482-0106](tel:(202)482-0106)

Email: [kmcphail@doc.gov](mailto:kmcphail@doc.gov)

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**From:** Mark Graff - NOAA Federal [mailto:[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)]

**Sent:** Tuesday, February 21, 2017 11:35 AM

**To:** McPhail, Katherine (Federal) <[KMcPhail@doc.gov](mailto:KMcPhail@doc.gov)>

**Subject:** Re: FOIA Request from PEER

(b)(5)  
[Redacted]

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:(301)628-5658) (O)

(b)(6) (C)

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On Tue, Feb 21, 2017 at 11:29 AM, McPhail, Katherine (Federal) <[KMcPhail@doc.gov](mailto:KMcPhail@doc.gov)> wrote:

Hi Mark,

Thanks (b)(5)

Let me know if you are thinking otherwise.

Thanks,

Kate

**Kate McPhail**

Program Analyst

Plans, Programs & Compliance Division

U.S. Department of Commerce, Office of Security

Desk: [\(202\) 482-0106](tel:2024820106)

Email: [kmcphail@doc.gov](mailto:kmcphail@doc.gov)

[Security is Everyone's Responsibility](#)

**From:** Mark Graff - NOAA Federal [mailto:[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)]

**Sent:** Tuesday, February 21, 2017 11:12 AM

**To:** McPhail, Katherine (Federal) <[KMcPhail@doc.gov](mailto:KMcPhail@doc.gov)>

**Subject:** Re: FOIA Request from PEER

Hi Kate--

(b)(5)

I'll let you know when he responds. I know he's in the office today.

Out of curiosity (b)(5)

?

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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On Tue, Feb 21, 2017 at 11:02 AM, McPhail, Katherine (Federal) <[KMcPhail@doc.gov](mailto:KMcPhail@doc.gov)> wrote:

Mark,

I hope this email finds you well. I just wanted to follow up regarding the PEER FOIA. Have you had a chance to speak with Mike Toland?

If so, let me know and I can send you the consolidated OSY response.

Thanks,

Kate

**Kate McPhail**

Program Analyst

Plans, Programs & Compliance Division

U.S. Department of Commerce, Office of Security

Desk: [\(202\) 482-0106](tel:202-482-0106)

Email: [kmcphail@doc.gov](mailto:kmcphail@doc.gov)

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**Sent:** Monday, February 13, 2017 11:20 AM  
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Kate  
[202-482-0106](tel:202-482-0106)

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**Subject:** FOIA Request from PEER

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Thanks,

Kate

**Kate McPhail**

Program Analyst

Plans, Programs & Compliance Division

U.S. Department of Commerce, Office of Security

Desk: [\(202\) 482-0106](tel:2024820106)

Email: [kmcphail@doc.gov](mailto:kmcphail@doc.gov)

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MEMORANDUM FOR Mark Graff  
NOAA FOIA Officer

FROM: Kate McPhail  
Management Analyst  
Office of Security

SUBJECT: Response to DOC-OS 2017-000544  
(Laura Dumais PEER)  
Freedom of Information Act (FOIA) Request

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(b)(5)  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

If you have any questions, please don't hesitate to contact me at 202-482-0601 or [kmcp hail@doc.gov](mailto:kmcp hail@doc.gov).

Attachments

(b) (5)

---

**From:** Kimberly Katzenbarger - NOAA Federal <kimberly.katzenbarger@noaa.gov>  
**Sent:** Monday, March 6, 2017 3:55 PM  
**To:** Jeri Dockett - NOAA Affiliate; Nkolika Ndubisi - NOAA Federal; Mark Graff  
**Subject:** Re: 2017-000320 Closing letter  
**Attachments:** Closing Letter 2017-000320 (2) kk.docx

Jeri, I apologize for the delay in responding. (b)(5) [redacted]  
[redacted]

[redacted]  
[redacted]  
[redacted]  
[redacted]  
[redacted]  
[redacted]  
[redacted]

[redacted]  
[redacted]  
[redacted]  
[redacted] Please advise.

Thanks, Kim

On Mon, Mar 6, 2017 at 3:23 PM, Jeri Dockett - NOAA Affiliate <[jeri.dockett@noaa.gov](mailto:jeri.dockett@noaa.gov)> wrote:

Kim (b)(5) [redacted]  
[redacted]  
[redacted].

Thanks,  
Jeri  
--

**Very respectfully,**  
**Jeri Dockett**  
**FOIA/Records Manager**  
*National Oceanic Atmospheric Administration*  
*Office of Response and Restoration*  
*1305 East West Highway*  
*SSMC4 RM 10124*  
*Silver Spring, MD 20910*  
*(O)[240.533.0395](tel:240.533.0395)*

--

Kimberly Katzenbarger, Attorney  
National Oceanic and Atmospheric Administration  
Office of General Counsel, Natural Resources Section  
1315 East West Hwy, Suite 15104  
Silver Spring, MD 20910 3282  
Desk: 301 713 7448  
Cell (b)(6)

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(b) (5)

(b) (5)

(b) (5)



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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE

Defendant.

Case No. 1:15-cv-02088-CRC

**BRIEF OF CLIMATE SCIENCE LEGAL DEFENSE FUND, AMERICAN  
METEOROLOGICAL SOCIETY, AND UNION OF CONCERNED SCIENTISTS  
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT**

Ian Fein (Cal. Bar No. 281394)  
ORRICK, HERRINGTON &  
SUTCLIFFE LLP  
405 Howard Street  
San Francisco, CA 94105  
(415) 773-5700

Kelsi Brown Corkran  
(D.C. Bar No. 501157)  
*Counsel of Record*  
Benjamin Chagnon (D.C. Bar No. 1044746)  
Shani S. Harmon (D.C. Bar No. 1020893)  
ORRICK, HERRINGTON &  
SUTCLIFFE LLP  
1152 15th Street, N.W.  
Washington, D.C. 20005  
(202) 339-8400  
kcorkran@orrick.com

*Counsel for Amici Curiae*

**CORPORATE DISCLOSURE STATEMENT**

I, Kelsi Brown Corkran, counsel of record for *Amici Curiae* Climate Science Legal Defense Fund (CSLDF), American Meteorological Society (AMS), and Union of Concerned Scientists (UCS), certify that, to the best of my knowledge and belief, amici CSLDF, AMS, and UCS have no parent companies, subsidiaries, or affiliates with any outstanding securities in the hands of the public. Furthermore, CSLDF, AMS, and UCS are organized under Section 501(c)(3) of the Internal Revenue Code, and no publicly held company has a 10% or greater ownership interest in the organizations. These representations are made in order that judges of this Court may determine the need for recusal.

/s/ Kelsi Brown Corkran  
Kelsi Brown Corkran  
*Counsel of Record for Amici Curiae*

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### **INTEREST OF AMICI**<sup>1</sup>

Amici are nonprofit organizations committed to ensuring robust, independent scientific research into vitally important but politically charged subjects like climate change. Such research can occur only where scientists feel free to explore new ideas and provide candid feedback to each other without fear that their confidential exchanges or preliminary drafts will later be subject to indiscriminate public disclosure. Amici are thus deeply concerned about attempts, like those in this case, to obtain scientists' confidential correspondence and drafts. Amici have an interest in ensuring that public records laws are applied in a manner that appropriately protects the privileged, deliberative records of government scientists and the colleagues with whom they collaborate.

Climate Science Legal Defense Fund (CSLDF) was founded in 2011 in response to the increasing incidence of legal attacks against climate scientists. Its mission is to protect the scientific endeavor in general and climate science and climate scientists in particular from assaults being launched through the legal system, including intrusive public records requests.

American Meteorological Society (AMS) was founded in 1919 and is dedicated to advancing the atmospheric and related sciences for the benefit of society. It accomplishes this goal by, among other things, publishing several peer-reviewed scientific journals. AMS has more than 13,000 members, including scientists, researchers, and other climate professionals. It is committed to strengthening scientific work across the public, private, and academic sectors, and believes that collaboration and information sharing are critical to ensuring that society benefits from the best, most current scientific knowledge and understanding available.

---

<sup>1</sup> Amici CSLDF, AMS, and UCS state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Union of Concerned Scientists (UCS) was founded in 1969 and is supported by an alliance of 500,000 citizens and scientists dedicated to using science to foster a healthy environment and safe world. UCS combines independent scientific research and citizen action to develop innovative and practical solutions to pressing environmental and security problems like climate change. UCS believes that a crucial ingredient in achieving these goals is maintaining research institutions within the federal government that foster an environment of independent and rigorous scientific inquiry free from political interference.

### **INTRODUCTION**

The efforts to obtain government scientists' privileged materials in this case are, unfortunately, all too familiar. Over the last decade, groups across the political spectrum have attempted to discredit scientific studies they dislike not by contesting the validity of the underlying data or methodology, or by showing that the studies' results cannot be reproduced (which is how the scientific process traditionally works), but rather by seeking to use the scientists' emails and preliminary drafts against them. This strategy has been a particularly common tactic of those who dispute the scientific consensus on climate change.

Whatever one's reasons for seeking such materials, however, these types of records are generally protected from disclosure by the deliberative process privilege as courts have repeatedly recognized in cases similar to this one. Government scientists' correspondence, preliminary drafts, and peer review materials are quintessential deliberative, pre-decisional records safeguarded by Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5). Maintaining the confidentiality of such records is necessary for the reasons that Congress codified the deliberative process privilege in that exemption: Quality government science (on which both policymakers and the general public rely) depends on an uninhibited exchange of ideas among scientists, and the unintended release of their correspondence and

preliminary drafts would likely result in public confusion.

Indeed, the policy concerns animating the deliberative process privilege are directly implicated in this very case. Numerous scientific organizations (including some of the present amici) specifically warned of the dangerous chilling effects that would result if the materials withheld by the National Oceanographic and Atmospheric Administration (NOAA) in this case were ordered released pursuant to an earlier congressional subpoena. These same effects would occur if the materials were released pursuant to FOIA instead. Ordering their release would harm (or halt altogether) government scientists' ability to collaborate with colleagues, damage the government's ability to recruit or retain top scientists, and deter critically important research into politically charged fields like climate change.

Moreover, releasing such materials is entirely unnecessary to ensure transparency in government science. The scientific method itself promotes transparency by, for example, requiring that research undergo rigorous peer review before publication and that its underlying data and methodology generally be made available to the public. NOAA scientists faithfully followed these practices here, and even took additional measures to ensure transparency by volunteering to answer questions directly from congressional critics. These steps allowed others to test the reliability of their research, and to disagree with their findings where testing suggested a different result. That is the way science works and how it has already worked in this case, without compelled disclosure of the scientists' deliberative records.

Accordingly, the Court should enter summary judgment for the government and reject Plaintiff's attempt to obtain these scientists' confidential correspondence and preliminary drafts.

**ARGUMENT**

**I. NOAA Has Withheld Only Privileged Correspondence And Preliminary Drafts Of Its Climate Science Paper.**

**A. NOAA Publicly Released The Data And Methodology Behind Its Paper.**

The FOIA request at issue in this case centers around a June 2015 paper that NOAA scientists published in the prominent, peer-reviewed journal *Science*. See Thomas Karl et al., *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus*, 348 *Sci.* 1469 (June 26, 2015) (“Hiatus Paper” or “Paper”). The Paper addressed (and refuted) earlier claims about a so-called “hiatus” in global warming i.e., the notion that the rate of global warming slowed in the 21st century as compared to the second half of the 20th century.

As explained in the government’s motion and accompanying declarations, NOAA scientists in 2014 developed an idea to reexamine the alleged “hiatus” in light of two recent developments: NOAA had made certain improvements to its dataset of sea surface temperatures, and 2013 and 2014 were two of the five warmest years on record. See Def.’s Mot. for Summ. J. (“MSJ”) at 1-3, ECF No. 16; Decl. of Mark Graff (“Graff Decl.”) ¶ 10, ECF No. 16-1. When researchers accounted for those developments, they found that global temperatures in the last 15 years rose as fast or faster than they did during the latter half of the 20th century. In other words, any slowdown in warming that could be described as a “hiatus” had largely disappeared.

The Hiatus Paper attracted significant attention in part because those who dispute the scientific consensus on climate change had previously seized upon the alleged “hiatus” as a reason to oppose restrictions on greenhouse gas emissions. One such contrarian was Representative Lamar Smith, a Republican from Texas who chairs the House Committee on Science, Space, and Technology. Over the course of several months, Smith sent increasingly invasive record requests to NOAA in an effort to undermine the Paper’s credibility.

At first, Smith's inquiry focused on obtaining the data and methodology underlying the Paper.<sup>2</sup> NOAA fully cooperated with these requests. The agency pointed Smith to the websites where consistent with standard scientific practice all of the underlying data and methodologies had already been made available to the public.<sup>3</sup> NOAA also directed Smith to other publicly available datasets and peer-reviewed papers relevant to the methods it had used.<sup>4</sup> And at NOAA's own suggestion, several authors of the Paper traveled to Washington D.C. on two separate occasions to answer, in person, any questions that Smith's committee had about the Paper.<sup>5</sup> NOAA also offered to make some of its top scientists available for additional transcribed interviews with committee staff.<sup>6</sup>

As NOAA explained, it had made its data and methodology "available to the Committee, the public, and the scientific community"; accordingly, if anyone "doubt[ed] the integrity of the study, [they] ha[d] the tools [they] need[ed] to commission a competing scientific assessment."<sup>7</sup>

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<sup>2</sup> See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (July 14, 2015), <http://tinyurl.com/gqotymh> (requesting "[a]ll data related to [the NOAA] study and the updated global datasets, including the methods of analysis used to adjust the data.").

<sup>3</sup> See Letter from Robert Moller, Acting Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Aug. 20, 2015), <http://tinyurl.com/j8hjjlx>.

<sup>4</sup> See, e.g., Letter from Coby Dolan, Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 2, 2015), <http://tinyurl.com/zc3w8eg>; Letter from Coby Dolan, Director of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Dec. 15, 2015), <http://tinyurl.com/h49e2wp>.

<sup>5</sup> See Letter from Coby Dolan, Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 27, 2015), <http://tinyurl.com/gumxt9t>.

<sup>6</sup> See Letter from Kathryn Sullivan, Adm'r, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 20, 2015), <http://tinyurl.com/h55yhqw>.

<sup>7</sup> *Id.*

**B. Representative Smith Sought Privileged Communications From NOAA.**

Representative Smith then shifted his focus to allegations that the Paper was politically motivated. He subpoenaed the NOAA scientists' internal, deliberative communications related to the Paper.<sup>8</sup> Smith acknowledged that "NOAA has provided in-person briefings, publicly available data related to the [Hiatus] study, and has agreed to make several witnesses available for voluntary interviews."<sup>9</sup> He further demanded, however, "the production of e-mails and other communications sent and received by NOAA officials."<sup>10</sup> Smith attempted to justify this extraordinary subpoena by alleging in public statements that NOAA "altered the data to get the results they needed to advance this administration's extreme climate change agenda."<sup>11</sup>

NOAA declined to provide the privileged correspondence. The agency explained that protecting "the confidentiality of these communications among scientists is essential to frank discourse" and consistent with "long-standing practice in the scientific community."<sup>12</sup>

Other scientists supported NOAA's decision, and criticized as dangerous and improper Smith's inquiry into their colleagues' confidential correspondence. Eight major professional

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<sup>8</sup> See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (Oct. 13, 2015), <http://tinyurl.com/h9g4rty>.

<sup>9</sup> See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Penny Pritzker, Sec'y, Dep't of Commerce (Dec. 1, 2015), <http://tinyurl.com/h8exxdj>.

<sup>10</sup> *Id.*; see also Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (Feb. 22, 2016), <http://tinyurl.com/z2ce6ul>.

<sup>11</sup> Jeff Tollefson, *US Science Agency Refuses Request for Climate Records*, *Nature*, Oct. 28, 2015, <http://tinyurl.com/hul3jzr>; see also Lamar Smith, *Letter to the Editor*, *N.Y. Times*, Dec. 9, 2015, <http://tinyurl.com/zm3nkmr> (characterizing the "motivations behind [the Hiatus] study" as "clearly suspect"); Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, and Tech., to Penny Pritzker, Sec'y, Dep't of Commerce (Nov. 18, 2015), <http://tinyurl.com/jrrbefm> (alleging the Paper was "prematurely rushed to publication ... to fit the Administration's aggressive climate agenda").

<sup>12</sup> Tollefson, *US Science Agency Refuses Request*, *supra* note 11.

scientific organizations (including amici AMS) wrote: “These broad inquiries threaten to inhibit the free exchange of ideas across scientific disciplines not only for NOAA, but for other government experts and the academic and industry scientists with whom they collaborate.”<sup>13</sup> They explained that breaking the confidentiality of such communications would cause a dangerous “chilling effect” on government scientists and, in particular, their willingness to conduct research on politically charged topics like climate change.<sup>14</sup> Nearly 600 scientists made a similar point in a letter praising NOAA for standing up to Smith’s “bullying tactics.”<sup>15</sup> And nearly two dozen former NOAA scientists also weighed in: “We know firsthand that scientists need intellectual space to debate new ideas and give each other confidential feedback without worrying that an individual comment will be subject to public scrutiny at a later date.”<sup>16</sup> They warned that releasing the scientists’ privileged emails would “significantly damage NOAA’s ability to conduct science.”<sup>17</sup>

Smith’s subpoena came under political fire as well. Representative Eddie Bernice

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<sup>13</sup> Letter from Am. Ass’n for the Advancement of Sci. (AAAS) et al., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 24, 2015), <http://tinyurl.com/zdpwrdrn>.

<sup>14</sup> *Id.*; accord Letter from Am. Meteorological Soc’y (AMS) to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 4, 2015), <http://tinyurl.com/h9fze9l> (“The demand for internal communications ... imposes a chilling effect on future communication among scientists” and “can be viewed as a form of intimidation that could deter scientists from freely carrying out research on important national challenges.”); Letter from Union of Concerned Scientists (UCS) to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Feb. 26, 2016), <http://tinyurl.com/jb7ucua> (the “demands have a chilling effect by deterring federal scientists from freely carrying out their research regardless of the political or policy implications”).

<sup>15</sup> Letter from Dr. Guy Almes, Dir., Acad. for Advanced Telecomm. & Learning Techs., et al., to Kathryn Sullivan, Adm’r, NOAA (Dec. 7, 2015), <http://tinyurl.com/zwoztdy> (explaining that releasing the NOAA scientists’ correspondence “can create a chilling effect on both federal scientists and any other scientist with whom they collaborate or correspond”).

<sup>16</sup> Letter from Dr. Susan Avery, President, Woods Hole Oceanographic Inst., et al., to Kathryn Sullivan, Adm’r, NOAA (Dec. 7, 2015), <http://tinyurl.com/gp5lorh>.

<sup>17</sup> *Id.*

Johnson, the ranking Democrat on the House Science Committee, criticized Smith's subpoena as a mere "fishing expedition." "[O]btaining all of the data and methods used in this study seemingly was not enough for the Majority. You also demanded internal communications by NOAA scientists regarding their scientific research," she wrote in a letter to Smith, adding that she "cannot help but note that your requests in this case echo the tactics" of other climate change contrarians "who frequently submit similar FOIA requests of climate scientists in both federal government and in state universities."<sup>18</sup> Johnson lamented that Smith's "entire effort smacks of the discredited tactics used by climate change denial groups (oftentimes funded by the fossil fuel industry) to sway public opinion based on misinformation, innuendo, and falsehoods."<sup>19</sup>

**C. Judicial Watch Requested The Same Privileged Materials Via FOIA.**

While NOAA was responding to Smith's inquiries, Judicial Watch submitted a FOIA request that expressly referenced Smith's subpoena and sought many of the same privileged materials. *See* Ex. A to Answer, ECF No. 8-1. Indeed, Judicial Watch asserted in a press release that this lawsuit seeks "the same documents unsuccessfully subpoenaed by [the] House committee."<sup>20</sup> The organization also announced its belief that the "Obama administration put politics before science to advance global warming alarmism," and trumpeted its previous attempts to use FOIA to pursue "alleged data manipulation by global warming advocates."<sup>21</sup>

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<sup>18</sup> Letter from Eddie Bernice Johnson, Ranking Member, H. Comm. on Sci., Space, & Tech., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 23, 2015), <http://tinyurl.com/qd5psrd>.

<sup>19</sup> Letter from Eddie Bernice Johnson, Ranking Member, H. Comm. on Sci., Space, & Tech., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 19, 2015), <http://tinyurl.com/z4dmwue>.

<sup>20</sup> Press Release, Judicial Watch, Judicial Watch Sues for Documents Withheld From Congress in New Climate Data Scandal (Dec. 22, 2015), <http://tinyurl.com/o9vk22d>.

<sup>21</sup> *Id.*



NOAA released hundreds of pages of documents in response to the FOIA request. *See* Graff Decl. ¶¶ 29-31. The agency properly withheld, however, three general categories of records—internal correspondence, unfinished drafts of the Hiatus Paper, and peer review materials—that, as explained below, are the types of deliberative, predecisional records appropriately protected from release under FOIA Exemption 5. *See also* Def.’s MSJ at 8-20.

## **II. Public Records Laws Are Increasingly Being Misused To Pursue Privileged Correspondence And Research Materials Like Those At Issue Here.**

As Representative Johnson observed (and Judicial Watch’s own press release reveals), the attempts to obtain the NOAA scientists’ privileged records in this case are unfortunately familiar. Over the past decade, organizations across the political spectrum have increasingly used public records laws to attack research findings (or even fields of study) that they dislike.<sup>22</sup> As in this case, the records requests typically do not seek the data, methodology, or funding sources of completed studies. Rather, the requests seek privileged prepublication materials such as preliminary drafts, private critiques from other scientists, and even researchers’ personal documents and correspondence.<sup>23</sup> These types of materials, however, are traditionally protected as confidential to ensure that scientists can raise new ideas and engage in robust debate without fear that their deliberations will later be publicized or taken out of context. *See* Decl. of Dr. Richard Spinrad ¶¶ 14-24, ECF No. 16-4 (hereinafter “Spinrad Decl.”).

The increasing frequency of these sorts of public records requests underscores the importance of protecting scientists’ deliberative materials from improper disclosure. As

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<sup>22</sup> *See, e.g.,* Michael Halpern, *Freedom to Bully: How Laws Intended to Free Information Are Used to Harass Researchers*, Ctr. for Sci. & Democracy, Union of Concerned Scientists (Feb. 2015), <http://tinyurl.com/hjzyq6g>; Rachel Levinson-Waldman, *Academic Freedom and the Public’s Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship at 1-5*, Am. Constitution Soc’y (Sept. 2011), <http://tinyurl.com/h87kevm>.

<sup>23</sup> *See* Halpern, *Freedom to Bully*, *supra* note 22, at 2.

explained in greater detail below (at 12-21), releasing such materials could stifle important research, confuse the public, and harm the government's ability to collaborate with outside scientists and recruit or retain top talent. *See* Spinrad Decl. ¶¶ 22-26. These potentially damaging effects are exacerbated in the field of climate science, which because of its political salience is particularly vulnerable to partisan attacks and concerted efforts to confuse the public. *See, e.g., id.* ¶¶ 23, 25 (noting that, in the climate science context, “the potential for a chilling effect is particularly high” and “the risks of misinterpretation or confusion” are “elevated”).

In fact, the attempts to obtain the NOAA scientists' privileged materials in this case are disturbingly similar to earlier efforts to obtain confidential records from climate scientist Dr. Michael Mann, who, by virtue of his position at a public university, was also the subject of intrusive public records requests.<sup>24</sup> Dr. Mann became a chief target of climate change contrarians because he was one of the authors of a seminal paper depicting the so-called “hockey stick” curve, which showed a spike in global temperature over the past century and a half.<sup>25</sup>

As in this case, Dr. Mann's emails were initially the subject of a failed civil subpoena by a political figure. Virginia Attorney General Ken Cuccinelli tried, unsuccessfully, to subpoena all of Dr. Mann's personal emails with more than thirty other scientists during his tenure at the University of Virginia. *See Cuccinelli v. Rector & Visitors of Univ. of Va.*, 722 S.E.2d 626 (Va. 2012) (holding that the Attorney General lacked authority to make the demands). But also like

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<sup>24</sup> Representative Johnson made this same connection between the present case and the Dr. Mann dispute, describing both as “invasive fishing expeditions in search of a pretext to discredit” climate scientists. Johnson Oct. 23 Letter, *supra* note 18 (quoting Editorial, *Harassing Climate-Change Researchers*, Wash. Post, May 29, 2011, <http://tinyurl.com/zg8p75o>).

<sup>25</sup> *See* Michael E. Mann et al., *Northern Hemisphere Temperatures During the Past Millennium: Inferences, Uncertainties, and Limitations*, 26 *Geophysical Res. Letters* 759 (1999).

here, another organization that frequently files public records requests, the American Tradition Institute<sup>26</sup>, then stepped in and tried to obtain the privileged records via that method instead.

The Virginia Supreme Court unanimously rejected the attempt to obtain Dr. Mann's emails in an opinion that strongly affirmed the importance of protecting the confidentiality of scientists' correspondence. *See Am Tradition Inst. ("ATI") v. Rector & Visitors of Univ. of Va.*, 756 S.E.2d 435, 442 (Va. 2014). The state high court quoted at length an affidavit from the University Provost explaining that "compelled disclosure of [scientists'] unpublished thoughts ... and personal scholarly communications would mean a fundamental disruption of the norms and expectations which have enabled research to flourish." *Id.*

Although the *ATI* case involved a state-law exemption for public records at institutions of higher education, the same rationales extend to protecting such records under the deliberative process privilege of FOIA Exemption 5. Indeed, the West Virginia Supreme Court later relied on the *ATI* opinion (and the declaration quoted above) in applying this Court's federal deliberative process precedent to its own state analogue. *See Highland Mining Co. v. W. Va. Univ. Sch. of Med.*, 774 S.E.2d 36, 53-54 (W. Va. 2015) ("The same reasoning applies with equal force here."). The court in *Highland Mining* rejected a coal company's attempt to use a public records statute to discredit a public university scientist who had published articles linking the environmental impacts of surface coal mining with health problems of local residents. *See id.* at 43. The court upheld the university's decision to withhold the same kinds of materials at issue in this case i.e., "drafts, data compilations and analyses, proposed edits, e-mails and other communications, and peer review comments and responses relate[d] to the planning, preparation

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<sup>26</sup> The American Tradition Institute, now known as the Energy and Environmental Legal Institute, has filed similar public records requests regarding the work of scientists in many other states as well. *See Halpern, Freedom to Bully, supra* note 22, at 6.

and editing necessary to produce a final published article” on the ground that they would improperly reveal the scientist’s deliberative process. *See id.* at 52-53.

Dr. Mann referenced the *Highland Mining* case and his own experience in *ATI* in an editorial that he co-authored warning about the potential abuse of public records laws in cases like this. Groups “across the political spectrum” are increasingly requesting “not only records of discussions about the strengths and weaknesses of work, but also preliminary paper drafts and private constructive criticisms from colleagues,” Dr. Mann warned, noting that “[t]hese requests can attack and intimidate [scientists], threatening their reputations, chilling their speech, disrupting their research, discouraging them from tackling contentious topics, and ultimately confusing the public.”<sup>27</sup> Presciently, Dr. Mann’s editorial appeared in the journal *Science* just weeks before the NOAA scientists’ Hiatus Paper.

### **III. The Deliberative Process Privilege Appropriately Protects The Confidentiality Of Government Scientists’ Correspondence And Drafts.**

In enacting FOIA, Congress recognized that certain government records should appropriately be withheld from public disclosure. *See EPA v. Mink*, 410 U.S. 73, 80 (1973). Exemption 5 of FOIA codified, among other things, the common law “deliberative process privilege,” which safeguards from disclosure materials that reveal “the decisionmaking processes of government agencies.” *Wolfe v. Dep’t of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc). The privilege is designed to improve the quality of agency decisions by promoting the uninhibited exchange of ideas, and also to prevent the public confusion that could result from releasing documents that do not represent the government’s final word on a given matter. *See Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

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<sup>27</sup> Michael Halpern & Michael Mann, Editorial, *Transparency Versus Harassment*, 348 *Sci.* 479 (May 1, 2015), <http://tinyurl.com/jumo5nc>.

Consistent with these policies, courts have regularly protected deliberative, predecisional scientific materials like those at issue in this case. *See, e.g., Formaldehyde Inst. v. Dep't of Health and Human Servs.*, 889 F.2d 1118, 1124-25 (D.C. Cir. 1989) (peer review comments); *Hooker v. U.S. Dep't of Health & Human Servs.*, 887 F. Supp. 2d 40, 57-59 (D.D.C. 2012) (internal email communications, edits to draft manuscript, and peer review comments); *ViroPharma Inc. v. Dep't of Health & Human Servs.*, 839 F. Supp. 2d 184, 192-94 (D.D.C. 2012) (draft scientific documents and internal review documents); *Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184, 189 (D.D.C. 2009) (draft scientific model that calibrated raw data); *Weinstein v. U.S. Dep't of Health & Human Servs.*, 977 F. Supp. 41 (D.D.C. 1997) (peer review materials); *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health & Human Servs.*, 844 F. Supp. 770, 782-83 (D.D.C. 1993) (draft manuscript and software program designed to manipulate raw data); *Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 115 (D.D.C. 1984) (draft reports); *Highland Mining*, 774 S.E.2d at 48-54 (drafts, data compilations and analyses, proposed edits, emails, and other communications related to research articles). The same policy concerns and reasoning discussed in these cases support the government's position here.

**A. Protecting Drafts, Correspondence, And Peer Review Materials Allows An Uninhibited Exchange Of Ideas That Is Critical To The Scientific Process.**

The deliberative process privilege recognizes that “free and uninhibited exchange and communication of opinions, ideas, and points of view” is necessary to the “wise functioning” of government. *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 n.31 (D.C. Cir. 1974). Such uninhibited communication is impossible, however, if government employees fear public disclosure of their preliminary thoughts and ideas. “[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances ... to the detriment of the decisionmaking process.” *NLRB v. Sears, Roebuck &*

*Co.*, 421 U.S. 132, 150-51 (1975). Government employees “will not communicate candidly ... if each remark is a potential item of discovery and front page news.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001). In other words, “the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.” *Wolfe*, 839 F.2d at 773.

Accordingly, the deliberative process privilege “prevent[s] injury to the quality of agency decisions,” *Sears*, 421 U.S. at 151, by removing the “threat of cross-examination in a public tribunal,” *Montrose*, 491 F.2d at 68 n.31. The privilege ensures that government employees “feel free to provide ... their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

The work of government scientists is particularly dependent on uninhibited exchanges, and no less susceptible to the chilling effect of threatened public disclosure. This court has thus long recognized that the deliberative process privilege protects preliminary scientific drafts and correspondence because disclosure would “discourage the intellectual risk-taking so essential to technical progress.” *Chem. Mfrs*, 600 F. Supp. at 118. The “give and take of science,” UCS Letter, *supra* note 14, is the same “give-and-take of the consultative process” that Congress sought to safeguard in Exemption 5, *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Homeland Sec.*, 648 F. Supp. 2d 152, 163 (D.D.C. 2009); *see also Horsehead Indus. v. EPA*, No. 94-1299, slip op. at 15-20 (D.D.C. Oct. 1, 1996) (government scientists’ “frank exchanges of view regarding [their research] reside near the core of an agency’s deliberative process”).

Uninhibited exploration and discussion is fundamental to the scientific process. Research projects typically begin with “only rough ideas ... that are not yet fully formed.” Spinrad Decl.

¶ 14; *see also Humane Soc’y v. Super. Ct. of Yolo Cnty.*, 155 Cal. Rptr. 3d 93, 113 (Cal. Ct. App. 2013) (scientific research involves “trying new ideas, investigating lines of thinking that do not work out, suggesting ideas that turn out to be wrong”). Further, scientists do not pursue their research in isolation; they develop and refine hypotheses “through exchanges and candid debates with peers inside and outside the federal government.” Spinrad Decl. ¶ 14; *see also Chem. Mfrs.*, 600 F. Supp. at 118 (scientists “discuss hypotheses which have not matured” and “can be effectively shared only with peers in regular and confidential communication”). These exchanges take the form of informal email correspondence and formal peer review both of which are “critical to developing and releasing scientific information of the highest possible quality.” Spinrad Decl. ¶ 15.

These important exchanges can only take place, however, if scientists are given the “intellectual space to debate new ideas and give each other confidential feedback without worrying that an individual comment will be subject to public scrutiny at a later date.” Avery et al. Letter, *supra* note 16. Accordingly, there is a “well-established presumption” within the scientific community that such exchanges “are not intended to be, and will not be, shared with a wider audience.” Spinrad Decl. ¶ 20. Indeed, peer reviewers are often expressly instructed to treat the draft as privileged and confidential, as they were in this case. *See* Graff Decl. ¶¶ 17-20. “Confidentiality is essential to ensuring the participants are free to propose new ideas or explanations without fear of misinterpretation or being taken out of context.” Spinrad Decl. ¶ 20.

The preliminary work of the NOAA scientists at issue in this case thus fall comfortably within the class of materials protected by the deliberative process privilege. Requiring the disclosure of scientists’ communications, drafts, and peer review materials would have an “obvious chilling effect” on the candid, informal exchanges and debates that are crucial to the

scientific method. *Chem. Mfrs*, 600 F. Supp. at 118; *see also Formaldehyde Inst.*, 889 F.2d at 1124-25 (deeming it “indisputable,” based on scientists’ affidavits, that “release of reviewers’ editorial comments would ... have a chilling effect on ... the candor of potential reviewers of government-submitted articles”). Absent a robust “exchange of scientific understanding” among government scientists and their colleagues, “the pace of scientific progress would slow.” Spinrad Decl. ¶ 21; *see also ATI*, 756 S.E.2d at 442 (“compelled disclosure of [scientists’] unpublished thoughts, data, and personal scholarly communications would mean a fundamental disruption of the norms and expectations which have enabled research to flourish”). Such a slowdown would deprive policymakers as well as the general public of important information that helps guide their own decisions. *See AAAS et al. Letter*, *supra* note 13.

For many of the same reasons, the contributions of outside scientists through both informal correspondence and formal peer review are also generally protected by the deliberative process privilege. *See, e.g., Wash. Research Project, Inc. v. Dep’t of Health, Educ. & Welfare*, 504 F.2d 238, 249-50 (D.C. Cir. 1974) (protecting reports prepared by outside consultant peer review panels); *Formaldehyde Inst.*, 889 F.2d at 1122-25 (external peer review comments); *Hooker*, 887 F. Supp. 2d at 54-55 (correspondence with external coauthor). Peer review comments from outside scientists can “play[] essentially the same part in an agency’s process of deliberation” as would comments from other government scientists. *Klamath Water Users*, 532 U.S. at 10; *see also Dow Jones & Co., Inc. v. Dep’t of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990) (“Exemption 5 permits an agency to protect the confidentiality of communications from outside the agency so long as those communications are part and parcel of the agency’s deliberative process.”) (emphasis omitted). Indeed, because experts specializing in a given area are spread out among various institutions, the exchange and debate necessary to the



scientific process may effectively require participation by scientists outside the federal government. *See* Spinrad Decl. ¶¶ 16-18; *see also Formaldehyde Inst.*, 889 F.2d at 1122 (when government scientists “encounter problems outside their ken” it is “preferable that they enlist the help of outside experts skilled at unraveling their knotty complexities”).

If correspondence with outside scientists were not protected by Exemption 5, those scientists might alter their comments or simply refuse to collaborate with their government counterparts. *See Formaldehyde Inst.*, 889 F.2d at 1125 (disclosure of reviewers’ comments “would very likely have a chilling effect on either the candor of potential reviewers of government-submitted articles or on the ability of the government to have its work considered for review at all”); Spinrad Decl. ¶ 24 (“If an outside scientist believed that their communications with federal scientists may become public, he or she may change the way they engage with federal colleagues in a way that slows the exchange of ideas, or they may choose not to engage in this type of valuable, informal peer review at all.”); Avery et al. Letter, *supra* note 16 (releasing correspondence will “mak[e] it more difficult for NOAA scientists to collaborate with peers in academia and the private sector”); *see also ATI*, 756 S.E.2d at 442 (similar).

Similarly, compelled disclosure would also make it more difficult for the government to recruit or retain top scientists, who would likely enjoy the benefits of confidentiality in private industry or academia and thus refuse to work where public records laws “render their communications involuntarily public.” *ATI*, 756 S.E.2d at 442; *see also AAAS et al. Letter*, *supra* note 13 (releasing NOAA scientists’ emails will inhibit agencies’ ability “to attract world-class scientific talent”). “Such a loss of technical expertise in federal agencies would then greatly harm the quality of agency decisions regarding scientific issues.” Dianna G. Goldenson, *FOIA Exemption Five: Will It Protect Government Scientists From Unfair Intrusion?*, 29 B.C.

Env'tl. Aff. L. Rev. 311, 314 (2002) (arguing that the deliberative process privilege should protect government scientists from unfair intrusion into scientific research).

As mentioned above (at 10), these concerns about a chilling effect are heightened in the particular context of climate science, where scientific developments “typically generate a high level of interest or controversy.” Spinrad Decl. ¶ 23; *see also Climate Science in the Political Arena: Hearing Before the H. Select Comm. on Energy Independence and Global Warming*, 111th Cong. 25-27 (2010) (testimony of Dr. Ben Santer, Department of Energy climate scientist: “I would now be leading a different life if my research suggested that there was no human effect on climate. I would not be the subject of congressional inquiries, Freedom of Information Act requests, or e-mail threats. I would not need to be concerned about the safety of my family.”).

Indeed, these concerns are front and center in this very case. The letters opposing Smith’s subpoena all warned of the chilling effects that would occur if the NOAA scientists’ deliberative materials were ordered disclosed. Requiring disclosure of scientists’ deliberative materials—whether via subpoena or FOIA—“could deter scientists from freely carrying out research on important national challenges” like climate change. AMS Letter, *supra* note 14.<sup>28</sup>

**B. Protecting Such Materials From Disclosure Also Helps Avoid Public Confusion.**

Protecting preliminary, deliberative scientific materials also avoids “premature disclosure of ongoing discussions that might confuse the public.” *Cleary, Gottlieb*, 844 F. Supp. at 782; *see*

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<sup>28</sup> *See also, e.g.,* AAAS et al. Letter, *supra* note 13 (compelled disclosure would “have a chilling effect on the willingness of government scientists to conduct research that intersects with policy-relevant scientific questions”); UCS Letter, *supra* note 14 (compelled disclosure creates a “chilling effect by deterring federal scientists from freely carrying out their research regardless of the political or policy implications”); Almes et al. Letter, *supra* note 15 (compelled disclosure “can create a chilling effect on both federal scientists and any other scientist with whom they collaborate or correspond”).

*also Russell*, 682 F.2d at 1048.

Scientists frequently pursue initial ideas and preliminary hypotheses in email exchanges and early drafts of a study only to abandon them later. Withholding of non-final drafts is thus appropriate because the public “could mistakenly interpret the views within a draft as the [final] views of the agency.” *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 161 F. Supp. 3d 120, 129 (D.D.C. 2016); *see also Hooker*, 887 F. Supp. 2d at 58-59 (affirming agency’s decision to withhold drafts of scientific manuscript). The same is true for the NOAA scientists’ confidential correspondence: Release of these internal deliberations could “confuse the public by disclosing tentative rationales not ultimately published” in the final Paper. *FPL Grp., Inc. v. IRS*, 698 F. Supp. 2d 66, 83 (D.D.C. 2010); *see also Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 306 F. Supp. 2d 58, 72 (D.D.C. 2004) (describing internal email as “exactly the kind of internal predecisional discussion that, if revealed, might confuse the public”). So too might the public latch onto early, candid critiques by reviewers, even if the authors subsequently bolstered their conclusions to address and assuage the reviewers’ concerns. “There is no real public interest in such documents save perhaps for satisfying public curiosity.” *Pies v. U.S. IRS*, 668 F.2d 1350, 1353 (D.C. Cir. 1981) (“Such documents, if released, may actually mislead the public.”).

The risk of public confusion is particularly acute when it comes to prepublication scientific correspondence. Scientists familiar with a particular subject matter will often communicate with each other using “shorthand and informal language in sharing ideas that are actually highly technical and complex.” Spinrad Decl. ¶ 25. “While use of informal or shorthand language is useful and appropriate to expedite discussions among peers, more formal explanations and, in many cases, caveats, would be necessary for products that are intended to be shared with a public audience.” *Id.* Moreover, “[s]cientists use many words that mean

something very different to much of the public.”<sup>29</sup> And their informal shorthand, in particular, is often “interpreted in a vastly different manner by the lay public.” Spinrad Decl. ¶ 25; *see also Humane Soc’y*, 155 Cal. Rptr. 3d at 113-14 (“researchers communicate informally, often in jargon or shorthand, ... [in] ways open to misinterpretation”). Beyond scientists’ use of jargon and shorthand, they also often use especially blunt or harsh language in critiquing each other’s work. *See, e.g., Halpern, Freedom to Bully, supra* note 22, at 4 (“candid discussion[] among researchers ... does not cast doubt on the strengths of [the ultimate] conclusions; rather, it constitutes the typically unvarnished, yet rigorous, deliberative process by which scientists test and refine their conclusions”). Releasing scientists’ peer review materials or email exchanges can thus easily confuse the public, especially if they are taken out of context.

Indeed, this is precisely what occurred in the so-called “Climategate” manufactured controversy of 2009, when a hacker stole thousands of emails from the University of East Anglia’s Climate Research Unit. The emails were used to confuse the public by generating “media coverage ... based on email statements quoted out of context.”<sup>30</sup> For example, opponents of greenhouse gas regulations highlighted an exchange where one scientist referred to using a “trick.” The “trick,” however, was actually just a scientific technique i.e., a “trick of the trade” which had been publicly disclosed in a published, peer-reviewed journal article.<sup>31</sup>

Numerous investigations found that nothing in the hacked emails actually called into question

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<sup>29</sup> Susan Joy Hassol, *Improving How Scientists Communicate About Climate Change*, 89 Eos 106, 106 (Mar. 2008), <http://tinyurl.com/hkjas9g> (collecting examples).

<sup>30</sup> *Myths vs. Facts: Denial of Petitions for Reconsideration of the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, U.S. Env’tl. Prot. Agency, <http://tinyurl.com/j3xgnrf> (last visited Jan. 27, 2017).

<sup>31</sup> *See, e.g., Debunking Misinformation About Stolen Climate Emails In The “Climategate” Manufactured Controversy*, Union of Concerned Scientists, <http://tinyurl.com/zto92to> (last visited Jan. 27, 2017).

the underlying climate data and research.<sup>32</sup> Public confusion from the incident, however, still persists today. Indeed, the emails are, apparently, a reason why the new President of the United States says he questions the science behind climate change.<sup>33</sup>

The deliberative process privilege protects government scientists' correspondence and non-final drafts from becoming part of a similar misinformation campaign in the future.

### **C. Protecting Such Materials Does Not Undermine Transparency.**

Notwithstanding the need to protect their deliberative preliminary materials from public disclosure, scientists do not seek to isolate their actual work from public vetting. Rather, consistent with standard scientific practice, they typically embrace transparency by publishing their research in peer-reviewed journals and making their data and methodologies available via public databases. *See* AMS Letter, *supra* note 14 (“reporting on research results fully and transparently through the peer-reviewed literature and providing the capability for other scientists to replicate that research ... is a fundamental foundation of the scientific process”). The proper way to test a scientific paper is not by sifting through email correspondence and non-final drafts. Instead, the public can test the accuracy of government science without threatening the deliberative process by independently evaluating and vetting the final results. *See, e.g.,* AAAS et al. Letter, *supra* note 13 (“part of the purpose of placing research into the

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<sup>32</sup> *See, e.g., id.* (collecting investigations); *Myths vs. Facts*, *supra* note 30; Jess Henig, *Some ‘Climategate’ Conclusions*, FactCheck.Org, Apr. 15, 2010, <http://tinyurl.com/28qfqwr>; Editorial, *Closing the Climategate*, 468 *Nature* 345 (Nov. 18, 2010), <http://tinyurl.com/gnl2l3y> (although some hacked emails exhibited “bravado” and “rudeness,” such “robust exchanges were typical in science” and reflective of the sometimes “bruising process” of peer review).

<sup>33</sup> *See, e.g., Donald Trump’s New York Times Interview: Full Transcript*, N.Y. Times (Nov. 23, 2016), <http://tinyurl.com/j3on4f3> (“[Climate change is] a very complex subject. I’m not sure anybody is ever going to really know. ... [T]hey say they have science on one side but then they also have those horrible emails that were sent between the scientists. Where was that, in Geneva or wherever five years ago? Terrible.”).

scholarly record is so other scientists can attempt to replicate, confirm, or refute it”).

Consistent with this practice, the deliberative process privilege does not prevent the disclosure of underlying data in the government’s control where that data would not expose the scientists’ deliberative process. *Compare, e.g., Sw. Ctr. for Biological Diversity v. USDA*, 170 F. Supp. 2d 931, 941 (D. Ariz. 2000) (ordering release of “raw research data,” which “itself does not expose the deliberative process”), *with Chem. Mfrs.*, 600 F. Supp. at 117-19 (exempting preliminary data from release where scientists have not yet completed a final report).<sup>34</sup>

Indeed, this distinction between underlying research data and other, more deliberative materials is reflected in the disclosure rules regarding federally funded research. *See* OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, 64 Fed. Reg. 54,926 (Oct. 8, 1999). Under those rules, federal grant recipients must turn over only “research data,” which is defined as “the recorded factual material commonly accepted in the scientific community as necessary to validate research findings.” *Id.* at 54,930. However, recognizing “the importance of ensuring that [those rules do] not interfere with the traditional scientific process” wherein “scientists need to deliberate over, develop, and pursue alternative approaches in their research,” *id.* at 54,926-54,927 this definition specifically *excludes* “preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues,” *id.* at 54930; *see also Am. Chem. Council, Inc. v. U.S. Dep’t of Health & Human Servs.*, 922 F. Supp. 2d 56, 62 (D.D.C. 2013) (same). In other words, it exempts from compelled disclosure exactly the types of deliberative, predecisional materials at

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<sup>34</sup> Of course, some data may still be exempt from disclosure for other reasons. *See, e.g.,* 5 U.S.C. § 552(b)(6) (exempting “medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”).

issue in this case.<sup>35</sup>

Moreover, as described above, NOAA here complied with all the scientific transparency norms by publicly posting on its website the datasets underlying the Hiatus Paper even before Representative Smith had requested them. *See* Moller Letter, *supra* note 3. And the agency went above and beyond by sending its scientists to explain their methodology and answer questions posed by the congressional committee in person. *See* Dolan Oct. 27 Letter, *supra* note 5. The scientific organizations highlighted NOAA's transparency in their opposition to Smith's subpoena, and "applaud[ed] the open access to data and methodologies that NOAA consistently achieves." AMS Letter, *supra* note 14; *see also* AAAS et al. Letter, *supra* note 13 ("The data and methodology of the paper in question have been publicly shared and discussed directly with committee staff."); UCS Letter, *supra* note 14 ("NOAA made all data and methodology publicly available. Not a shred of evidence of scientific misconduct has surfaced."). Thus, as NOAA noted, if anyone "doubts the integrity of the study," they have all the "tools [they] need[] to commission a competing scientific assessment." Sullivan Nov. 20 Letter, *supra* note 6.

Indeed, as the scientific organizations noted, since the Hiatus Paper's publication "there have been other peer-reviewed research papers published by university scientists and derived from other independent data sources that have also analyzed the climate hiatus." AAAS et al.

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<sup>35</sup> The deliberative process privilege also likely would not prevent disclosure of any outside funding sources for government scientists, or undue influence by other outside parties. *See, e.g.*, Justin Gillis & John Schwartz, *Deeper Ties to Corporate Cash for Doubtful Climate Researcher*, N.Y. Times, Feb. 21, 2015, <http://tinyurl.com/zm772tz> (describing FOIA request which revealed that a government astrophysicist had failed to disclose substantial outside funding). This is because in contrast to communications with non-governmental scientists who participate in formal or informal peer review, *see supra* at 16-17 communications with outside parties who act in their own self-interest are generally not considered privileged or exempt from disclosure under FOIA Exemption 5. *See, e.g.*, *Physicians Comm. for Responsible Med. v. Nat'l Insts. of Health*, 326 F. Supp. 2d 19, 29-30 (D.D.C. 2004).

Letter, *supra* note 13. Some of these papers including one published earlier this month have largely corroborated the Paper's findings that there has been no slowdown in the rate of global warming during the 21st century.<sup>36</sup> Others, meanwhile, have pushed back on some of its conclusions.<sup>37</sup>

"This is the way in which science advances," the scientific organizations explained. AAAS et al., Letter, *supra* note 13. Not through fishing expeditions into scientists' deliberative, confidential correspondence and preliminary drafts.

### **CONCLUSION**

The government's motion for summary judgment should be granted.

Respectfully submitted,

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January 27, 2017

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<sup>36</sup> See, e.g., Zeke Hausfather et al., *Assessing Recent Warming Using Instrumentally Homogenous Sea Surface Temperature Records*, 3 *Sci. Advances* (Jan. 2017), <http://tinyurl.com/hetylun>; Bala Rajaratnam et al., *Debunking the Climate Hiatus*, 133 *Climatic Change* 129 (Nov. 2015), <http://tinyurl.com/j9v228x>.

<sup>37</sup> See, e.g., John C. Fyfe et al., *Making Sense of the Early-2000s Warming Slowdown*, 6 *Nature Climate Change* 224 (Feb. 2016).



**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-2088 (CRC)
	)	
U.S. DEPARTMENT OF	)	
COMMERCE,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S RESPONSE TO MOTION OF CLIMATE SCIENCE LEGAL DEFENSE  
FUND, AMERICAN METEOROLOGICAL SOCIETY, AND  
UNION OF CONCERNED SCIENTISTS FOR  
LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT**

Plaintiff Judicial Watch, Inc. (“Plaintiff” or “Judicial Watch”) hereby responds to the Motion of Climate Science Legal Defense Fund, American Meteorological Society, and Union of Concerned Scientists (collectively “*Amici*”) for Leave to File Brief as *Amici Curiae* in Support of Defendant U.S. Department of Commerce (“Defendant” or “Commerce”) (“*Amici* Motion”). ECF Doc. No. 18.

MEMORANDUM OF LAW

*Amici*’s proposed brief improperly attacks Plaintiff’s motives for requesting records under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and merely restates legal arguments already asserted in Defendant’s summary judgment motion brief (“Defendant’s Motion”). *Amici*’s proposed brief offers no unique information or perspective that has not, or could not have been, raised by Defendant. See Brief of Climate Science Legal Defense Fund, American Meteorological Society, and Union of Concerned Scientists as *Amici Curiae* in Support of Defendant, ECF Doc. No. 18-1 (“*Amici* Brief”); Defendant’s Motion, ECF Doc. No. 16.

“An *amicus curiae*, defined as 'friend of the court,' . . . does not represent the parties but participates only for the benefit of the Court.” *United States v. Microsoft Corp.*, 2002 U.S. Dist. LEXIS 26549, 2002 WL 319366, at \*2 (D.D.C. 2002). While no rule requires that an *amicus* be impartial, the court does consider the presence of partiality with regard to an *amici*'s admittance. *Youming Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136-38 (D.D.C. 2008).

*Amici* asserts that it can “assist the Court in resolving this case by sharing their relevant expertise about the scientific endeavor, first-hand knowledge of how scientists approach their work, and familiarity with how other courts have recently handled similar issues regarding public records requests involving scientific research.” *See Amici Motion* at 1-2. However, *Amici* serve as no “friends of the court”. Rather, the majority of *Amici*'s brief talks about “groups across the political spectrum” using FOIA as a tactic to undermine scientific studies. *Amici Brief* at 2. The bulk of “ideas, arguments, and facts” provided by *Amici* are merely recitations of and speculation about why requests for scientific records from federal and state agencies and academic institutions are made. In fact, *Amici* specifically uses Plaintiff as an example in asserting their position that records requested under FOIA are nothing more than a bullying effort to harass scientists. *Amici Brief* at 8-9. *Amici*'s opinion is very clear from the beginning Plaintiff is allegedly using FOIA to discredit a scientific study, and Defendant should not be required to release the records it is withholding because of Plaintiff's purported motives.

In a December 28, 2015 blog posting, one of the requesting *Amici*, Climate Science Legal Defense Fund, made its opinion and feelings about Plaintiff, and similar public records requests, openly clear they are fighting back. See <https://climatesciencedefensefund.org/2015/12/28/new-lawsuit-over-climate-scientists-emails/> (“FOIA lawsuits for scientists' private communications are an increasingly popular method by groups who seek to intimidate, harass, and try to discredit publicly-funded scientists. Lawsuits across the country are attempting to use FOIA and state law

equivalents to access troves of researchers' private correspondence. But CSLDF has been busy fighting back.”)

The case before the court is a straightforward lawsuit about whether Defendant has satisfied its FOIA obligations. Defendant's motion turns on whether Defendant has properly searched for and produced all responsive, non-exempt records and the propriety of Defendant's deliberative process privilege withholdings pursuant to exemption 5 under FOIA. See 5 U.S.C. § 552. This litigation, and the motion before the court, is not the proper forum for *Amici* to “fight back” with its agenda.

*Amici* assert they have “familiarity with the underlying events that led to this litigation.” *Amici* Motion at 5. However, the underlying event that led to this litigation is Defendant failed to satisfy its FOIA obligation. Proposed *Amici* have no unique knowledge and insight about the purely procedural issues. The “perspective” *Amici* proposes to provide is nothing more than a veiled attack on Plaintiff and its motives for requesting records from a federal agency. Such an attack is not permitted under FOIA. See *Chiquita Brands, Intl, Inc. v. U.S. Sec. & Exch. Comm'n*, 805 F.3d 289, 294 (D.C. Cir. 2015) (“Government agencies must generally release requested records without regard to the identity or motive of the requestor.”)

The purpose of an *amicus* brief is to assist the court. *Amici's* brief adds nothing to the court's analysis and merely restates the same cases highlighted by Defendant or simply presents similar cases whose resulting argument is duplicative of those in Defendant's brief. As a result, *Amici's* brief is inappropriate and unnecessary in this litigation.

Dated: February 10, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

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## Fwd: Additional Information Needed to Adjudicate your Fee Waiver Request - 2017-000580

1 message

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**FOIA Office - NOAA Service Account** <foia@noaa.gov>  
To: Mark Graff - NOAA Federal <mark.graff@noaa.gov>

Tue, Feb 21, 2017 at 2:41 PM

Mark H. Graff  
FOIA Officer  
National Oceanic and Atmospheric Administration  
(301)-628-5658

——— Forwarded message ———

From: **Bill Marshall** <BMarshall@judicialwatch.org>  
Date: Tue, Feb 21, 2017 at 2:22 PM  
Subject: RE: Additional Information Needed to Adjudicate your Fee Waiver Request  
To: "foia@noaa.gov" <foia@noaa.gov>  
Cc: Lauren Burke <lburke@judicialwatch.org>, Paul Orfanedes <POrfanedes@judicialwatch.org>, Chris Farrell <CFarrell@judicialwatch.org>

Mr. Graff,

The basis for my request for records in the instant FOIA case was a media report that Dr. Thomas Karl had a "hotline to the White House" via a "longstanding relationship" between Dr. Karl and President Obama's "science czar" John Holdren. I would refer you to <http://www.dailymail.co.uk/sciencetech/article-4192182/World-leaders-duped-manipulated-global-warming-data.html>.

I believe that many Americans, most particularly Judicial Watch's audience, would find it interesting and newsworthy that a mid-level scientist within NOAA's science apparatus would have a "hotline" to the White House through his relationship to President Obama's chief scientist, Dr. Holdren. Moreover, based on the allegations of one of NOAA's former top scientists, Dr. John Bates, who alleged fraud at NOAA, and in particular, fraud used in the methodologies of a study whose lead author was Dr. Karl, which had a significant impact on US government climate policy, there is now keen public interest in the contents of any conversations between Drs. Karl and Holdren over the course of their relationship during the Obama administration.

As noted in the article, the timing of the Karl Study was highly suspect, with the newly inflated temperature data appearing shortly before US attendance at the 2015 Paris climate change conference, at which the Karl Study itself was reportedly a much-discussed topic. The Karl Study's timing suggests that the study was intended to influence policies decided at the conference, with the study's findings supporting the Obama administration's preferred position of US accession to the terms of the Paris climate accord.

If in fact the White House, through Dr. Holdren, was communicating with Dr. Karl about the findings of his seminal 2015 "pausebuster" study for the purpose of influencing the outcome of the study to favor President Obama's

climate change policy preferences, it begs the question of what other studies and research Dr. Holdren may have communicated to Dr. Karl about during the latter's tenure with the National Centers for Environmental Information; thus, my request for all of the pair's communications during the eight years of their mutual work in the Obama administration.

It is not unprecedented for government agencies to turn over lengthy time periods of communications, regardless of content and irrespective of subject matter. See for example *Judicial Watch, Inc. v. U.S. Department of State* (No. 1:15-cv-00684), in which four years' worth of emails – ALL emails – sent to or from former State Department deputy chief of staff, Huma Abedin, using a non-.gov email account, were ordered by the court to be released.

For the foregoing reasons, I believe that my request as written is both reasonable and in the public interest and, therefore, eligible for a waiver of duplication and processing fees.

Thank you for your continued assistance in this matter.

Respectfully,

William F. Marshall

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*"Those who expect to reap the blessings of freedom must, like men, undergo the fatigue of supporting it." - Thomas Paine*

*"If you get to thinking you're a person of some influence, try ordering somebody else's dog around." - Will Rogers*



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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Wednesday, February 22, 2017 8:58 AM  
**To:** Kimberly Katzenbarger - NOAA FEDERAL  
**Subject:** Amicus brief for Judicial Watch Climate Change litigation  
**Attachments:** Brief of Science Legal Defense Fund, American Meteorological Society, and UCS in support of Defendant.pdf

Hi Kim--I thought you might like to see this--really good read, and rare for NGO's to gather to come to the defense of the Government in a FOIA litigation.

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE

Defendant.

Case No. 1:15-cv-02088-CRC

**BRIEF OF CLIMATE SCIENCE LEGAL DEFENSE FUND, AMERICAN  
METEOROLOGICAL SOCIETY, AND UNION OF CONCERNED SCIENTISTS  
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT**

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**CORPORATE DISCLOSURE STATEMENT**

I, Kelsi Brown Corkran, counsel of record for *Amici Curiae* Climate Science Legal Defense Fund (CSLDF), American Meteorological Society (AMS), and Union of Concerned Scientists (UCS), certify that, to the best of my knowledge and belief, amici CSLDF, AMS, and UCS have no parent companies, subsidiaries, or affiliates with any outstanding securities in the hands of the public. Furthermore, CSLDF, AMS, and UCS are organized under Section 501(c)(3) of the Internal Revenue Code, and no publicly held company has a 10% or greater ownership interest in the organizations. These representations are made in order that judges of this Court may determine the need for recusal.

/s/ Kelsi Brown Corkran  
Kelsi Brown Corkran  
*Counsel of Record for Amici Curiae*

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### **INTEREST OF AMICI**<sup>1</sup>

Amici are nonprofit organizations committed to ensuring robust, independent scientific research into vitally important but politically charged subjects like climate change. Such research can occur only where scientists feel free to explore new ideas and provide candid feedback to each other without fear that their confidential exchanges or preliminary drafts will later be subject to indiscriminate public disclosure. Amici are thus deeply concerned about attempts, like those in this case, to obtain scientists' confidential correspondence and drafts. Amici have an interest in ensuring that public records laws are applied in a manner that appropriately protects the privileged, deliberative records of government scientists and the colleagues with whom they collaborate.

Climate Science Legal Defense Fund (CSLDF) was founded in 2011 in response to the increasing incidence of legal attacks against climate scientists. Its mission is to protect the scientific endeavor in general and climate science and climate scientists in particular from assaults being launched through the legal system, including intrusive public records requests.

American Meteorological Society (AMS) was founded in 1919 and is dedicated to advancing the atmospheric and related sciences for the benefit of society. It accomplishes this goal by, among other things, publishing several peer-reviewed scientific journals. AMS has more than 13,000 members, including scientists, researchers, and other climate professionals. It is committed to strengthening scientific work across the public, private, and academic sectors, and believes that collaboration and information sharing are critical to ensuring that society benefits from the best, most current scientific knowledge and understanding available.

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<sup>1</sup> Amici CSLDF, AMS, and UCS state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.



Union of Concerned Scientists (UCS) was founded in 1969 and is supported by an alliance of 500,000 citizens and scientists dedicated to using science to foster a healthy environment and safe world. UCS combines independent scientific research and citizen action to develop innovative and practical solutions to pressing environmental and security problems like climate change. UCS believes that a crucial ingredient in achieving these goals is maintaining research institutions within the federal government that foster an environment of independent and rigorous scientific inquiry free from political interference.

### **INTRODUCTION**

The efforts to obtain government scientists' privileged materials in this case are, unfortunately, all too familiar. Over the last decade, groups across the political spectrum have attempted to discredit scientific studies they dislike not by contesting the validity of the underlying data or methodology, or by showing that the studies' results cannot be reproduced (which is how the scientific process traditionally works), but rather by seeking to use the scientists' emails and preliminary drafts against them. This strategy has been a particularly common tactic of those who dispute the scientific consensus on climate change.

Whatever one's reasons for seeking such materials, however, these types of records are generally protected from disclosure by the deliberative process privilege as courts have repeatedly recognized in cases similar to this one. Government scientists' correspondence, preliminary drafts, and peer review materials are quintessential deliberative, pre-decisional records safeguarded by Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5). Maintaining the confidentiality of such records is necessary for the reasons that Congress codified the deliberative process privilege in that exemption: Quality government science (on which both policymakers and the general public rely) depends on an uninhibited exchange of ideas among scientists, and the unintended release of their correspondence and

preliminary drafts would likely result in public confusion.

Indeed, the policy concerns animating the deliberative process privilege are directly implicated in this very case. Numerous scientific organizations (including some of the present amici) specifically warned of the dangerous chilling effects that would result if the materials withheld by the National Oceanographic and Atmospheric Administration (NOAA) in this case were ordered released pursuant to an earlier congressional subpoena. These same effects would occur if the materials were released pursuant to FOIA instead. Ordering their release would harm (or halt altogether) government scientists' ability to collaborate with colleagues, damage the government's ability to recruit or retain top scientists, and deter critically important research into politically charged fields like climate change.

Moreover, releasing such materials is entirely unnecessary to ensure transparency in government science. The scientific method itself promotes transparency by, for example, requiring that research undergo rigorous peer review before publication and that its underlying data and methodology generally be made available to the public. NOAA scientists faithfully followed these practices here, and even took additional measures to ensure transparency by volunteering to answer questions directly from congressional critics. These steps allowed others to test the reliability of their research, and to disagree with their findings where testing suggested a different result. That is the way science works and how it has already worked in this case, without compelled disclosure of the scientists' deliberative records.

Accordingly, the Court should enter summary judgment for the government and reject Plaintiff's attempt to obtain these scientists' confidential correspondence and preliminary drafts.

**ARGUMENT**

**I. NOAA Has Withheld Only Privileged Correspondence And Preliminary Drafts Of Its Climate Science Paper.**

**A. NOAA Publicly Released The Data And Methodology Behind Its Paper.**

The FOIA request at issue in this case centers around a June 2015 paper that NOAA scientists published in the prominent, peer-reviewed journal *Science*. See Thomas Karl et al., *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus*, 348 *Sci.* 1469 (June 26, 2015) (“Hiatus Paper” or “Paper”). The Paper addressed (and refuted) earlier claims about a so-called “hiatus” in global warming i.e., the notion that the rate of global warming slowed in the 21st century as compared to the second half of the 20th century.

As explained in the government’s motion and accompanying declarations, NOAA scientists in 2014 developed an idea to reexamine the alleged “hiatus” in light of two recent developments: NOAA had made certain improvements to its dataset of sea surface temperatures, and 2013 and 2014 were two of the five warmest years on record. See Def.’s Mot. for Summ. J. (“MSJ”) at 1-3, ECF No. 16; Decl. of Mark Graff (“Graff Decl.”) ¶ 10, ECF No. 16-1. When researchers accounted for those developments, they found that global temperatures in the last 15 years rose as fast or faster than they did during the latter half of the 20th century. In other words, any slowdown in warming that could be described as a “hiatus” had largely disappeared.

The Hiatus Paper attracted significant attention in part because those who dispute the scientific consensus on climate change had previously seized upon the alleged “hiatus” as a reason to oppose restrictions on greenhouse gas emissions. One such contrarian was Representative Lamar Smith, a Republican from Texas who chairs the House Committee on Science, Space, and Technology. Over the course of several months, Smith sent increasingly invasive record requests to NOAA in an effort to undermine the Paper’s credibility.

At first, Smith's inquiry focused on obtaining the data and methodology underlying the Paper.<sup>2</sup> NOAA fully cooperated with these requests. The agency pointed Smith to the websites where consistent with standard scientific practice all of the underlying data and methodologies had already been made available to the public.<sup>3</sup> NOAA also directed Smith to other publicly available datasets and peer-reviewed papers relevant to the methods it had used.<sup>4</sup> And at NOAA's own suggestion, several authors of the Paper traveled to Washington D.C. on two separate occasions to answer, in person, any questions that Smith's committee had about the Paper.<sup>5</sup> NOAA also offered to make some of its top scientists available for additional transcribed interviews with committee staff.<sup>6</sup>

As NOAA explained, it had made its data and methodology "available to the Committee, the public, and the scientific community"; accordingly, if anyone "doubt[ed] the integrity of the study, [they] ha[d] the tools [they] need[ed] to commission a competing scientific assessment."<sup>7</sup>

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<sup>2</sup> See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (July 14, 2015), <http://tinyurl.com/gqotymh> (requesting "[a]ll data related to [the NOAA] study and the updated global datasets, including the methods of analysis used to adjust the data.").

<sup>3</sup> See Letter from Robert Moller, Acting Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Aug. 20, 2015), <http://tinyurl.com/j8hjjlx>.

<sup>4</sup> See, e.g., Letter from Coby Dolan, Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 2, 2015), <http://tinyurl.com/zc3w8eg>; Letter from Coby Dolan, Director of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Dec. 15, 2015), <http://tinyurl.com/h49e2wp>.

<sup>5</sup> See Letter from Coby Dolan, Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 27, 2015), <http://tinyurl.com/gumxt9t>.

<sup>6</sup> See Letter from Kathryn Sullivan, Adm'r, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 20, 2015), <http://tinyurl.com/h55yhqw>.

<sup>7</sup> *Id.*

**B. Representative Smith Sought Privileged Communications From NOAA.**

Representative Smith then shifted his focus to allegations that the Paper was politically motivated. He subpoenaed the NOAA scientists' internal, deliberative communications related to the Paper.<sup>8</sup> Smith acknowledged that "NOAA has provided in-person briefings, publicly available data related to the [Hiatus] study, and has agreed to make several witnesses available for voluntary interviews."<sup>9</sup> He further demanded, however, "the production of e-mails and other communications sent and received by NOAA officials."<sup>10</sup> Smith attempted to justify this extraordinary subpoena by alleging in public statements that NOAA "altered the data to get the results they needed to advance this administration's extreme climate change agenda."<sup>11</sup>

NOAA declined to provide the privileged correspondence. The agency explained that protecting "the confidentiality of these communications among scientists is essential to frank discourse" and consistent with "long-standing practice in the scientific community."<sup>12</sup>

Other scientists supported NOAA's decision, and criticized as dangerous and improper Smith's inquiry into their colleagues' confidential correspondence. Eight major professional

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<sup>8</sup> See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (Oct. 13, 2015), <http://tinyurl.com/h9g4rty>.

<sup>9</sup> See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Penny Pritzker, Sec'y, Dep't of Commerce (Dec. 1, 2015), <http://tinyurl.com/h8exxdj>.

<sup>10</sup> *Id.*; see also Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (Feb. 22, 2016), <http://tinyurl.com/z2ce6ul>.

<sup>11</sup> Jeff Tollefson, *US Science Agency Refuses Request for Climate Records*, *Nature*, Oct. 28, 2015, <http://tinyurl.com/hul3jzr>; see also Lamar Smith, *Letter to the Editor*, *N.Y. Times*, Dec. 9, 2015, <http://tinyurl.com/zm3nkmr> (characterizing the "motivations behind [the Hiatus] study" as "clearly suspect"); Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, and Tech., to Penny Pritzker, Sec'y, Dep't of Commerce (Nov. 18, 2015), <http://tinyurl.com/jrrbefm> (alleging the Paper was "prematurely rushed to publication ... to fit the Administration's aggressive climate agenda").

<sup>12</sup> Tollefson, *US Science Agency Refuses Request*, *supra* note 11.

scientific organizations (including amici AMS) wrote: “These broad inquiries threaten to inhibit the free exchange of ideas across scientific disciplines not only for NOAA, but for other government experts and the academic and industry scientists with whom they collaborate.”<sup>13</sup> They explained that breaking the confidentiality of such communications would cause a dangerous “chilling effect” on government scientists and, in particular, their willingness to conduct research on politically charged topics like climate change.<sup>14</sup> Nearly 600 scientists made a similar point in a letter praising NOAA for standing up to Smith’s “bullying tactics.”<sup>15</sup> And nearly two dozen former NOAA scientists also weighed in: “We know firsthand that scientists need intellectual space to debate new ideas and give each other confidential feedback without worrying that an individual comment will be subject to public scrutiny at a later date.”<sup>16</sup> They warned that releasing the scientists’ privileged emails would “significantly damage NOAA’s ability to conduct science.”<sup>17</sup>

Smith’s subpoena came under political fire as well. Representative Eddie Bernice

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<sup>13</sup> Letter from Am. Ass’n for the Advancement of Sci. (AAAS) et al., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 24, 2015), <http://tinyurl.com/zdpwrdrn>.

<sup>14</sup> *Id.*; accord Letter from Am. Meteorological Soc’y (AMS) to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 4, 2015), <http://tinyurl.com/h9fze9l> (“The demand for internal communications ... imposes a chilling effect on future communication among scientists” and “can be viewed as a form of intimidation that could deter scientists from freely carrying out research on important national challenges.”); Letter from Union of Concerned Scientists (UCS) to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Feb. 26, 2016), <http://tinyurl.com/jb7ucua> (the “demands have a chilling effect by deterring federal scientists from freely carrying out their research regardless of the political or policy implications”).

<sup>15</sup> Letter from Dr. Guy Almes, Dir., Acad. for Advanced Telecomm. & Learning Techs., et al., to Kathryn Sullivan, Adm’r, NOAA (Dec. 7, 2015), <http://tinyurl.com/zwoztdy> (explaining that releasing the NOAA scientists’ correspondence “can create a chilling effect on both federal scientists and any other scientist with whom they collaborate or correspond”).

<sup>16</sup> Letter from Dr. Susan Avery, President, Woods Hole Oceanographic Inst., et al., to Kathryn Sullivan, Adm’r, NOAA (Dec. 7, 2015), <http://tinyurl.com/gp5lorh>.

<sup>17</sup> *Id.*

Johnson, the ranking Democrat on the House Science Committee, criticized Smith's subpoena as a mere "fishing expedition." "[O]btaining all of the data and methods used in this study seemingly was not enough for the Majority. You also demanded internal communications by NOAA scientists regarding their scientific research," she wrote in a letter to Smith, adding that she "cannot help but note that your requests in this case echo the tactics" of other climate change contrarians "who frequently submit similar FOIA requests of climate scientists in both federal government and in state universities."<sup>18</sup> Johnson lamented that Smith's "entire effort smacks of the discredited tactics used by climate change denial groups (oftentimes funded by the fossil fuel industry) to sway public opinion based on misinformation, innuendo, and falsehoods."<sup>19</sup>

**C. Judicial Watch Requested The Same Privileged Materials Via FOIA.**

While NOAA was responding to Smith's inquiries, Judicial Watch submitted a FOIA request that expressly referenced Smith's subpoena and sought many of the same privileged materials. *See* Ex. A to Answer, ECF No. 8-1. Indeed, Judicial Watch asserted in a press release that this lawsuit seeks "the same documents unsuccessfully subpoenaed by [the] House committee."<sup>20</sup> The organization also announced its belief that the "Obama administration put politics before science to advance global warming alarmism," and trumpeted its previous attempts to use FOIA to pursue "alleged data manipulation by global warming advocates."<sup>21</sup>

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<sup>18</sup> Letter from Eddie Bernice Johnson, Ranking Member, H. Comm. on Sci., Space, & Tech., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 23, 2015), <http://tinyurl.com/qd5psrd>.

<sup>19</sup> Letter from Eddie Bernice Johnson, Ranking Member, H. Comm. on Sci., Space, & Tech., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 19, 2015), <http://tinyurl.com/z4dmwue>.

<sup>20</sup> Press Release, Judicial Watch, Judicial Watch Sues for Documents Withheld From Congress in New Climate Data Scandal (Dec. 22, 2015), <http://tinyurl.com/o9vk22d>.

<sup>21</sup> *Id.*

NOAA released hundreds of pages of documents in response to the FOIA request. *See* Graff Decl. ¶¶ 29-31. The agency properly withheld, however, three general categories of records—internal correspondence, unfinished drafts of the Hiatus Paper, and peer review materials—that, as explained below, are the types of deliberative, predecisional records appropriately protected from release under FOIA Exemption 5. *See also* Def.’s MSJ at 8-20.

## **II. Public Records Laws Are Increasingly Being Misused To Pursue Privileged Correspondence And Research Materials Like Those At Issue Here.**

As Representative Johnson observed (and Judicial Watch’s own press release reveals), the attempts to obtain the NOAA scientists’ privileged records in this case are unfortunately familiar. Over the past decade, organizations across the political spectrum have increasingly used public records laws to attack research findings (or even fields of study) that they dislike.<sup>22</sup> As in this case, the records requests typically do not seek the data, methodology, or funding sources of completed studies. Rather, the requests seek privileged prepublication materials such as preliminary drafts, private critiques from other scientists, and even researchers’ personal documents and correspondence.<sup>23</sup> These types of materials, however, are traditionally protected as confidential to ensure that scientists can raise new ideas and engage in robust debate without fear that their deliberations will later be publicized or taken out of context. *See* Decl. of Dr. Richard Spinrad ¶¶ 14-24, ECF No. 16-4 (hereinafter “Spinrad Decl.”).

The increasing frequency of these sorts of public records requests underscores the importance of protecting scientists’ deliberative materials from improper disclosure. As

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<sup>22</sup> *See, e.g.*, Michael Halpern, *Freedom to Bully: How Laws Intended to Free Information Are Used to Harass Researchers*, Ctr. for Sci. & Democracy, Union of Concerned Scientists (Feb. 2015), <http://tinyurl.com/hjzyq6g>; Rachel Levinson-Waldman, *Academic Freedom and the Public’s Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship at 1-5*, Am. Constitution Soc’y (Sept. 2011), <http://tinyurl.com/h87kevm>.

<sup>23</sup> *See* Halpern, *Freedom to Bully*, *supra* note 22, at 2.



explained in greater detail below (at 12-21), releasing such materials could stifle important research, confuse the public, and harm the government's ability to collaborate with outside scientists and recruit or retain top talent. *See* Spinrad Decl. ¶¶ 22-26. These potentially damaging effects are exacerbated in the field of climate science, which because of its political salience is particularly vulnerable to partisan attacks and concerted efforts to confuse the public. *See, e.g., id.* ¶¶ 23, 25 (noting that, in the climate science context, “the potential for a chilling effect is particularly high” and “the risks of misinterpretation or confusion” are “elevated”).

In fact, the attempts to obtain the NOAA scientists' privileged materials in this case are disturbingly similar to earlier efforts to obtain confidential records from climate scientist Dr. Michael Mann, who, by virtue of his position at a public university, was also the subject of intrusive public records requests.<sup>24</sup> Dr. Mann became a chief target of climate change contrarians because he was one of the authors of a seminal paper depicting the so-called “hockey stick” curve, which showed a spike in global temperature over the past century and a half.<sup>25</sup>

As in this case, Dr. Mann's emails were initially the subject of a failed civil subpoena by a political figure. Virginia Attorney General Ken Cuccinelli tried, unsuccessfully, to subpoena all of Dr. Mann's personal emails with more than thirty other scientists during his tenure at the University of Virginia. *See Cuccinelli v. Rector & Visitors of Univ. of Va.*, 722 S.E.2d 626 (Va. 2012) (holding that the Attorney General lacked authority to make the demands). But also like

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<sup>24</sup> Representative Johnson made this same connection between the present case and the Dr. Mann dispute, describing both as “invasive fishing expeditions in search of a pretext to discredit” climate scientists. Johnson Oct. 23 Letter, *supra* note 18 (quoting Editorial, *Harassing Climate-Change Researchers*, Wash. Post, May 29, 2011, <http://tinyurl.com/zg8p75o>).

<sup>25</sup> *See* Michael E. Mann et al., *Northern Hemisphere Temperatures During the Past Millennium: Inferences, Uncertainties, and Limitations*, 26 *Geophysical Res. Letters* 759 (1999).

here, another organization that frequently files public records requests, the American Tradition Institute<sup>26</sup>, then stepped in and tried to obtain the privileged records via that method instead.

The Virginia Supreme Court unanimously rejected the attempt to obtain Dr. Mann's emails in an opinion that strongly affirmed the importance of protecting the confidentiality of scientists' correspondence. *See Am Tradition Inst. ("ATI") v. Rector & Visitors of Univ. of Va.*, 756 S.E.2d 435, 442 (Va. 2014). The state high court quoted at length an affidavit from the University Provost explaining that "compelled disclosure of [scientists'] unpublished thoughts ... and personal scholarly communications would mean a fundamental disruption of the norms and expectations which have enabled research to flourish." *Id.*

Although the *ATI* case involved a state-law exemption for public records at institutions of higher education, the same rationales extend to protecting such records under the deliberative process privilege of FOIA Exemption 5. Indeed, the West Virginia Supreme Court later relied on the *ATI* opinion (and the declaration quoted above) in applying this Court's federal deliberative process precedent to its own state analogue. *See Highland Mining Co. v. W. Va. Univ. Sch. of Med.*, 774 S.E.2d 36, 53-54 (W. Va. 2015) ("The same reasoning applies with equal force here."). The court in *Highland Mining* rejected a coal company's attempt to use a public records statute to discredit a public university scientist who had published articles linking the environmental impacts of surface coal mining with health problems of local residents. *See id.* at 43. The court upheld the university's decision to withhold the same kinds of materials at issue in this case i.e., "drafts, data compilations and analyses, proposed edits, e-mails and other communications, and peer review comments and responses relate[d] to the planning, preparation

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<sup>26</sup> The American Tradition Institute, now known as the Energy and Environmental Legal Institute, has filed similar public records requests regarding the work of scientists in many other states as well. *See Halpern, Freedom to Bully, supra* note 22, at 6.

and editing necessary to produce a final published article” on the ground that they would improperly reveal the scientist’s deliberative process. *See id.* at 52-53.

Dr. Mann referenced the *Highland Mining* case and his own experience in *ATI* in an editorial that he co-authored warning about the potential abuse of public records laws in cases like this. Groups “across the political spectrum” are increasingly requesting “not only records of discussions about the strengths and weaknesses of work, but also preliminary paper drafts and private constructive criticisms from colleagues,” Dr. Mann warned, noting that “[t]hese requests can attack and intimidate [scientists], threatening their reputations, chilling their speech, disrupting their research, discouraging them from tackling contentious topics, and ultimately confusing the public.”<sup>27</sup> Presciently, Dr. Mann’s editorial appeared in the journal *Science* just weeks before the NOAA scientists’ Hiatus Paper.

### **III. The Deliberative Process Privilege Appropriately Protects The Confidentiality Of Government Scientists’ Correspondence And Drafts.**

In enacting FOIA, Congress recognized that certain government records should appropriately be withheld from public disclosure. *See EPA v. Mink*, 410 U.S. 73, 80 (1973). Exemption 5 of FOIA codified, among other things, the common law “deliberative process privilege,” which safeguards from disclosure materials that reveal “the decisionmaking processes of government agencies.” *Wolfe v. Dep’t of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc). The privilege is designed to improve the quality of agency decisions by promoting the uninhibited exchange of ideas, and also to prevent the public confusion that could result from releasing documents that do not represent the government’s final word on a given matter. *See Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

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<sup>27</sup> Michael Halpern & Michael Mann, Editorial, *Transparency Versus Harassment*, 348 *Sci.* 479 (May 1, 2015), <http://tinyurl.com/jumo5nc>.

Consistent with these policies, courts have regularly protected deliberative, predecisional scientific materials like those at issue in this case. *See, e.g., Formaldehyde Inst. v. Dep't of Health and Human Servs.*, 889 F.2d 1118, 1124-25 (D.C. Cir. 1989) (peer review comments); *Hooker v. U.S. Dep't of Health & Human Servs.*, 887 F. Supp. 2d 40, 57-59 (D.D.C. 2012) (internal email communications, edits to draft manuscript, and peer review comments); *ViroPharma Inc. v. Dep't of Health & Human Servs.*, 839 F. Supp. 2d 184, 192-94 (D.D.C. 2012) (draft scientific documents and internal review documents); *Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184, 189 (D.D.C. 2009) (draft scientific model that calibrated raw data); *Weinstein v. U.S. Dep't of Health & Human Servs.*, 977 F. Supp. 41 (D.D.C. 1997) (peer review materials); *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health & Human Servs.*, 844 F. Supp. 770, 782-83 (D.D.C. 1993) (draft manuscript and software program designed to manipulate raw data); *Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 115 (D.D.C. 1984) (draft reports); *Highland Mining*, 774 S.E.2d at 48-54 (drafts, data compilations and analyses, proposed edits, emails, and other communications related to research articles). The same policy concerns and reasoning discussed in these cases support the government's position here.

**A. Protecting Drafts, Correspondence, And Peer Review Materials Allows An Uninhibited Exchange Of Ideas That Is Critical To The Scientific Process.**

The deliberative process privilege recognizes that “free and uninhibited exchange and communication of opinions, ideas, and points of view” is necessary to the “wise functioning” of government. *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 n.31 (D.C. Cir. 1974). Such uninhibited communication is impossible, however, if government employees fear public disclosure of their preliminary thoughts and ideas. “[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances ... to the detriment of the decisionmaking process.” *NLRB v. Sears, Roebuck &*

*Co.*, 421 U.S. 132, 150-51 (1975). Government employees “will not communicate candidly ... if each remark is a potential item of discovery and front page news.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001). In other words, “the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.” *Wolfe*, 839 F.2d at 773.

Accordingly, the deliberative process privilege “prevent[s] injury to the quality of agency decisions,” *Sears*, 421 U.S. at 151, by removing the “threat of cross-examination in a public tribunal,” *Montrose*, 491 F.2d at 68 n.31. The privilege ensures that government employees “feel free to provide ... their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

The work of government scientists is particularly dependent on uninhibited exchanges, and no less susceptible to the chilling effect of threatened public disclosure. This court has thus long recognized that the deliberative process privilege protects preliminary scientific drafts and correspondence because disclosure would “discourage the intellectual risk-taking so essential to technical progress.” *Chem. Mfrs*, 600 F. Supp. at 118. The “give and take of science,” UCS Letter, *supra* note 14, is the same “give-and-take of the consultative process” that Congress sought to safeguard in Exemption 5, *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Homeland Sec.*, 648 F. Supp. 2d 152, 163 (D.D.C. 2009); *see also Horsehead Indus. v. EPA*, No. 94-1299, slip op. at 15-20 (D.D.C. Oct. 1, 1996) (government scientists’ “frank exchanges of view regarding [their research] reside near the core of an agency’s deliberative process”).

Uninhibited exploration and discussion is fundamental to the scientific process. Research projects typically begin with “only rough ideas ... that are not yet fully formed.” Spinrad Decl.

¶ 14; *see also Humane Soc’y v. Super. Ct. of Yolo Cnty.*, 155 Cal. Rptr. 3d 93, 113 (Cal. Ct. App. 2013) (scientific research involves “trying new ideas, investigating lines of thinking that do not work out, suggesting ideas that turn out to be wrong”). Further, scientists do not pursue their research in isolation; they develop and refine hypotheses “through exchanges and candid debates with peers inside and outside the federal government.” Spinrad Decl. ¶ 14; *see also Chem. Mfrs.*, 600 F. Supp. at 118 (scientists “discuss hypotheses which have not matured” and “can be effectively shared only with peers in regular and confidential communication”). These exchanges take the form of informal email correspondence and formal peer review both of which are “critical to developing and releasing scientific information of the highest possible quality.” Spinrad Decl. ¶ 15.

These important exchanges can only take place, however, if scientists are given the “intellectual space to debate new ideas and give each other confidential feedback without worrying that an individual comment will be subject to public scrutiny at a later date.” Avery et al. Letter, *supra* note 16. Accordingly, there is a “well-established presumption” within the scientific community that such exchanges “are not intended to be, and will not be, shared with a wider audience.” Spinrad Decl. ¶ 20. Indeed, peer reviewers are often expressly instructed to treat the draft as privileged and confidential, as they were in this case. *See* Graff Decl. ¶¶ 17-20. “Confidentiality is essential to ensuring the participants are free to propose new ideas or explanations without fear of misinterpretation or being taken out of context.” Spinrad Decl. ¶ 20.

The preliminary work of the NOAA scientists at issue in this case thus fall comfortably within the class of materials protected by the deliberative process privilege. Requiring the disclosure of scientists’ communications, drafts, and peer review materials would have an “obvious chilling effect” on the candid, informal exchanges and debates that are crucial to the

scientific method. *Chem. Mfrs*, 600 F. Supp. at 118; *see also Formaldehyde Inst.*, 889 F.2d at 1124-25 (deeming it “indisputable,” based on scientists’ affidavits, that “release of reviewers’ editorial comments would ... have a chilling effect on ... the candor of potential reviewers of government-submitted articles”). Absent a robust “exchange of scientific understanding” among government scientists and their colleagues, “the pace of scientific progress would slow.” Spinrad Decl. ¶ 21; *see also ATI*, 756 S.E.2d at 442 (“compelled disclosure of [scientists’] unpublished thoughts, data, and personal scholarly communications would mean a fundamental disruption of the norms and expectations which have enabled research to flourish”). Such a slowdown would deprive policymakers as well as the general public of important information that helps guide their own decisions. *See AAAS et al. Letter*, *supra* note 13.

For many of the same reasons, the contributions of outside scientists through both informal correspondence and formal peer review are also generally protected by the deliberative process privilege. *See, e.g., Wash. Research Project, Inc. v. Dep’t of Health, Educ. & Welfare*, 504 F.2d 238, 249-50 (D.C. Cir. 1974) (protecting reports prepared by outside consultant peer review panels); *Formaldehyde Inst.*, 889 F.2d at 1122-25 (external peer review comments); *Hooker*, 887 F. Supp. 2d at 54-55 (correspondence with external coauthor). Peer review comments from outside scientists can “play[] essentially the same part in an agency’s process of deliberation” as would comments from other government scientists. *Klamath Water Users*, 532 U.S. at 10; *see also Dow Jones & Co., Inc. v. Dep’t of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990) (“Exemption 5 permits an agency to protect the confidentiality of communications from outside the agency so long as those communications are part and parcel of the agency’s deliberative process.”) (emphasis omitted). Indeed, because experts specializing in a given area are spread out among various institutions, the exchange and debate necessary to the

scientific process may effectively require participation by scientists outside the federal government. *See* Spinrad Decl. ¶¶ 16-18; *see also Formaldehyde Inst.*, 889 F.2d at 1122 (when government scientists “encounter problems outside their ken” it is “preferable that they enlist the help of outside experts skilled at unraveling their knotty complexities”).

If correspondence with outside scientists were not protected by Exemption 5, those scientists might alter their comments or simply refuse to collaborate with their government counterparts. *See Formaldehyde Inst.*, 889 F.2d at 1125 (disclosure of reviewers’ comments “would very likely have a chilling effect on either the candor of potential reviewers of government-submitted articles or on the ability of the government to have its work considered for review at all”); Spinrad Decl. ¶ 24 (“If an outside scientist believed that their communications with federal scientists may become public, he or she may change the way they engage with federal colleagues in a way that slows the exchange of ideas, or they may choose not to engage in this type of valuable, informal peer review at all.”); Avery et al. Letter, *supra* note 16 (releasing correspondence will “mak[e] it more difficult for NOAA scientists to collaborate with peers in academia and the private sector”); *see also ATI*, 756 S.E.2d at 442 (similar).

Similarly, compelled disclosure would also make it more difficult for the government to recruit or retain top scientists, who would likely enjoy the benefits of confidentiality in private industry or academia and thus refuse to work where public records laws “render their communications involuntarily public.” *ATI*, 756 S.E.2d at 442; *see also AAAS et al. Letter*, *supra* note 13 (releasing NOAA scientists’ emails will inhibit agencies’ ability “to attract world-class scientific talent”). “Such a loss of technical expertise in federal agencies would then greatly harm the quality of agency decisions regarding scientific issues.” Dianna G. Goldenson, *FOIA Exemption Five: Will It Protect Government Scientists From Unfair Intrusion?*, 29 B.C.



Envtl. Aff. L. Rev. 311, 314 (2002) (arguing that the deliberative process privilege should protect government scientists from unfair intrusion into scientific research).

As mentioned above (at 10), these concerns about a chilling effect are heightened in the particular context of climate science, where scientific developments “typically generate a high level of interest or controversy.” Spinrad Decl. ¶ 23; *see also Climate Science in the Political Arena: Hearing Before the H. Select Comm. on Energy Independence and Global Warming*, 111th Cong. 25-27 (2010) (testimony of Dr. Ben Santer, Department of Energy climate scientist: “I would now be leading a different life if my research suggested that there was no human effect on climate. I would not be the subject of congressional inquiries, Freedom of Information Act requests, or e-mail threats. I would not need to be concerned about the safety of my family.”).

Indeed, these concerns are front and center in this very case. The letters opposing Smith’s subpoena all warned of the chilling effects that would occur if the NOAA scientists’ deliberative materials were ordered disclosed. Requiring disclosure of scientists’ deliberative materials—whether via subpoena or FOIA—“could deter scientists from freely carrying out research on important national challenges” like climate change. AMS Letter, *supra* note 14.<sup>28</sup>

**B. Protecting Such Materials From Disclosure Also Helps Avoid Public Confusion.**

Protecting preliminary, deliberative scientific materials also avoids “premature disclosure of ongoing discussions that might confuse the public.” *Cleary, Gottlieb*, 844 F. Supp. at 782; *see*

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<sup>28</sup> *See also, e.g.*, AAAS et al. Letter, *supra* note 13 (compelled disclosure would “have a chilling effect on the willingness of government scientists to conduct research that intersects with policy-relevant scientific questions”); UCS Letter, *supra* note 14 (compelled disclosure creates a “chilling effect by deterring federal scientists from freely carrying out their research regardless of the political or policy implications”); Almes et al. Letter, *supra* note 15 (compelled disclosure “can create a chilling effect on both federal scientists and any other scientist with whom they collaborate or correspond”).

*also Russell*, 682 F.2d at 1048.

Scientists frequently pursue initial ideas and preliminary hypotheses in email exchanges and early drafts of a study only to abandon them later. Withholding of non-final drafts is thus appropriate because the public “could mistakenly interpret the views within a draft as the [final] views of the agency.” *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 161 F. Supp. 3d 120, 129 (D.D.C. 2016); *see also Hooker*, 887 F. Supp. 2d at 58-59 (affirming agency’s decision to withhold drafts of scientific manuscript). The same is true for the NOAA scientists’ confidential correspondence: Release of these internal deliberations could “confuse the public by disclosing tentative rationales not ultimately published” in the final Paper. *FPL Grp., Inc. v. IRS*, 698 F. Supp. 2d 66, 83 (D.D.C. 2010); *see also Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 306 F. Supp. 2d 58, 72 (D.D.C. 2004) (describing internal email as “exactly the kind of internal predecisional discussion that, if revealed, might confuse the public”). So too might the public latch onto early, candid critiques by reviewers, even if the authors subsequently bolstered their conclusions to address and assuage the reviewers’ concerns. “There is no real public interest in such documents save perhaps for satisfying public curiosity.” *Pies v. U.S. IRS*, 668 F.2d 1350, 1353 (D.C. Cir. 1981) (“Such documents, if released, may actually mislead the public.”).

The risk of public confusion is particularly acute when it comes to prepublication scientific correspondence. Scientists familiar with a particular subject matter will often communicate with each other using “shorthand and informal language in sharing ideas that are actually highly technical and complex.” Spinrad Decl. ¶ 25. “While use of informal or shorthand language is useful and appropriate to expedite discussions among peers, more formal explanations and, in many cases, caveats, would be necessary for products that are intended to be shared with a public audience.” *Id.* Moreover, “[s]cientists use many words that mean

something very different to much of the public.”<sup>29</sup> And their informal shorthand, in particular, is often “interpreted in a vastly different manner by the lay public.” Spinrad Decl. ¶ 25; *see also Humane Soc’y*, 155 Cal. Rptr. 3d at 113-14 (“researchers communicate informally, often in jargon or shorthand, ... [in] ways open to misinterpretation”). Beyond scientists’ use of jargon and shorthand, they also often use especially blunt or harsh language in critiquing each other’s work. *See, e.g.*, Halpern, *Freedom to Bully*, *supra* note 22, at 4 (“candid discussion[] among researchers ... does not cast doubt on the strengths of [the ultimate] conclusions; rather, it constitutes the typically unvarnished, yet rigorous, deliberative process by which scientists test and refine their conclusions”). Releasing scientists’ peer review materials or email exchanges can thus easily confuse the public, especially if they are taken out of context.

Indeed, this is precisely what occurred in the so-called “Climategate” manufactured controversy of 2009, when a hacker stole thousands of emails from the University of East Anglia’s Climate Research Unit. The emails were used to confuse the public by generating “media coverage ... based on email statements quoted out of context.”<sup>30</sup> For example, opponents of greenhouse gas regulations highlighted an exchange where one scientist referred to using a “trick.” The “trick,” however, was actually just a scientific technique i.e., a “trick of the trade” which had been publicly disclosed in a published, peer-reviewed journal article.<sup>31</sup>

Numerous investigations found that nothing in the hacked emails actually called into question

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<sup>29</sup> Susan Joy Hassol, *Improving How Scientists Communicate About Climate Change*, 89 *Eos* 106, 106 (Mar. 2008), <http://tinyurl.com/hkjas9g> (collecting examples).

<sup>30</sup> *Myths vs. Facts: Denial of Petitions for Reconsideration of the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, U.S. Env’tl. Prot. Agency, <http://tinyurl.com/j3xgnrf> (last visited Jan. 27, 2017).

<sup>31</sup> *See, e.g., Debunking Misinformation About Stolen Climate Emails In The “Climategate” Manufactured Controversy*, Union of Concerned Scientists, <http://tinyurl.com/zto92to> (last visited Jan. 27, 2017).

the underlying climate data and research.<sup>32</sup> Public confusion from the incident, however, still persists today. Indeed, the emails are, apparently, a reason why the new President of the United States says he questions the science behind climate change.<sup>33</sup>

The deliberative process privilege protects government scientists' correspondence and non-final drafts from becoming part of a similar misinformation campaign in the future.

### **C. Protecting Such Materials Does Not Undermine Transparency.**

Notwithstanding the need to protect their deliberative preliminary materials from public disclosure, scientists do not seek to isolate their actual work from public vetting. Rather, consistent with standard scientific practice, they typically embrace transparency by publishing their research in peer-reviewed journals and making their data and methodologies available via public databases. *See* AMS Letter, *supra* note 14 (“reporting on research results fully and transparently through the peer-reviewed literature and providing the capability for other scientists to replicate that research ... is a fundamental foundation of the scientific process”). The proper way to test a scientific paper is not by sifting through email correspondence and non-final drafts. Instead, the public can test the accuracy of government science without threatening the deliberative process by independently evaluating and vetting the final results. *See, e.g.,* AAAS et al. Letter, *supra* note 13 (“part of the purpose of placing research into the

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<sup>32</sup> *See, e.g., id.* (collecting investigations); *Myths vs. Facts*, *supra* note 30; Jess Henig, *Some ‘Climategate’ Conclusions*, FactCheck.Org, Apr. 15, 2010, <http://tinyurl.com/28qfqwr>; Editorial, *Closing the Climategate*, 468 *Nature* 345 (Nov. 18, 2010), <http://tinyurl.com/gnl2l3y> (although some hacked emails exhibited “bravado” and “rudeness,” such “robust exchanges were typical in science” and reflective of the sometimes “bruising process” of peer review).

<sup>33</sup> *See, e.g., Donald Trump’s New York Times Interview: Full Transcript*, N.Y. Times (Nov. 23, 2016), <http://tinyurl.com/j3on4f3> (“[Climate change is] a very complex subject. I’m not sure anybody is ever going to really know. ... [T]hey say they have science on one side but then they also have those horrible emails that were sent between the scientists. Where was that, in Geneva or wherever five years ago? Terrible.”).

scholarly record is so other scientists can attempt to replicate, confirm, or refute it”).

Consistent with this practice, the deliberative process privilege does not prevent the disclosure of underlying data in the government’s control where that data would not expose the scientists’ deliberative process. *Compare, e.g., Sw. Ctr. for Biological Diversity v. USDA*, 170 F. Supp. 2d 931, 941 (D. Ariz. 2000) (ordering release of “raw research data,” which “itself does not expose the deliberative process”), *with Chem. Mfrs.*, 600 F. Supp. at 117-19 (exempting preliminary data from release where scientists have not yet completed a final report).<sup>34</sup>

Indeed, this distinction between underlying research data and other, more deliberative materials is reflected in the disclosure rules regarding federally funded research. *See* OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, 64 Fed. Reg. 54,926 (Oct. 8, 1999). Under those rules, federal grant recipients must turn over only “research data,” which is defined as “the recorded factual material commonly accepted in the scientific community as necessary to validate research findings.” *Id.* at 54,930. However, recognizing “the importance of ensuring that [those rules do] not interfere with the traditional scientific process” wherein “scientists need to deliberate over, develop, and pursue alternative approaches in their research,” *id.* at 54,926-54,927 this definition specifically *excludes* “preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues,” *id.* at 54930; *see also Am. Chem. Council, Inc. v. U.S. Dep’t of Health & Human Servs.*, 922 F. Supp. 2d 56, 62 (D.D.C. 2013) (same). In other words, it exempts from compelled disclosure exactly the types of deliberative, predecisional materials at

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<sup>34</sup> Of course, some data may still be exempt from disclosure for other reasons. *See, e.g.,* 5 U.S.C. § 552(b)(6) (exempting “medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”).

issue in this case.<sup>35</sup>

Moreover, as described above, NOAA here complied with all the scientific transparency norms by publicly posting on its website the datasets underlying the Hiatus Paper even before Representative Smith had requested them. *See* Moller Letter, *supra* note 3. And the agency went above and beyond by sending its scientists to explain their methodology and answer questions posed by the congressional committee in person. *See* Dolan Oct. 27 Letter, *supra* note 5. The scientific organizations highlighted NOAA's transparency in their opposition to Smith's subpoena, and "applaud[ed] the open access to data and methodologies that NOAA consistently achieves." AMS Letter, *supra* note 14; *see also* AAAS et al. Letter, *supra* note 13 ("The data and methodology of the paper in question have been publicly shared and discussed directly with committee staff."); UCS Letter, *supra* note 14 ("NOAA made all data and methodology publicly available. Not a shred of evidence of scientific misconduct has surfaced."). Thus, as NOAA noted, if anyone "doubts the integrity of the study," they have all the "tools [they] need[] to commission a competing scientific assessment." Sullivan Nov. 20 Letter, *supra* note 6.

Indeed, as the scientific organizations noted, since the Hiatus Paper's publication "there have been other peer-reviewed research papers published by university scientists and derived from other independent data sources that have also analyzed the climate hiatus." AAAS et al.

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<sup>35</sup> The deliberative process privilege also likely would not prevent disclosure of any outside funding sources for government scientists, or undue influence by other outside parties. *See, e.g.,* Justin Gillis & John Schwartz, *Deeper Ties to Corporate Cash for Doubtful Climate Researcher*, N.Y. Times, Feb. 21, 2015, <http://tinyurl.com/zm772tz> (describing FOIA request which revealed that a government astrophysicist had failed to disclose substantial outside funding). This is because in contrast to communications with non-governmental scientists who participate in formal or informal peer review, *see supra* at 16-17 communications with outside parties who act in their own self-interest are generally not considered privileged or exempt from disclosure under FOIA Exemption 5. *See, e.g., Physicians Comm. for Responsible Med. v. Nat'l Insts. of Health*, 326 F. Supp. 2d 19, 29-30 (D.D.C. 2004).

Letter, *supra* note 13. Some of these papers including one published earlier this month have largely corroborated the Paper's findings that there has been no slowdown in the rate of global warming during the 21st century.<sup>36</sup> Others, meanwhile, have pushed back on some of its conclusions.<sup>37</sup>

"This is the way in which science advances," the scientific organizations explained. AAAS et al., Letter, *supra* note 13. Not through fishing expeditions into scientists' deliberative, confidential correspondence and preliminary drafts.

### **CONCLUSION**

The government's motion for summary judgment should be granted.

Respectfully submitted,

/s/ Kelsi Brown Corkran

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*Counsel for Amici Curiae*

January 27, 2017

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<sup>36</sup> See, e.g., Zeke Hausfather et al., *Assessing Recent Warming Using Instrumentally Homogenous Sea Surface Temperature Records*, 3 *Sci. Advances* (Jan. 2017), <http://tinyurl.com/hetylun>; Bala Rajaratnam et al., *Debunking the Climate Hiatus*, 133 *Climatic Change* 129 (Nov. 2015), <http://tinyurl.com/j9v228x>.

<sup>37</sup> See, e.g., John C. Fyfe et al., *Making Sense of the Early-2000s Warming Slowdown*, 6 *Nature Climate Change* 224 (Feb. 2016).

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**From:** Kevin Mitchell - NOAA Affiliate <kevin.mitchell@noaa.gov>  
**Sent:** Wednesday, February 22, 2017 11:50 AM  
**To:** Mark Graff - NOAA Federal  
**Subject:** FW: NOAA0200 PTA  
**Attachments:** NOAA0200 Privacy Threshold Analysis 08082016-DAP.pdf

Good morning Mark,

Please see the attached NOAA0200 PTA for you review and signature.

If approved, please return to me so that I can upload to CSAM. Thank you.

Regards.

---

**Kevin Mitchell**

Information System Security Officer  
NOAA Network Operations Center (NOC) NOAA0200  
Cell: 240.338.0944  
Office: 301.628.5683  
[kevin.mitchell@noaa.gov](mailto:kevin.mitchell@noaa.gov)

**From:** Douglas Perry - NOAA Federal [mailto:[douglas.a.perry@noaa.gov](mailto:douglas.a.perry@noaa.gov)]  
**Sent:** Wednesday, February 22, 2017 11:39 AM  
**To:** Ann Madden  
**Cc:** Kevin Mitchell - NOAA Affiliate  
**Subject:** Fwd: NOAA0200 PTA

Ann,

I forwarded a signed copy on Feb 8th. Unless something changed, you should be able to use this copy.

----- Forwarded message -----

**From:** Douglas Perry - NOAA Federal <[douglas.a.perry@noaa.gov](mailto:douglas.a.perry@noaa.gov)>  
**Date:** Wed, Feb 8, 2017 at 11:06 AM  
**Subject:** NOAA0200 PTA  
**To:** Ann Madden <[Ann.Madden@noaa.gov](mailto:Ann.Madden@noaa.gov)>

--

**Doug**



---

Douglas A. Perry

Deputy Chief Information Officer  
National Oceanic and Atmospheric Administration

Office: [\(301\) 713-9600](tel:3017139600)

[www.noaa.gov](http://www.noaa.gov)

The contents of this message are mine personally and do not necessarily reflect any position of NOAA.

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**Doug**

---

Douglas A. Perry

Deputy Chief Information Officer  
National Oceanic and Atmospheric Administration

Office: (301) 713-9600

[www.noaa.gov](http://www.noaa.gov)

The contents of this message are mine personally and do not necessarily reflect any position of NOAA.

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Wednesday, February 22, 2017 11:56 AM  
**To:** Sarah Brabson - NOAA Federal  
**Subject:** Fwd: FW: NOAA0200 PTA  
**Attachments:** NOAA0200 Privacy Threshold Analysis 08082016-DAP.pdf

From Kevin, the ISSO for NOAA0200

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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**From:** Kevin Mitchell - NOAA Affiliate <[kevin.mitchell@noaa.gov](mailto:kevin.mitchell@noaa.gov)>  
**Date:** Wed, Feb 22, 2017 at 11:50 AM  
**Subject:** FW: NOAA0200 PTA  
**To:** Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)>

Good morning Mark,

Please see the attached NOAA0200 PTA for you review and signature.

If approved, please return to me so that I can upload to CSAM. Thank you.

Regards.

---

**Kevin Mitchell**

Information System Security Officer

NOAA Network Operations Center (NOC) NOAA0200

Cell (b)(6)

Office: [301.628.5683](tel:301.628.5683)

[kevin.mitchell@noaa.gov](mailto:kevin.mitchell@noaa.gov)

**From:** Douglas Perry - NOAA Federal [mailto:[douglas.a.perry@noaa.gov](mailto:douglas.a.perry@noaa.gov)]  
**Sent:** Wednesday, February 22, 2017 11:39 AM  
**To:** Ann Madden  
**Cc:** Kevin Mitchell - NOAA Affiliate  
**Subject:** Fwd: NOAA0200 PTA

Ann,

I forwarded a signed copy on Feb 8th. Unless something changed, you should be able to use this copy.

----- Forwarded message -----

**From:** Douglas Perry - NOAA Federal <[douglas.a.perry@noaa.gov](mailto:douglas.a.perry@noaa.gov)>  
**Date:** Wed, Feb 8, 2017 at 11:06 AM  
**Subject:** NOAA0200 PTA  
**To:** Ann Madden <[Ann.Madden@noaa.gov](mailto:Ann.Madden@noaa.gov)>

--

**Doug**

~~~~~



Douglas A. Perry

Deputy Chief Information Officer  
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**Doug**

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Douglas A. Perry

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Wednesday, February 22, 2017 12:45 PM  
**To:** Ruth Ann Lowery - NOAA Federal  
**Subject:** Re: Judicial Watch Response to Request for Further Fee Waiver Justification  
**Attachments:** Brief of Science Legal Defense Fund, American Meteorological Society, and UCS in support of Defendant.pdf; Plaintiffs response to motion for leave to file brief as amici curiae.pdf

Yes! I was just copying the group from Kristen Gustafson's distribution for the weekly calls. Did not mean to leave you off. Here are the JW filings attached--

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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On Wed, Feb 22, 2017 at 12:04 PM, Ruth Ann Lowery - NOAA Federal <[ruthann.lowery@noaa.gov](mailto:ruthann.lowery@noaa.gov)> wrote:  
Mark,

Rod referenced a message from you that refers to a response from JW, but I don't appear to have been copied. Can you please forward and next time be sure to include me?

Thanks,  
Ruth Ann

On Tue, Feb 21, 2017 at 7:29 PM, Rod.Vieira (NOAA GC) <[rod.vieira@noaa.gov](mailto:rod.vieira@noaa.gov)> wrote:

I don't have a calendar invite for a call tomorrow, do you? Did we just agree to this day/time on the last call and I missed it?

On 2/21/2017 4:43 PM, Mark Graff - NOAA Federal wrote:

Good Afternoon,

In advance of tomorrow's (b)(5)

[REDACTED]

(b)(5)

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
[\(301\) 628-5658](tel:3016285658) (O)  
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--

Ruth Ann Lowery  
Attorney Advisor  
NOAA Office of the General Counsel, Fisheries and Protected Resources  
U.S. Department of Commerce



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE

Defendant.

Case No. 1:15-cv-02088-CRC

**BRIEF OF CLIMATE SCIENCE LEGAL DEFENSE FUND, AMERICAN  
METEOROLOGICAL SOCIETY, AND UNION OF CONCERNED SCIENTISTS  
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT**

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**CORPORATE DISCLOSURE STATEMENT**

I, Kelsi Brown Corkran, counsel of record for *Amici Curiae* Climate Science Legal Defense Fund (CSLDF), American Meteorological Society (AMS), and Union of Concerned Scientists (UCS), certify that, to the best of my knowledge and belief, amici CSLDF, AMS, and UCS have no parent companies, subsidiaries, or affiliates with any outstanding securities in the hands of the public. Furthermore, CSLDF, AMS, and UCS are organized under Section 501(c)(3) of the Internal Revenue Code, and no publicly held company has a 10% or greater ownership interest in the organizations. These representations are made in order that judges of this Court may determine the need for recusal.

/s/ Kelsi Brown Corkran  
Kelsi Brown Corkran  
*Counsel of Record for Amici Curiae*

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### **INTEREST OF AMICI**<sup>1</sup>

Amici are nonprofit organizations committed to ensuring robust, independent scientific research into vitally important but politically charged subjects like climate change. Such research can occur only where scientists feel free to explore new ideas and provide candid feedback to each other without fear that their confidential exchanges or preliminary drafts will later be subject to indiscriminate public disclosure. Amici are thus deeply concerned about attempts, like those in this case, to obtain scientists' confidential correspondence and drafts. Amici have an interest in ensuring that public records laws are applied in a manner that appropriately protects the privileged, deliberative records of government scientists and the colleagues with whom they collaborate.

Climate Science Legal Defense Fund (CSLDF) was founded in 2011 in response to the increasing incidence of legal attacks against climate scientists. Its mission is to protect the scientific endeavor in general and climate science and climate scientists in particular from assaults being launched through the legal system, including intrusive public records requests.

American Meteorological Society (AMS) was founded in 1919 and is dedicated to advancing the atmospheric and related sciences for the benefit of society. It accomplishes this goal by, among other things, publishing several peer-reviewed scientific journals. AMS has more than 13,000 members, including scientists, researchers, and other climate professionals. It is committed to strengthening scientific work across the public, private, and academic sectors, and believes that collaboration and information sharing are critical to ensuring that society benefits from the best, most current scientific knowledge and understanding available.

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<sup>1</sup> Amici CSLDF, AMS, and UCS state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.



Union of Concerned Scientists (UCS) was founded in 1969 and is supported by an alliance of 500,000 citizens and scientists dedicated to using science to foster a healthy environment and safe world. UCS combines independent scientific research and citizen action to develop innovative and practical solutions to pressing environmental and security problems like climate change. UCS believes that a crucial ingredient in achieving these goals is maintaining research institutions within the federal government that foster an environment of independent and rigorous scientific inquiry free from political interference.

### **INTRODUCTION**

The efforts to obtain government scientists' privileged materials in this case are, unfortunately, all too familiar. Over the last decade, groups across the political spectrum have attempted to discredit scientific studies they dislike not by contesting the validity of the underlying data or methodology, or by showing that the studies' results cannot be reproduced (which is how the scientific process traditionally works), but rather by seeking to use the scientists' emails and preliminary drafts against them. This strategy has been a particularly common tactic of those who dispute the scientific consensus on climate change.

Whatever one's reasons for seeking such materials, however, these types of records are generally protected from disclosure by the deliberative process privilege as courts have repeatedly recognized in cases similar to this one. Government scientists' correspondence, preliminary drafts, and peer review materials are quintessential deliberative, pre-decisional records safeguarded by Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5). Maintaining the confidentiality of such records is necessary for the reasons that Congress codified the deliberative process privilege in that exemption: Quality government science (on which both policymakers and the general public rely) depends on an uninhibited exchange of ideas among scientists, and the unintended release of their correspondence and

preliminary drafts would likely result in public confusion.

Indeed, the policy concerns animating the deliberative process privilege are directly implicated in this very case. Numerous scientific organizations (including some of the present amici) specifically warned of the dangerous chilling effects that would result if the materials withheld by the National Oceanographic and Atmospheric Administration (NOAA) in this case were ordered released pursuant to an earlier congressional subpoena. These same effects would occur if the materials were released pursuant to FOIA instead. Ordering their release would harm (or halt altogether) government scientists' ability to collaborate with colleagues, damage the government's ability to recruit or retain top scientists, and deter critically important research into politically charged fields like climate change.

Moreover, releasing such materials is entirely unnecessary to ensure transparency in government science. The scientific method itself promotes transparency by, for example, requiring that research undergo rigorous peer review before publication and that its underlying data and methodology generally be made available to the public. NOAA scientists faithfully followed these practices here, and even took additional measures to ensure transparency by volunteering to answer questions directly from congressional critics. These steps allowed others to test the reliability of their research, and to disagree with their findings where testing suggested a different result. That is the way science works and how it has already worked in this case, without compelled disclosure of the scientists' deliberative records.

Accordingly, the Court should enter summary judgment for the government and reject Plaintiff's attempt to obtain these scientists' confidential correspondence and preliminary drafts.

**ARGUMENT**

**I. NOAA Has Withheld Only Privileged Correspondence And Preliminary Drafts Of Its Climate Science Paper.**

**A. NOAA Publicly Released The Data And Methodology Behind Its Paper.**

The FOIA request at issue in this case centers around a June 2015 paper that NOAA scientists published in the prominent, peer-reviewed journal *Science*. See Thomas Karl et al., *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus*, 348 *Sci.* 1469 (June 26, 2015) (“Hiatus Paper” or “Paper”). The Paper addressed (and refuted) earlier claims about a so-called “hiatus” in global warming i.e., the notion that the rate of global warming slowed in the 21st century as compared to the second half of the 20th century.

As explained in the government’s motion and accompanying declarations, NOAA scientists in 2014 developed an idea to reexamine the alleged “hiatus” in light of two recent developments: NOAA had made certain improvements to its dataset of sea surface temperatures, and 2013 and 2014 were two of the five warmest years on record. See Def.’s Mot. for Summ. J. (“MSJ”) at 1-3, ECF No. 16; Decl. of Mark Graff (“Graff Decl.”) ¶ 10, ECF No. 16-1. When researchers accounted for those developments, they found that global temperatures in the last 15 years rose as fast or faster than they did during the latter half of the 20th century. In other words, any slowdown in warming that could be described as a “hiatus” had largely disappeared.

The Hiatus Paper attracted significant attention in part because those who dispute the scientific consensus on climate change had previously seized upon the alleged “hiatus” as a reason to oppose restrictions on greenhouse gas emissions. One such contrarian was Representative Lamar Smith, a Republican from Texas who chairs the House Committee on Science, Space, and Technology. Over the course of several months, Smith sent increasingly invasive record requests to NOAA in an effort to undermine the Paper’s credibility.

At first, Smith's inquiry focused on obtaining the data and methodology underlying the Paper.<sup>2</sup> NOAA fully cooperated with these requests. The agency pointed Smith to the websites where consistent with standard scientific practice all of the underlying data and methodologies had already been made available to the public.<sup>3</sup> NOAA also directed Smith to other publicly available datasets and peer-reviewed papers relevant to the methods it had used.<sup>4</sup> And at NOAA's own suggestion, several authors of the Paper traveled to Washington D.C. on two separate occasions to answer, in person, any questions that Smith's committee had about the Paper.<sup>5</sup> NOAA also offered to make some of its top scientists available for additional transcribed interviews with committee staff.<sup>6</sup>

As NOAA explained, it had made its data and methodology "available to the Committee, the public, and the scientific community"; accordingly, if anyone "doubt[ed] the integrity of the study, [they] ha[d] the tools [they] need[ed] to commission a competing scientific assessment."<sup>7</sup>

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<sup>2</sup> See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (July 14, 2015), <http://tinyurl.com/gqotymh> (requesting "[a]ll data related to [the NOAA] study and the updated global datasets, including the methods of analysis used to adjust the data.").

<sup>3</sup> See Letter from Robert Moller, Acting Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Aug. 20, 2015), <http://tinyurl.com/j8hjjlx>.

<sup>4</sup> See, e.g., Letter from Coby Dolan, Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 2, 2015), <http://tinyurl.com/zc3w8eg>; Letter from Coby Dolan, Director of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Dec. 15, 2015), <http://tinyurl.com/h49e2wp>.

<sup>5</sup> See Letter from Coby Dolan, Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 27, 2015), <http://tinyurl.com/gumxt9t>.

<sup>6</sup> See Letter from Kathryn Sullivan, Adm'r, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 20, 2015), <http://tinyurl.com/h55yhqw>.

<sup>7</sup> *Id.*

**B. Representative Smith Sought Privileged Communications From NOAA.**

Representative Smith then shifted his focus to allegations that the Paper was politically motivated. He subpoenaed the NOAA scientists' internal, deliberative communications related to the Paper.<sup>8</sup> Smith acknowledged that "NOAA has provided in-person briefings, publicly available data related to the [Hiatus] study, and has agreed to make several witnesses available for voluntary interviews."<sup>9</sup> He further demanded, however, "the production of e-mails and other communications sent and received by NOAA officials."<sup>10</sup> Smith attempted to justify this extraordinary subpoena by alleging in public statements that NOAA "altered the data to get the results they needed to advance this administration's extreme climate change agenda."<sup>11</sup>

NOAA declined to provide the privileged correspondence. The agency explained that protecting "the confidentiality of these communications among scientists is essential to frank discourse" and consistent with "long-standing practice in the scientific community."<sup>12</sup>

Other scientists supported NOAA's decision, and criticized as dangerous and improper Smith's inquiry into their colleagues' confidential correspondence. Eight major professional

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<sup>8</sup> See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (Oct. 13, 2015), <http://tinyurl.com/h9g4rty>.

<sup>9</sup> See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Penny Pritzker, Sec'y, Dep't of Commerce (Dec. 1, 2015), <http://tinyurl.com/h8exxdj>.

<sup>10</sup> *Id.*; see also Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (Feb. 22, 2016), <http://tinyurl.com/z2ce6ul>.

<sup>11</sup> Jeff Tollefson, *US Science Agency Refuses Request for Climate Records*, Nature, Oct. 28, 2015, <http://tinyurl.com/hul3jzr>; see also Lamar Smith, *Letter to the Editor*, N.Y. Times, Dec. 9, 2015, <http://tinyurl.com/zm3nkmr> (characterizing the "motivations behind [the Hiatus] study" as "clearly suspect"); Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, and Tech., to Penny Pritzker, Sec'y, Dep't of Commerce (Nov. 18, 2015), <http://tinyurl.com/jrrbefm> (alleging the Paper was "prematurely rushed to publication ... to fit the Administration's aggressive climate agenda").

<sup>12</sup> Tollefson, *US Science Agency Refuses Request*, *supra* note 11.

scientific organizations (including amici AMS) wrote: “These broad inquiries threaten to inhibit the free exchange of ideas across scientific disciplines not only for NOAA, but for other government experts and the academic and industry scientists with whom they collaborate.”<sup>13</sup> They explained that breaking the confidentiality of such communications would cause a dangerous “chilling effect” on government scientists and, in particular, their willingness to conduct research on politically charged topics like climate change.<sup>14</sup> Nearly 600 scientists made a similar point in a letter praising NOAA for standing up to Smith’s “bullying tactics.”<sup>15</sup> And nearly two dozen former NOAA scientists also weighed in: “We know firsthand that scientists need intellectual space to debate new ideas and give each other confidential feedback without worrying that an individual comment will be subject to public scrutiny at a later date.”<sup>16</sup> They warned that releasing the scientists’ privileged emails would “significantly damage NOAA’s ability to conduct science.”<sup>17</sup>

Smith’s subpoena came under political fire as well. Representative Eddie Bernice

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<sup>13</sup> Letter from Am. Ass’n for the Advancement of Sci. (AAAS) et al., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 24, 2015), <http://tinyurl.com/zdpwrdrn>.

<sup>14</sup> *Id.*; accord Letter from Am. Meteorological Soc’y (AMS) to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 4, 2015), <http://tinyurl.com/h9fze9l> (“The demand for internal communications ... imposes a chilling effect on future communication among scientists” and “can be viewed as a form of intimidation that could deter scientists from freely carrying out research on important national challenges.”); Letter from Union of Concerned Scientists (UCS) to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Feb. 26, 2016), <http://tinyurl.com/jb7ucua> (the “demands have a chilling effect by deterring federal scientists from freely carrying out their research regardless of the political or policy implications”).

<sup>15</sup> Letter from Dr. Guy Almes, Dir., Acad. for Advanced Telecomm. & Learning Techs., et al., to Kathryn Sullivan, Adm’r, NOAA (Dec. 7, 2015), <http://tinyurl.com/zwoztdy> (explaining that releasing the NOAA scientists’ correspondence “can create a chilling effect on both federal scientists and any other scientist with whom they collaborate or correspond”).

<sup>16</sup> Letter from Dr. Susan Avery, President, Woods Hole Oceanographic Inst., et al., to Kathryn Sullivan, Adm’r, NOAA (Dec. 7, 2015), <http://tinyurl.com/gp5lorh>.

<sup>17</sup> *Id.*

Johnson, the ranking Democrat on the House Science Committee, criticized Smith's subpoena as a mere "fishing expedition." "[O]btaining all of the data and methods used in this study seemingly was not enough for the Majority. You also demanded internal communications by NOAA scientists regarding their scientific research," she wrote in a letter to Smith, adding that she "cannot help but note that your requests in this case echo the tactics" of other climate change contrarians "who frequently submit similar FOIA requests of climate scientists in both federal government and in state universities."<sup>18</sup> Johnson lamented that Smith's "entire effort smacks of the discredited tactics used by climate change denial groups (oftentimes funded by the fossil fuel industry) to sway public opinion based on misinformation, innuendo, and falsehoods."<sup>19</sup>

**C. Judicial Watch Requested The Same Privileged Materials Via FOIA.**

While NOAA was responding to Smith's inquiries, Judicial Watch submitted a FOIA request that expressly referenced Smith's subpoena and sought many of the same privileged materials. *See* Ex. A to Answer, ECF No. 8-1. Indeed, Judicial Watch asserted in a press release that this lawsuit seeks "the same documents unsuccessfully subpoenaed by [the] House committee."<sup>20</sup> The organization also announced its belief that the "Obama administration put politics before science to advance global warming alarmism," and trumpeted its previous attempts to use FOIA to pursue "alleged data manipulation by global warming advocates."<sup>21</sup>

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<sup>18</sup> Letter from Eddie Bernice Johnson, Ranking Member, H. Comm. on Sci., Space, & Tech., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 23, 2015), <http://tinyurl.com/qd5psrd>.

<sup>19</sup> Letter from Eddie Bernice Johnson, Ranking Member, H. Comm. on Sci., Space, & Tech., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 19, 2015), <http://tinyurl.com/z4dmwue>.

<sup>20</sup> Press Release, Judicial Watch, Judicial Watch Sues for Documents Withheld From Congress in New Climate Data Scandal (Dec. 22, 2015), <http://tinyurl.com/o9vk22d>.

<sup>21</sup> *Id.*

NOAA released hundreds of pages of documents in response to the FOIA request. *See* Graff Decl. ¶¶ 29-31. The agency properly withheld, however, three general categories of records—internal correspondence, unfinished drafts of the Hiatus Paper, and peer review materials—that, as explained below, are the types of deliberative, predecisional records appropriately protected from release under FOIA Exemption 5. *See also* Def.’s MSJ at 8-20.

## **II. Public Records Laws Are Increasingly Being Misused To Pursue Privileged Correspondence And Research Materials Like Those At Issue Here.**

As Representative Johnson observed (and Judicial Watch’s own press release reveals), the attempts to obtain the NOAA scientists’ privileged records in this case are unfortunately familiar. Over the past decade, organizations across the political spectrum have increasingly used public records laws to attack research findings (or even fields of study) that they dislike.<sup>22</sup> As in this case, the records requests typically do not seek the data, methodology, or funding sources of completed studies. Rather, the requests seek privileged prepublication materials such as preliminary drafts, private critiques from other scientists, and even researchers’ personal documents and correspondence.<sup>23</sup> These types of materials, however, are traditionally protected as confidential to ensure that scientists can raise new ideas and engage in robust debate without fear that their deliberations will later be publicized or taken out of context. *See* Decl. of Dr. Richard Spinrad ¶¶ 14-24, ECF No. 16-4 (hereinafter “Spinrad Decl.”).

The increasing frequency of these sorts of public records requests underscores the importance of protecting scientists’ deliberative materials from improper disclosure. As

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<sup>22</sup> *See, e.g.,* Michael Halpern, *Freedom to Bully: How Laws Intended to Free Information Are Used to Harass Researchers*, Ctr. for Sci. & Democracy, Union of Concerned Scientists (Feb. 2015), <http://tinyurl.com/hjzyq6g>; Rachel Levinson-Waldman, *Academic Freedom and the Public’s Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship* at 1-5, Am. Constitution Soc’y (Sept. 2011), <http://tinyurl.com/h87kevm>.

<sup>23</sup> *See* Halpern, *Freedom to Bully*, *supra* note 22, at 2.



explained in greater detail below (at 12-21), releasing such materials could stifle important research, confuse the public, and harm the government's ability to collaborate with outside scientists and recruit or retain top talent. *See* Spinrad Decl. ¶¶ 22-26. These potentially damaging effects are exacerbated in the field of climate science, which because of its political salience is particularly vulnerable to partisan attacks and concerted efforts to confuse the public. *See, e.g., id.* ¶¶ 23, 25 (noting that, in the climate science context, “the potential for a chilling effect is particularly high” and “the risks of misinterpretation or confusion” are “elevated”).

In fact, the attempts to obtain the NOAA scientists' privileged materials in this case are disturbingly similar to earlier efforts to obtain confidential records from climate scientist Dr. Michael Mann, who, by virtue of his position at a public university, was also the subject of intrusive public records requests.<sup>24</sup> Dr. Mann became a chief target of climate change contrarians because he was one of the authors of a seminal paper depicting the so-called “hockey stick” curve, which showed a spike in global temperature over the past century and a half.<sup>25</sup>

As in this case, Dr. Mann's emails were initially the subject of a failed civil subpoena by a political figure. Virginia Attorney General Ken Cuccinelli tried, unsuccessfully, to subpoena all of Dr. Mann's personal emails with more than thirty other scientists during his tenure at the University of Virginia. *See Cuccinelli v. Rector & Visitors of Univ. of Va.*, 722 S.E.2d 626 (Va. 2012) (holding that the Attorney General lacked authority to make the demands). But also like

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<sup>24</sup> Representative Johnson made this same connection between the present case and the Dr. Mann dispute, describing both as “invasive fishing expeditions in search of a pretext to discredit” climate scientists. Johnson Oct. 23 Letter, *supra* note 18 (quoting Editorial, *Harassing Climate-Change Researchers*, Wash. Post, May 29, 2011, <http://tinyurl.com/zg8p75o>).

<sup>25</sup> *See* Michael E. Mann et al., *Northern Hemisphere Temperatures During the Past Millennium: Inferences, Uncertainties, and Limitations*, 26 *Geophysical Res. Letters* 759 (1999).

here, another organization that frequently files public records requests, the American Tradition Institute<sup>26</sup>, then stepped in and tried to obtain the privileged records via that method instead.

The Virginia Supreme Court unanimously rejected the attempt to obtain Dr. Mann's emails in an opinion that strongly affirmed the importance of protecting the confidentiality of scientists' correspondence. *See Am Tradition Inst. ("ATI") v. Rector & Visitors of Univ. of Va.*, 756 S.E.2d 435, 442 (Va. 2014). The state high court quoted at length an affidavit from the University Provost explaining that "compelled disclosure of [scientists'] unpublished thoughts ... and personal scholarly communications would mean a fundamental disruption of the norms and expectations which have enabled research to flourish." *Id.*

Although the *ATI* case involved a state-law exemption for public records at institutions of higher education, the same rationales extend to protecting such records under the deliberative process privilege of FOIA Exemption 5. Indeed, the West Virginia Supreme Court later relied on the *ATI* opinion (and the declaration quoted above) in applying this Court's federal deliberative process precedent to its own state analogue. *See Highland Mining Co. v. W. Va. Univ. Sch. of Med.*, 774 S.E.2d 36, 53-54 (W. Va. 2015) ("The same reasoning applies with equal force here."). The court in *Highland Mining* rejected a coal company's attempt to use a public records statute to discredit a public university scientist who had published articles linking the environmental impacts of surface coal mining with health problems of local residents. *See id.* at 43. The court upheld the university's decision to withhold the same kinds of materials at issue in this case i.e., "drafts, data compilations and analyses, proposed edits, e-mails and other communications, and peer review comments and responses relate[d] to the planning, preparation

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<sup>26</sup> The American Tradition Institute, now known as the Energy and Environmental Legal Institute, has filed similar public records requests regarding the work of scientists in many other states as well. *See Halpern, Freedom to Bully, supra* note 22, at 6.

and editing necessary to produce a final published article” on the ground that they would improperly reveal the scientist’s deliberative process. *See id.* at 52-53.

Dr. Mann referenced the *Highland Mining* case and his own experience in *ATI* in an editorial that he co-authored warning about the potential abuse of public records laws in cases like this. Groups “across the political spectrum” are increasingly requesting “not only records of discussions about the strengths and weaknesses of work, but also preliminary paper drafts and private constructive criticisms from colleagues,” Dr. Mann warned, noting that “[t]hese requests can attack and intimidate [scientists], threatening their reputations, chilling their speech, disrupting their research, discouraging them from tackling contentious topics, and ultimately confusing the public.”<sup>27</sup> Presciently, Dr. Mann’s editorial appeared in the journal *Science* just weeks before the NOAA scientists’ Hiatus Paper.

### **III. The Deliberative Process Privilege Appropriately Protects The Confidentiality Of Government Scientists’ Correspondence And Drafts.**

In enacting FOIA, Congress recognized that certain government records should appropriately be withheld from public disclosure. *See EPA v. Mink*, 410 U.S. 73, 80 (1973). Exemption 5 of FOIA codified, among other things, the common law “deliberative process privilege,” which safeguards from disclosure materials that reveal “the decisionmaking processes of government agencies.” *Wolfe v. Dep’t of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc). The privilege is designed to improve the quality of agency decisions by promoting the uninhibited exchange of ideas, and also to prevent the public confusion that could result from releasing documents that do not represent the government’s final word on a given matter. *See Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

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<sup>27</sup> Michael Halpern & Michael Mann, Editorial, *Transparency Versus Harassment*, 348 *Sci.* 479 (May 1, 2015), <http://tinyurl.com/jumo5nc>.

Consistent with these policies, courts have regularly protected deliberative, predecisional scientific materials like those at issue in this case. *See, e.g., Formaldehyde Inst. v. Dep't of Health and Human Servs.*, 889 F.2d 1118, 1124-25 (D.C. Cir. 1989) (peer review comments); *Hooker v. U.S. Dep't of Health & Human Servs.*, 887 F. Supp. 2d 40, 57-59 (D.D.C. 2012) (internal email communications, edits to draft manuscript, and peer review comments); *ViroPharma Inc. v. Dep't of Health & Human Servs.*, 839 F. Supp. 2d 184, 192-94 (D.D.C. 2012) (draft scientific documents and internal review documents); *Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184, 189 (D.D.C. 2009) (draft scientific model that calibrated raw data); *Weinstein v. U.S. Dep't of Health & Human Servs.*, 977 F. Supp. 41 (D.D.C. 1997) (peer review materials); *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health & Human Servs.*, 844 F. Supp. 770, 782-83 (D.D.C. 1993) (draft manuscript and software program designed to manipulate raw data); *Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 115 (D.D.C. 1984) (draft reports); *Highland Mining*, 774 S.E.2d at 48-54 (drafts, data compilations and analyses, proposed edits, emails, and other communications related to research articles). The same policy concerns and reasoning discussed in these cases support the government's position here.

**A. Protecting Drafts, Correspondence, And Peer Review Materials Allows An Uninhibited Exchange Of Ideas That Is Critical To The Scientific Process.**

The deliberative process privilege recognizes that “free and uninhibited exchange and communication of opinions, ideas, and points of view” is necessary to the “wise functioning” of government. *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 n.31 (D.C. Cir. 1974). Such uninhibited communication is impossible, however, if government employees fear public disclosure of their preliminary thoughts and ideas. “[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances ... to the detriment of the decisionmaking process.” *NLRB v. Sears, Roebuck &*

*Co.*, 421 U.S. 132, 150-51 (1975). Government employees “will not communicate candidly ... if each remark is a potential item of discovery and front page news.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001). In other words, “the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.” *Wolfe*, 839 F.2d at 773.

Accordingly, the deliberative process privilege “prevent[s] injury to the quality of agency decisions,” *Sears*, 421 U.S. at 151, by removing the “threat of cross-examination in a public tribunal,” *Montrose*, 491 F.2d at 68 n.31. The privilege ensures that government employees “feel free to provide ... their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

The work of government scientists is particularly dependent on uninhibited exchanges, and no less susceptible to the chilling effect of threatened public disclosure. This court has thus long recognized that the deliberative process privilege protects preliminary scientific drafts and correspondence because disclosure would “discourage the intellectual risk-taking so essential to technical progress.” *Chem. Mfrs*, 600 F. Supp. at 118. The “give and take of science,” UCS Letter, *supra* note 14, is the same “give-and-take of the consultative process” that Congress sought to safeguard in Exemption 5, *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Homeland Sec.*, 648 F. Supp. 2d 152, 163 (D.D.C. 2009); *see also Horsehead Indus. v. EPA*, No. 94-1299, slip op. at 15-20 (D.D.C. Oct. 1, 1996) (government scientists’ “frank exchanges of view regarding [their research] reside near the core of an agency’s deliberative process”).

Uninhibited exploration and discussion is fundamental to the scientific process. Research projects typically begin with “only rough ideas ... that are not yet fully formed.” Spinrad Decl.

¶ 14; *see also Humane Soc’y v. Super. Ct. of Yolo Cnty.*, 155 Cal. Rptr. 3d 93, 113 (Cal. Ct. App. 2013) (scientific research involves “trying new ideas, investigating lines of thinking that do not work out, suggesting ideas that turn out to be wrong”). Further, scientists do not pursue their research in isolation; they develop and refine hypotheses “through exchanges and candid debates with peers inside and outside the federal government.” Spinrad Decl. ¶ 14; *see also Chem. Mfrs.*, 600 F. Supp. at 118 (scientists “discuss hypotheses which have not matured” and “can be effectively shared only with peers in regular and confidential communication”). These exchanges take the form of informal email correspondence and formal peer review both of which are “critical to developing and releasing scientific information of the highest possible quality.” Spinrad Decl. ¶ 15.

These important exchanges can only take place, however, if scientists are given the “intellectual space to debate new ideas and give each other confidential feedback without worrying that an individual comment will be subject to public scrutiny at a later date.” Avery et al. Letter, *supra* note 16. Accordingly, there is a “well-established presumption” within the scientific community that such exchanges “are not intended to be, and will not be, shared with a wider audience.” Spinrad Decl. ¶ 20. Indeed, peer reviewers are often expressly instructed to treat the draft as privileged and confidential, as they were in this case. *See* Graff Decl. ¶¶ 17-20. “Confidentiality is essential to ensuring the participants are free to propose new ideas or explanations without fear of misinterpretation or being taken out of context.” Spinrad Decl. ¶ 20.

The preliminary work of the NOAA scientists at issue in this case thus fall comfortably within the class of materials protected by the deliberative process privilege. Requiring the disclosure of scientists’ communications, drafts, and peer review materials would have an “obvious chilling effect” on the candid, informal exchanges and debates that are crucial to the

scientific method. *Chem. Mfrs*, 600 F. Supp. at 118; *see also Formaldehyde Inst.*, 889 F.2d at 1124-25 (deeming it “indisputable,” based on scientists’ affidavits, that “release of reviewers’ editorial comments would ... have a chilling effect on ... the candor of potential reviewers of government-submitted articles”). Absent a robust “exchange of scientific understanding” among government scientists and their colleagues, “the pace of scientific progress would slow.” Spinrad Decl. ¶ 21; *see also ATI*, 756 S.E.2d at 442 (“compelled disclosure of [scientists’] unpublished thoughts, data, and personal scholarly communications would mean a fundamental disruption of the norms and expectations which have enabled research to flourish”). Such a slowdown would deprive policymakers as well as the general public of important information that helps guide their own decisions. *See AAAS et al. Letter*, *supra* note 13.

For many of the same reasons, the contributions of outside scientists through both informal correspondence and formal peer review are also generally protected by the deliberative process privilege. *See, e.g., Wash. Research Project, Inc. v. Dep’t of Health, Educ. & Welfare*, 504 F.2d 238, 249-50 (D.C. Cir. 1974) (protecting reports prepared by outside consultant peer review panels); *Formaldehyde Inst.*, 889 F.2d at 1122-25 (external peer review comments); *Hooker*, 887 F. Supp. 2d at 54-55 (correspondence with external coauthor). Peer review comments from outside scientists can “play[] essentially the same part in an agency’s process of deliberation” as would comments from other government scientists. *Klamath Water Users*, 532 U.S. at 10; *see also Dow Jones & Co., Inc. v. Dep’t of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990) (“Exemption 5 permits an agency to protect the confidentiality of communications from outside the agency so long as those communications are part and parcel of the agency’s deliberative process.”) (emphasis omitted). Indeed, because experts specializing in a given area are spread out among various institutions, the exchange and debate necessary to the

scientific process may effectively require participation by scientists outside the federal government. *See* Spinrad Decl. ¶¶ 16-18; *see also Formaldehyde Inst.*, 889 F.2d at 1122 (when government scientists “encounter problems outside their ken” it is “preferable that they enlist the help of outside experts skilled at unraveling their knotty complexities”).

If correspondence with outside scientists were not protected by Exemption 5, those scientists might alter their comments or simply refuse to collaborate with their government counterparts. *See Formaldehyde Inst.*, 889 F.2d at 1125 (disclosure of reviewers’ comments “would very likely have a chilling effect on either the candor of potential reviewers of government-submitted articles or on the ability of the government to have its work considered for review at all”); Spinrad Decl. ¶ 24 (“If an outside scientist believed that their communications with federal scientists may become public, he or she may change the way they engage with federal colleagues in a way that slows the exchange of ideas, or they may choose not to engage in this type of valuable, informal peer review at all.”); Avery et al. Letter, *supra* note 16 (releasing correspondence will “mak[e] it more difficult for NOAA scientists to collaborate with peers in academia and the private sector”); *see also ATI*, 756 S.E.2d at 442 (similar).

Similarly, compelled disclosure would also make it more difficult for the government to recruit or retain top scientists, who would likely enjoy the benefits of confidentiality in private industry or academia and thus refuse to work where public records laws “render their communications involuntarily public.” *ATI*, 756 S.E.2d at 442; *see also AAAS et al. Letter*, *supra* note 13 (releasing NOAA scientists’ emails will inhibit agencies’ ability “to attract world-class scientific talent”). “Such a loss of technical expertise in federal agencies would then greatly harm the quality of agency decisions regarding scientific issues.” Dianna G. Goldenson, *FOIA Exemption Five: Will It Protect Government Scientists From Unfair Intrusion?*, 29 B.C.



Envtl. Aff. L. Rev. 311, 314 (2002) (arguing that the deliberative process privilege should protect government scientists from unfair intrusion into scientific research).

As mentioned above (at 10), these concerns about a chilling effect are heightened in the particular context of climate science, where scientific developments “typically generate a high level of interest or controversy.” Spinrad Decl. ¶ 23; *see also Climate Science in the Political Arena: Hearing Before the H. Select Comm. on Energy Independence and Global Warming*, 111th Cong. 25-27 (2010) (testimony of Dr. Ben Santer, Department of Energy climate scientist: “I would now be leading a different life if my research suggested that there was no human effect on climate. I would not be the subject of congressional inquiries, Freedom of Information Act requests, or e-mail threats. I would not need to be concerned about the safety of my family.”).

Indeed, these concerns are front and center in this very case. The letters opposing Smith’s subpoena all warned of the chilling effects that would occur if the NOAA scientists’ deliberative materials were ordered disclosed. Requiring disclosure of scientists’ deliberative materials whether via subpoena or FOIA “could deter scientists from freely carrying out research on important national challenges” like climate change. AMS Letter, *supra* note 14.<sup>28</sup>

**B. Protecting Such Materials From Disclosure Also Helps Avoid Public Confusion.**

Protecting preliminary, deliberative scientific materials also avoids “premature disclosure of ongoing discussions that might confuse the public.” *Cleary, Gottlieb*, 844 F. Supp. at 782; *see*

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<sup>28</sup> *See also, e.g.*, AAAS et al. Letter, *supra* note 13 (compelled disclosure would “have a chilling effect on the willingness of government scientists to conduct research that intersects with policy-relevant scientific questions”); UCS Letter, *supra* note 14 (compelled disclosure creates a “chilling effect by deterring federal scientists from freely carrying out their research regardless of the political or policy implications”); Almes et al. Letter, *supra* note 15 (compelled disclosure “can create a chilling effect on both federal scientists and any other scientist with whom they collaborate or correspond”).

*also Russell*, 682 F.2d at 1048.

Scientists frequently pursue initial ideas and preliminary hypotheses in email exchanges and early drafts of a study only to abandon them later. Withholding of non-final drafts is thus appropriate because the public “could mistakenly interpret the views within a draft as the [final] views of the agency.” *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 161 F. Supp. 3d 120, 129 (D.D.C. 2016); *see also Hooker*, 887 F. Supp. 2d at 58-59 (affirming agency’s decision to withhold drafts of scientific manuscript). The same is true for the NOAA scientists’ confidential correspondence: Release of these internal deliberations could “confuse the public by disclosing tentative rationales not ultimately published” in the final Paper. *FPL Grp., Inc. v. IRS*, 698 F. Supp. 2d 66, 83 (D.D.C. 2010); *see also Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 306 F. Supp. 2d 58, 72 (D.D.C. 2004) (describing internal email as “exactly the kind of internal predecisional discussion that, if revealed, might confuse the public”). So too might the public latch onto early, candid critiques by reviewers, even if the authors subsequently bolstered their conclusions to address and assuage the reviewers’ concerns. “There is no real public interest in such documents save perhaps for satisfying public curiosity.” *Pies v. U.S. IRS*, 668 F.2d 1350, 1353 (D.C. Cir. 1981) (“Such documents, if released, may actually mislead the public.”).

The risk of public confusion is particularly acute when it comes to prepublication scientific correspondence. Scientists familiar with a particular subject matter will often communicate with each other using “shorthand and informal language in sharing ideas that are actually highly technical and complex.” Spinrad Decl. ¶ 25. “While use of informal or shorthand language is useful and appropriate to expedite discussions among peers, more formal explanations and, in many cases, caveats, would be necessary for products that are intended to be shared with a public audience.” *Id.* Moreover, “[s]cientists use many words that mean

something very different to much of the public.”<sup>29</sup> And their informal shorthand, in particular, is often “interpreted in a vastly different manner by the lay public.” Spinrad Decl. ¶ 25; *see also Humane Soc’y*, 155 Cal. Rptr. 3d at 113-14 (“researchers communicate informally, often in jargon or shorthand, ... [in] ways open to misinterpretation”). Beyond scientists’ use of jargon and shorthand, they also often use especially blunt or harsh language in critiquing each other’s work. *See, e.g., Halpern, Freedom to Bully, supra* note 22, at 4 (“candid discussion[] among researchers ... does not cast doubt on the strengths of [the ultimate] conclusions; rather, it constitutes the typically unvarnished, yet rigorous, deliberative process by which scientists test and refine their conclusions”). Releasing scientists’ peer review materials or email exchanges can thus easily confuse the public, especially if they are taken out of context.

Indeed, this is precisely what occurred in the so-called “Climategate” manufactured controversy of 2009, when a hacker stole thousands of emails from the University of East Anglia’s Climate Research Unit. The emails were used to confuse the public by generating “media coverage ... based on email statements quoted out of context.”<sup>30</sup> For example, opponents of greenhouse gas regulations highlighted an exchange where one scientist referred to using a “trick.” The “trick,” however, was actually just a scientific technique i.e., a “trick of the trade” which had been publicly disclosed in a published, peer-reviewed journal article.<sup>31</sup>

Numerous investigations found that nothing in the hacked emails actually called into question

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<sup>29</sup> Susan Joy Hassol, *Improving How Scientists Communicate About Climate Change*, 89 *Eos* 106, 106 (Mar. 2008), <http://tinyurl.com/hkjas9g> (collecting examples).

<sup>30</sup> *Myths vs. Facts: Denial of Petitions for Reconsideration of the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, U.S. Env’tl. Prot. Agency, <http://tinyurl.com/j3xgnrf> (last visited Jan. 27, 2017).

<sup>31</sup> *See, e.g., Debunking Misinformation About Stolen Climate Emails In The “Climategate” Manufactured Controversy*, Union of Concerned Scientists, <http://tinyurl.com/zto92to> (last visited Jan. 27, 2017).

the underlying climate data and research.<sup>32</sup> Public confusion from the incident, however, still persists today. Indeed, the emails are, apparently, a reason why the new President of the United States says he questions the science behind climate change.<sup>33</sup>

The deliberative process privilege protects government scientists' correspondence and non-final drafts from becoming part of a similar misinformation campaign in the future.

### **C. Protecting Such Materials Does Not Undermine Transparency.**

Notwithstanding the need to protect their deliberative preliminary materials from public disclosure, scientists do not seek to isolate their actual work from public vetting. Rather, consistent with standard scientific practice, they typically embrace transparency by publishing their research in peer-reviewed journals and making their data and methodologies available via public databases. *See* AMS Letter, *supra* note 14 (“reporting on research results fully and transparently through the peer-reviewed literature and providing the capability for other scientists to replicate that research ... is a fundamental foundation of the scientific process”). The proper way to test a scientific paper is not by sifting through email correspondence and non-final drafts. Instead, the public can test the accuracy of government science without threatening the deliberative process by independently evaluating and vetting the final results. *See, e.g.,* AAAS et al. Letter, *supra* note 13 (“part of the purpose of placing research into the

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<sup>32</sup> *See, e.g., id.* (collecting investigations); *Myths vs. Facts*, *supra* note 30; Jess Henig, *Some ‘Climategate’ Conclusions*, FactCheck.Org, Apr. 15, 2010, <http://tinyurl.com/28qfqwr>; Editorial, *Closing the Climategate*, 468 *Nature* 345 (Nov. 18, 2010), <http://tinyurl.com/gnl2l3y> (although some hacked emails exhibited “bravado” and “rudeness,” such “robust exchanges were typical in science” and reflective of the sometimes “bruising process” of peer review).

<sup>33</sup> *See, e.g., Donald Trump’s New York Times Interview: Full Transcript*, N.Y. Times (Nov. 23, 2016), <http://tinyurl.com/j3on4f3> (“[Climate change is] a very complex subject. I’m not sure anybody is ever going to really know. ... [T]hey say they have science on one side but then they also have those horrible emails that were sent between the scientists. Where was that, in Geneva or wherever five years ago? Terrible.”).

scholarly record is so other scientists can attempt to replicate, confirm, or refute it”).

Consistent with this practice, the deliberative process privilege does not prevent the disclosure of underlying data in the government’s control where that data would not expose the scientists’ deliberative process. *Compare, e.g., Sw. Ctr. for Biological Diversity v. USDA*, 170 F. Supp. 2d 931, 941 (D. Ariz. 2000) (ordering release of “raw research data,” which “itself does not expose the deliberative process”), *with Chem. Mfrs.*, 600 F. Supp. at 117-19 (exempting preliminary data from release where scientists have not yet completed a final report).<sup>34</sup>

Indeed, this distinction between underlying research data and other, more deliberative materials is reflected in the disclosure rules regarding federally funded research. *See* OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, 64 Fed. Reg. 54,926 (Oct. 8, 1999). Under those rules, federal grant recipients must turn over only “research data,” which is defined as “the recorded factual material commonly accepted in the scientific community as necessary to validate research findings.” *Id.* at 54,930. However, recognizing “the importance of ensuring that [those rules do] not interfere with the traditional scientific process” wherein “scientists need to deliberate over, develop, and pursue alternative approaches in their research,” *id.* at 54,926-54,927 this definition specifically *excludes* “preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues,” *id.* at 54930; *see also Am. Chem. Council, Inc. v. U.S. Dep’t of Health & Human Servs.*, 922 F. Supp. 2d 56, 62 (D.D.C. 2013) (same). In other words, it exempts from compelled disclosure exactly the types of deliberative, predecisional materials at

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<sup>34</sup> Of course, some data may still be exempt from disclosure for other reasons. *See, e.g.,* 5 U.S.C. § 552(b)(6) (exempting “medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”).

issue in this case.<sup>35</sup>

Moreover, as described above, NOAA here complied with all the scientific transparency norms by publicly posting on its website the datasets underlying the Hiatus Paper even before Representative Smith had requested them. *See* Moller Letter, *supra* note 3. And the agency went above and beyond by sending its scientists to explain their methodology and answer questions posed by the congressional committee in person. *See* Dolan Oct. 27 Letter, *supra* note 5. The scientific organizations highlighted NOAA's transparency in their opposition to Smith's subpoena, and "applaud[ed] the open access to data and methodologies that NOAA consistently achieves." AMS Letter, *supra* note 14; *see also* AAAS et al. Letter, *supra* note 13 ("The data and methodology of the paper in question have been publicly shared and discussed directly with committee staff."); UCS Letter, *supra* note 14 ("NOAA made all data and methodology publicly available. Not a shred of evidence of scientific misconduct has surfaced."). Thus, as NOAA noted, if anyone "doubts the integrity of the study," they have all the "tools [they] need[] to commission a competing scientific assessment." Sullivan Nov. 20 Letter, *supra* note 6.

Indeed, as the scientific organizations noted, since the Hiatus Paper's publication "there have been other peer-reviewed research papers published by university scientists and derived from other independent data sources that have also analyzed the climate hiatus." AAAS et al.

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<sup>35</sup> The deliberative process privilege also likely would not prevent disclosure of any outside funding sources for government scientists, or undue influence by other outside parties. *See, e.g.,* Justin Gillis & John Schwartz, *Deeper Ties to Corporate Cash for Doubtful Climate Researcher*, N.Y. Times, Feb. 21, 2015, <http://tinyurl.com/zm772tz> (describing FOIA request which revealed that a government astrophysicist had failed to disclose substantial outside funding). This is because in contrast to communications with non-governmental scientists who participate in formal or informal peer review, *see supra* at 16-17 communications with outside parties who act in their own self-interest are generally not considered privileged or exempt from disclosure under FOIA Exemption 5. *See, e.g., Physicians Comm. for Responsible Med. v. Nat'l Insts. of Health*, 326 F. Supp. 2d 19, 29-30 (D.D.C. 2004).

Letter, *supra* note 13. Some of these papers including one published earlier this month have largely corroborated the Paper's findings that there has been no slowdown in the rate of global warming during the 21st century.<sup>36</sup> Others, meanwhile, have pushed back on some of its conclusions.<sup>37</sup>

"This is the way in which science advances," the scientific organizations explained. AAAS et al., Letter, *supra* note 13. Not through fishing expeditions into scientists' deliberative, confidential correspondence and preliminary drafts.

### **CONCLUSION**

The government's motion for summary judgment should be granted.

Respectfully submitted,

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January 27, 2017

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<sup>36</sup> See, e.g., Zeke Hausfather et al., *Assessing Recent Warming Using Instrumentally Homogenous Sea Surface Temperature Records*, 3 *Sci. Advances* (Jan. 2017), <http://tinyurl.com/hetylun>; Bala Rajaratnam et al., *Debunking the Climate Hiatus*, 133 *Climatic Change* 129 (Nov. 2015), <http://tinyurl.com/j9v228x>.

<sup>37</sup> See, e.g., John C. Fyfe et al., *Making Sense of the Early-2000s Warming Slowdown*, 6 *Nature Climate Change* 224 (Feb. 2016).

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-2088 (CRC)
	)	
U.S. DEPARTMENT OF	)	
COMMERCE,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S RESPONSE TO MOTION OF CLIMATE SCIENCE LEGAL DEFENSE  
FUND, AMERICAN METEOROLOGICAL SOCIETY, AND  
UNION OF CONCERNED SCIENTISTS FOR  
LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT**

Plaintiff Judicial Watch, Inc. (“Plaintiff” or “Judicial Watch”) hereby responds to the Motion of Climate Science Legal Defense Fund, American Meteorological Society, and Union of Concerned Scientists (collectively “*Amici*”) for Leave to File Brief as *Amici Curiae* in Support of Defendant U.S. Department of Commerce (“Defendant” or “Commerce”) (“*Amici* Motion”). ECF Doc. No. 18.

MEMORANDUM OF LAW

*Amici*’s proposed brief improperly attacks Plaintiff’s motives for requesting records under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and merely restates legal arguments already asserted in Defendant’s summary judgment motion brief (“Defendant’s Motion”). *Amici*’s proposed brief offers no unique information or perspective that has not, or could not have been, raised by Defendant. See Brief of Climate Science Legal Defense Fund, American Meteorological Society, and Union of Concerned Scientists as *Amici Curiae* in Support of Defendant, ECF Doc. No. 18-1 (“*Amici* Brief”); Defendant’s Motion, ECF Doc. No. 16.



“An *amicus curiae*, defined as 'friend of the court,' . . . does not represent the parties but participates only for the benefit of the Court.” *United States v. Microsoft Corp.*, 2002 U.S. Dist. LEXIS 26549, 2002 WL 319366, at \*2 (D.D.C. 2002). While no rule requires that an *amicus* be impartial, the court does consider the presence of partiality with regard to an *amici*'s admittance. *Youming Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136-38 (D.D.C. 2008).

*Amici* asserts that it can “assist the Court in resolving this case by sharing their relevant expertise about the scientific endeavor, first-hand knowledge of how scientists approach their work, and familiarity with how other courts have recently handled similar issues regarding public records requests involving scientific research.” *See Amici Motion* at 1-2. However, *Amici* serve as no “friends of the court”. Rather, the majority of *Amici*'s brief talks about “groups across the political spectrum” using FOIA as a tactic to undermine scientific studies. *Amici Brief* at 2. The bulk of “ideas, arguments, and facts” provided by *Amici* are merely recitations of and speculation about why requests for scientific records from federal and state agencies and academic institutions are made. In fact, *Amici* specifically uses Plaintiff as an example in asserting their position that records requested under FOIA are nothing more than a bullying effort to harass scientists. *Amici Brief* at 8-9. *Amici*'s opinion is very clear from the beginning Plaintiff is allegedly using FOIA to discredit a scientific study, and Defendant should not be required to release the records it is withholding because of Plaintiff's purported motives.

In a December 28, 2015 blog posting, one of the requesting *Amici*, Climate Science Legal Defense Fund, made its opinion and feelings about Plaintiff, and similar public records requests, openly clear they are fighting back. See <https://climatesciencedefensefund.org/2015/12/28/new-lawsuit-over-climate-scientists-emails/> (“FOIA lawsuits for scientists' private communications are an increasingly popular method by groups who seek to intimidate, harass, and try to discredit publicly-funded scientists. Lawsuits across the country are attempting to use FOIA and state law

equivalents to access troves of researchers' private correspondence. But CSLDF has been busy fighting back.”)

The case before the court is a straightforward lawsuit about whether Defendant has satisfied its FOIA obligations. Defendant's motion turns on whether Defendant has properly searched for and produced all responsive, non-exempt records and the propriety of Defendant's deliberative process privilege withholdings pursuant to exemption 5 under FOIA. See 5 U.S.C. § 552. This litigation, and the motion before the court, is not the proper forum for *Amici* to “fight back” with its agenda.

*Amici* assert they have “familiarity with the underlying events that led to this litigation.” *Amici* Motion at 5. However, the underlying event that led to this litigation is Defendant failed to satisfy its FOIA obligation. Proposed *Amici* have no unique knowledge and insight about the purely procedural issues. The “perspective” *Amici* proposes to provide is nothing more than a veiled attack on Plaintiff and its motives for requesting records from a federal agency. Such an attack is not permitted under FOIA. See *Chiquita Brands, Intl, Inc. v. U.S. Sec. & Exch. Comm'n*, 805 F.3d 289, 294 (D.C. Cir. 2015) (“Government agencies must generally release requested records without regard to the identity or motive of the requestor.”)

The purpose of an *amicus* brief is to assist the court. *Amici's* brief adds nothing to the court's analysis and merely restates the same cases highlighted by Defendant or simply presents similar cases whose resulting argument is duplicative of those in Defendant's brief. As a result, *Amici's* brief is inappropriate and unnecessary in this litigation.

Dated: February 10, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

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---

**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Wednesday, February 22, 2017 1:00 PM  
**To:** John Almeida - NOAA Federal  
**Cc:** Kimberly Katzenbarger - NOAA FEDERAL; Charles Green - NOAA Federal; Charles Lynch - NOAA Federal; Cheryl Scannell - NOAA Federal; Chris Fontecchio - NOAA Federal; Jackie Rolleri - NOAA Federal; Jeff Dillen - NOAA Federal; Jonelle Dilley - NOAA Federal; Kamaile Turcan - NOAA Federal; Kate Barfield - NOAA Federal; Kathryn Kempton - NOAA Federal; Lauren Smoker - NOAA Federal; Leah Melendy - NOAA Federal; Lola Stith - NOAA Affiliate; Louise Milkman - NOAA Federal; Martha McCoy - NOAA Federal; Rodney Vieira - NOAA Federal; Roxie Allison-Holman - NOAA Federal; Stacey Nathanson - NOAA Federal  
**Subject:** Re: Legal Experts Call  
**Attachments:** Brief of Science Legal Defense Fund, American Meteorological Society, and UCS in support of Defendant.pdf; Plaintiffs response to motion for leave to file brief as amici curiae.pdf

Hi Everyone,

As promised, here is the Amicus brief we talked about on the call from the Judicial Watch FOIA litigation, along with the Plaintiff's response.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

Confidentiality Notice: This e mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.

On Wed, Feb 22, 2017 at 7:29 AM, John Almeida - NOAA Federal <[john.almeida@noaa.gov](mailto:john.almeida@noaa.gov)> wrote:  
Reminder, FOIA legal experts call at noon today. Talk to you soon!

(b)(6)

#

On Wed, Jan 25, 2017 at 10:24 AM, John Almeida - NOAA Federal <[john.almeida@noaa.gov](mailto:john.almeida@noaa.gov)> wrote:  
Reminder, we've got FOIA legal experts call at 12:00 today (east coast time). Talk to you soon!

(b)(6),

(b)(6)

On Wed, Dec 28, 2016 at 8:51 AM, John Almeida - NOAA Federal <[john.almeida@noaa.gov](mailto:john.almeida@noaa.gov)> wrote:  
Good morning, and happy holidays! For those in the office today, attached are notes for today's FOIA Legal Experts call (12:00 here on the east coast). Also attached is a photo of the new puppy that Santa brought to my house this year, Woodsey the FOIA Dog. Talk to you soon!

(b)(6)

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE

Defendant.

Case No. 1:15-cv-02088-CRC

**BRIEF OF CLIMATE SCIENCE LEGAL DEFENSE FUND, AMERICAN  
METEOROLOGICAL SOCIETY, AND UNION OF CONCERNED SCIENTISTS  
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT**

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**CORPORATE DISCLOSURE STATEMENT**

I, Kelsi Brown Corkran, counsel of record for *Amici Curiae* Climate Science Legal Defense Fund (CSLDF), American Meteorological Society (AMS), and Union of Concerned Scientists (UCS), certify that, to the best of my knowledge and belief, amici CSLDF, AMS, and UCS have no parent companies, subsidiaries, or affiliates with any outstanding securities in the hands of the public. Furthermore, CSLDF, AMS, and UCS are organized under Section 501(c)(3) of the Internal Revenue Code, and no publicly held company has a 10% or greater ownership interest in the organizations. These representations are made in order that judges of this Court may determine the need for recusal.

/s/ Kelsi Brown Corkran  
Kelsi Brown Corkran  
*Counsel of Record for Amici Curiae*

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### **INTEREST OF AMICI**<sup>1</sup>

Amici are nonprofit organizations committed to ensuring robust, independent scientific research into vitally important but politically charged subjects like climate change. Such research can occur only where scientists feel free to explore new ideas and provide candid feedback to each other without fear that their confidential exchanges or preliminary drafts will later be subject to indiscriminate public disclosure. Amici are thus deeply concerned about attempts, like those in this case, to obtain scientists' confidential correspondence and drafts. Amici have an interest in ensuring that public records laws are applied in a manner that appropriately protects the privileged, deliberative records of government scientists and the colleagues with whom they collaborate.

Climate Science Legal Defense Fund (CSLDF) was founded in 2011 in response to the increasing incidence of legal attacks against climate scientists. Its mission is to protect the scientific endeavor in general and climate science and climate scientists in particular from assaults being launched through the legal system, including intrusive public records requests.

American Meteorological Society (AMS) was founded in 1919 and is dedicated to advancing the atmospheric and related sciences for the benefit of society. It accomplishes this goal by, among other things, publishing several peer-reviewed scientific journals. AMS has more than 13,000 members, including scientists, researchers, and other climate professionals. It is committed to strengthening scientific work across the public, private, and academic sectors, and believes that collaboration and information sharing are critical to ensuring that society benefits from the best, most current scientific knowledge and understanding available.

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<sup>1</sup> Amici CSLDF, AMS, and UCS state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Union of Concerned Scientists (UCS) was founded in 1969 and is supported by an alliance of 500,000 citizens and scientists dedicated to using science to foster a healthy environment and safe world. UCS combines independent scientific research and citizen action to develop innovative and practical solutions to pressing environmental and security problems like climate change. UCS believes that a crucial ingredient in achieving these goals is maintaining research institutions within the federal government that foster an environment of independent and rigorous scientific inquiry free from political interference.

### **INTRODUCTION**

The efforts to obtain government scientists' privileged materials in this case are, unfortunately, all too familiar. Over the last decade, groups across the political spectrum have attempted to discredit scientific studies they dislike not by contesting the validity of the underlying data or methodology, or by showing that the studies' results cannot be reproduced (which is how the scientific process traditionally works), but rather by seeking to use the scientists' emails and preliminary drafts against them. This strategy has been a particularly common tactic of those who dispute the scientific consensus on climate change.

Whatever one's reasons for seeking such materials, however, these types of records are generally protected from disclosure by the deliberative process privilege as courts have repeatedly recognized in cases similar to this one. Government scientists' correspondence, preliminary drafts, and peer review materials are quintessential deliberative, pre-decisional records safeguarded by Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5). Maintaining the confidentiality of such records is necessary for the reasons that Congress codified the deliberative process privilege in that exemption: Quality government science (on which both policymakers and the general public rely) depends on an uninhibited exchange of ideas among scientists, and the unintended release of their correspondence and

preliminary drafts would likely result in public confusion.

Indeed, the policy concerns animating the deliberative process privilege are directly implicated in this very case. Numerous scientific organizations (including some of the present amici) specifically warned of the dangerous chilling effects that would result if the materials withheld by the National Oceanographic and Atmospheric Administration (NOAA) in this case were ordered released pursuant to an earlier congressional subpoena. These same effects would occur if the materials were released pursuant to FOIA instead. Ordering their release would harm (or halt altogether) government scientists' ability to collaborate with colleagues, damage the government's ability to recruit or retain top scientists, and deter critically important research into politically charged fields like climate change.

Moreover, releasing such materials is entirely unnecessary to ensure transparency in government science. The scientific method itself promotes transparency by, for example, requiring that research undergo rigorous peer review before publication and that its underlying data and methodology generally be made available to the public. NOAA scientists faithfully followed these practices here, and even took additional measures to ensure transparency by volunteering to answer questions directly from congressional critics. These steps allowed others to test the reliability of their research, and to disagree with their findings where testing suggested a different result. That is the way science works and how it has already worked in this case, without compelled disclosure of the scientists' deliberative records.

Accordingly, the Court should enter summary judgment for the government and reject Plaintiff's attempt to obtain these scientists' confidential correspondence and preliminary drafts.

**ARGUMENT**

**I. NOAA Has Withheld Only Privileged Correspondence And Preliminary Drafts Of Its Climate Science Paper.**

**A. NOAA Publicly Released The Data And Methodology Behind Its Paper.**

The FOIA request at issue in this case centers around a June 2015 paper that NOAA scientists published in the prominent, peer-reviewed journal *Science*. See Thomas Karl et al., *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus*, 348 *Sci.* 1469 (June 26, 2015) (“Hiatus Paper” or “Paper”). The Paper addressed (and refuted) earlier claims about a so-called “hiatus” in global warming i.e., the notion that the rate of global warming slowed in the 21st century as compared to the second half of the 20th century.

As explained in the government’s motion and accompanying declarations, NOAA scientists in 2014 developed an idea to reexamine the alleged “hiatus” in light of two recent developments: NOAA had made certain improvements to its dataset of sea surface temperatures, and 2013 and 2014 were two of the five warmest years on record. See Def.’s Mot. for Summ. J. (“MSJ”) at 1-3, ECF No. 16; Decl. of Mark Graff (“Graff Decl.”) ¶ 10, ECF No. 16-1. When researchers accounted for those developments, they found that global temperatures in the last 15 years rose as fast or faster than they did during the latter half of the 20th century. In other words, any slowdown in warming that could be described as a “hiatus” had largely disappeared.

The Hiatus Paper attracted significant attention in part because those who dispute the scientific consensus on climate change had previously seized upon the alleged “hiatus” as a reason to oppose restrictions on greenhouse gas emissions. One such contrarian was Representative Lamar Smith, a Republican from Texas who chairs the House Committee on Science, Space, and Technology. Over the course of several months, Smith sent increasingly invasive record requests to NOAA in an effort to undermine the Paper’s credibility.



At first, Smith's inquiry focused on obtaining the data and methodology underlying the Paper.<sup>2</sup> NOAA fully cooperated with these requests. The agency pointed Smith to the websites where consistent with standard scientific practice all of the underlying data and methodologies had already been made available to the public.<sup>3</sup> NOAA also directed Smith to other publicly available datasets and peer-reviewed papers relevant to the methods it had used.<sup>4</sup> And at NOAA's own suggestion, several authors of the Paper traveled to Washington D.C. on two separate occasions to answer, in person, any questions that Smith's committee had about the Paper.<sup>5</sup> NOAA also offered to make some of its top scientists available for additional transcribed interviews with committee staff.<sup>6</sup>

As NOAA explained, it had made its data and methodology "available to the Committee, the public, and the scientific community"; accordingly, if anyone "doubt[ed] the integrity of the study, [they] ha[d] the tools [they] need[ed] to commission a competing scientific assessment."<sup>7</sup>

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<sup>2</sup> See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (July 14, 2015), <http://tinyurl.com/gqotymh> (requesting "[a]ll data related to [the NOAA] study and the updated global datasets, including the methods of analysis used to adjust the data.").

<sup>3</sup> See Letter from Robert Moller, Acting Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Aug. 20, 2015), <http://tinyurl.com/j8hjjlx>.

<sup>4</sup> See, e.g., Letter from Coby Dolan, Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 2, 2015), <http://tinyurl.com/zc3w8eg>; Letter from Coby Dolan, Director of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Dec. 15, 2015), <http://tinyurl.com/h49e2wp>.

<sup>5</sup> See Letter from Coby Dolan, Dir. of Legislative & Intergovernmental Affairs, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 27, 2015), <http://tinyurl.com/gumxt9t>.

<sup>6</sup> See Letter from Kathryn Sullivan, Adm'r, NOAA, to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 20, 2015), <http://tinyurl.com/h55yhqw>.

<sup>7</sup> *Id.*

**B. Representative Smith Sought Privileged Communications From NOAA.**

Representative Smith then shifted his focus to allegations that the Paper was politically motivated. He subpoenaed the NOAA scientists' internal, deliberative communications related to the Paper.<sup>8</sup> Smith acknowledged that "NOAA has provided in-person briefings, publicly available data related to the [Hiatus] study, and has agreed to make several witnesses available for voluntary interviews."<sup>9</sup> He further demanded, however, "the production of e-mails and other communications sent and received by NOAA officials."<sup>10</sup> Smith attempted to justify this extraordinary subpoena by alleging in public statements that NOAA "altered the data to get the results they needed to advance this administration's extreme climate change agenda."<sup>11</sup>

NOAA declined to provide the privileged correspondence. The agency explained that protecting "the confidentiality of these communications among scientists is essential to frank discourse" and consistent with "long-standing practice in the scientific community."<sup>12</sup>

Other scientists supported NOAA's decision, and criticized as dangerous and improper Smith's inquiry into their colleagues' confidential correspondence. Eight major professional

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<sup>8</sup> See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (Oct. 13, 2015), <http://tinyurl.com/h9g4rty>.

<sup>9</sup> See Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Penny Pritzker, Sec'y, Dep't of Commerce (Dec. 1, 2015), <http://tinyurl.com/h8exxdj>.

<sup>10</sup> *Id.*; see also Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Kathryn Sullivan, Adm'r, NOAA (Feb. 22, 2016), <http://tinyurl.com/z2ce6ul>.

<sup>11</sup> Jeff Tollefson, *US Science Agency Refuses Request for Climate Records*, Nature, Oct. 28, 2015, <http://tinyurl.com/hul3jzr>; see also Lamar Smith, *Letter to the Editor*, N.Y. Times, Dec. 9, 2015, <http://tinyurl.com/zm3nkmr> (characterizing the "motivations behind [the Hiatus] study" as "clearly suspect"); Letter from Lamar Smith, Chairman, H. Comm. on Sci., Space, and Tech., to Penny Pritzker, Sec'y, Dep't of Commerce (Nov. 18, 2015), <http://tinyurl.com/jrrbefm> (alleging the Paper was "prematurely rushed to publication ... to fit the Administration's aggressive climate agenda").

<sup>12</sup> Tollefson, *US Science Agency Refuses Request*, *supra* note 11.

scientific organizations (including amici AMS) wrote: “These broad inquiries threaten to inhibit the free exchange of ideas across scientific disciplines not only for NOAA, but for other government experts and the academic and industry scientists with whom they collaborate.”<sup>13</sup> They explained that breaking the confidentiality of such communications would cause a dangerous “chilling effect” on government scientists and, in particular, their willingness to conduct research on politically charged topics like climate change.<sup>14</sup> Nearly 600 scientists made a similar point in a letter praising NOAA for standing up to Smith’s “bullying tactics.”<sup>15</sup> And nearly two dozen former NOAA scientists also weighed in: “We know firsthand that scientists need intellectual space to debate new ideas and give each other confidential feedback without worrying that an individual comment will be subject to public scrutiny at a later date.”<sup>16</sup> They warned that releasing the scientists’ privileged emails would “significantly damage NOAA’s ability to conduct science.”<sup>17</sup>

Smith’s subpoena came under political fire as well. Representative Eddie Bernice

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<sup>13</sup> Letter from Am. Ass’n for the Advancement of Sci. (AAAS) et al., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 24, 2015), <http://tinyurl.com/zdpwrdrn>.

<sup>14</sup> *Id.*; accord Letter from Am. Meteorological Soc’y (AMS) to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 4, 2015), <http://tinyurl.com/h9fze9l> (“The demand for internal communications ... imposes a chilling effect on future communication among scientists” and “can be viewed as a form of intimidation that could deter scientists from freely carrying out research on important national challenges.”); Letter from Union of Concerned Scientists (UCS) to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Feb. 26, 2016), <http://tinyurl.com/jb7ucua> (the “demands have a chilling effect by deterring federal scientists from freely carrying out their research regardless of the political or policy implications”).

<sup>15</sup> Letter from Dr. Guy Almes, Dir., Acad. for Advanced Telecomm. & Learning Techs., et al., to Kathryn Sullivan, Adm’r, NOAA (Dec. 7, 2015), <http://tinyurl.com/zwoztdy> (explaining that releasing the NOAA scientists’ correspondence “can create a chilling effect on both federal scientists and any other scientist with whom they collaborate or correspond”).

<sup>16</sup> Letter from Dr. Susan Avery, President, Woods Hole Oceanographic Inst., et al., to Kathryn Sullivan, Adm’r, NOAA (Dec. 7, 2015), <http://tinyurl.com/gp5lorh>.

<sup>17</sup> *Id.*

Johnson, the ranking Democrat on the House Science Committee, criticized Smith's subpoena as a mere "fishing expedition." "[O]btaining all of the data and methods used in this study seemingly was not enough for the Majority. You also demanded internal communications by NOAA scientists regarding their scientific research," she wrote in a letter to Smith, adding that she "cannot help but note that your requests in this case echo the tactics" of other climate change contrarians "who frequently submit similar FOIA requests of climate scientists in both federal government and in state universities."<sup>18</sup> Johnson lamented that Smith's "entire effort smacks of the discredited tactics used by climate change denial groups (oftentimes funded by the fossil fuel industry) to sway public opinion based on misinformation, innuendo, and falsehoods."<sup>19</sup>

**C. Judicial Watch Requested The Same Privileged Materials Via FOIA.**

While NOAA was responding to Smith's inquiries, Judicial Watch submitted a FOIA request that expressly referenced Smith's subpoena and sought many of the same privileged materials. *See* Ex. A to Answer, ECF No. 8-1. Indeed, Judicial Watch asserted in a press release that this lawsuit seeks "the same documents unsuccessfully subpoenaed by [the] House committee."<sup>20</sup> The organization also announced its belief that the "Obama administration put politics before science to advance global warming alarmism," and trumpeted its previous attempts to use FOIA to pursue "alleged data manipulation by global warming advocates."<sup>21</sup>

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<sup>18</sup> Letter from Eddie Bernice Johnson, Ranking Member, H. Comm. on Sci., Space, & Tech., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Oct. 23, 2015), <http://tinyurl.com/qd5psrd>.

<sup>19</sup> Letter from Eddie Bernice Johnson, Ranking Member, H. Comm. on Sci., Space, & Tech., to Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech. (Nov. 19, 2015), <http://tinyurl.com/z4dmwue>.

<sup>20</sup> Press Release, Judicial Watch, Judicial Watch Sues for Documents Withheld From Congress in New Climate Data Scandal (Dec. 22, 2015), <http://tinyurl.com/o9vk22d>.

<sup>21</sup> *Id.*

NOAA released hundreds of pages of documents in response to the FOIA request. *See* Graff Decl. ¶¶ 29-31. The agency properly withheld, however, three general categories of records—internal correspondence, unfinished drafts of the Hiatus Paper, and peer review materials—that, as explained below, are the types of deliberative, predecisional records appropriately protected from release under FOIA Exemption 5. *See also* Def.’s MSJ at 8-20.

## **II. Public Records Laws Are Increasingly Being Misused To Pursue Privileged Correspondence And Research Materials Like Those At Issue Here.**

As Representative Johnson observed (and Judicial Watch’s own press release reveals), the attempts to obtain the NOAA scientists’ privileged records in this case are unfortunately familiar. Over the past decade, organizations across the political spectrum have increasingly used public records laws to attack research findings (or even fields of study) that they dislike.<sup>22</sup> As in this case, the records requests typically do not seek the data, methodology, or funding sources of completed studies. Rather, the requests seek privileged prepublication materials such as preliminary drafts, private critiques from other scientists, and even researchers’ personal documents and correspondence.<sup>23</sup> These types of materials, however, are traditionally protected as confidential to ensure that scientists can raise new ideas and engage in robust debate without fear that their deliberations will later be publicized or taken out of context. *See* Decl. of Dr. Richard Spinrad ¶¶ 14-24, ECF No. 16-4 (hereinafter “Spinrad Decl.”).

The increasing frequency of these sorts of public records requests underscores the importance of protecting scientists’ deliberative materials from improper disclosure. As

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<sup>22</sup> *See, e.g.*, Michael Halpern, *Freedom to Bully: How Laws Intended to Free Information Are Used to Harass Researchers*, Ctr. for Sci. & Democracy, Union of Concerned Scientists (Feb. 2015), <http://tinyurl.com/hjzyq6g>; Rachel Levinson-Waldman, *Academic Freedom and the Public’s Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship* at 1-5, Am. Constitution Soc’y (Sept. 2011), <http://tinyurl.com/h87kevm>.

<sup>23</sup> *See* Halpern, *Freedom to Bully*, *supra* note 22, at 2.

explained in greater detail below (at 12-21), releasing such materials could stifle important research, confuse the public, and harm the government's ability to collaborate with outside scientists and recruit or retain top talent. *See* Spinrad Decl. ¶¶ 22-26. These potentially damaging effects are exacerbated in the field of climate science, which because of its political salience is particularly vulnerable to partisan attacks and concerted efforts to confuse the public. *See, e.g., id.* ¶¶ 23, 25 (noting that, in the climate science context, “the potential for a chilling effect is particularly high” and “the risks of misinterpretation or confusion” are “elevated”).

In fact, the attempts to obtain the NOAA scientists' privileged materials in this case are disturbingly similar to earlier efforts to obtain confidential records from climate scientist Dr. Michael Mann, who, by virtue of his position at a public university, was also the subject of intrusive public records requests.<sup>24</sup> Dr. Mann became a chief target of climate change contrarians because he was one of the authors of a seminal paper depicting the so-called “hockey stick” curve, which showed a spike in global temperature over the past century and a half.<sup>25</sup>

As in this case, Dr. Mann's emails were initially the subject of a failed civil subpoena by a political figure. Virginia Attorney General Ken Cuccinelli tried, unsuccessfully, to subpoena all of Dr. Mann's personal emails with more than thirty other scientists during his tenure at the University of Virginia. *See Cuccinelli v. Rector & Visitors of Univ. of Va.*, 722 S.E.2d 626 (Va. 2012) (holding that the Attorney General lacked authority to make the demands). But also like

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<sup>24</sup> Representative Johnson made this same connection between the present case and the Dr. Mann dispute, describing both as “invasive fishing expeditions in search of a pretext to discredit” climate scientists. Johnson Oct. 23 Letter, *supra* note 18 (quoting Editorial, *Harassing Climate-Change Researchers*, Wash. Post, May 29, 2011, <http://tinyurl.com/zg8p75o>).

<sup>25</sup> *See* Michael E. Mann et al., *Northern Hemisphere Temperatures During the Past Millennium: Inferences, Uncertainties, and Limitations*, 26 *Geophysical Res. Letters* 759 (1999).

here, another organization that frequently files public records requests, the American Tradition Institute<sup>26</sup>, then stepped in and tried to obtain the privileged records via that method instead.

The Virginia Supreme Court unanimously rejected the attempt to obtain Dr. Mann's emails in an opinion that strongly affirmed the importance of protecting the confidentiality of scientists' correspondence. *See Am Tradition Inst. ("ATI") v. Rector & Visitors of Univ. of Va.*, 756 S.E.2d 435, 442 (Va. 2014). The state high court quoted at length an affidavit from the University Provost explaining that "compelled disclosure of [scientists'] unpublished thoughts ... and personal scholarly communications would mean a fundamental disruption of the norms and expectations which have enabled research to flourish." *Id.*

Although the *ATI* case involved a state-law exemption for public records at institutions of higher education, the same rationales extend to protecting such records under the deliberative process privilege of FOIA Exemption 5. Indeed, the West Virginia Supreme Court later relied on the *ATI* opinion (and the declaration quoted above) in applying this Court's federal deliberative process precedent to its own state analogue. *See Highland Mining Co. v. W. Va. Univ. Sch. of Med.*, 774 S.E.2d 36, 53-54 (W. Va. 2015) ("The same reasoning applies with equal force here."). The court in *Highland Mining* rejected a coal company's attempt to use a public records statute to discredit a public university scientist who had published articles linking the environmental impacts of surface coal mining with health problems of local residents. *See id.* at 43. The court upheld the university's decision to withhold the same kinds of materials at issue in this case i.e., "drafts, data compilations and analyses, proposed edits, e-mails and other communications, and peer review comments and responses relate[d] to the planning, preparation

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<sup>26</sup> The American Tradition Institute, now known as the Energy and Environmental Legal Institute, has filed similar public records requests regarding the work of scientists in many other states as well. *See Halpern, Freedom to Bully, supra* note 22, at 6.

and editing necessary to produce a final published article” on the ground that they would improperly reveal the scientist’s deliberative process. *See id.* at 52-53.

Dr. Mann referenced the *Highland Mining* case and his own experience in *ATI* in an editorial that he co-authored warning about the potential abuse of public records laws in cases like this. Groups “across the political spectrum” are increasingly requesting “not only records of discussions about the strengths and weaknesses of work, but also preliminary paper drafts and private constructive criticisms from colleagues,” Dr. Mann warned, noting that “[t]hese requests can attack and intimidate [scientists], threatening their reputations, chilling their speech, disrupting their research, discouraging them from tackling contentious topics, and ultimately confusing the public.”<sup>27</sup> Presciently, Dr. Mann’s editorial appeared in the journal *Science* just weeks before the NOAA scientists’ Hiatus Paper.

### **III. The Deliberative Process Privilege Appropriately Protects The Confidentiality Of Government Scientists’ Correspondence And Drafts.**

In enacting FOIA, Congress recognized that certain government records should appropriately be withheld from public disclosure. *See EPA v. Mink*, 410 U.S. 73, 80 (1973). Exemption 5 of FOIA codified, among other things, the common law “deliberative process privilege,” which safeguards from disclosure materials that reveal “the decisionmaking processes of government agencies.” *Wolfe v. Dep’t of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc). The privilege is designed to improve the quality of agency decisions by promoting the uninhibited exchange of ideas, and also to prevent the public confusion that could result from releasing documents that do not represent the government’s final word on a given matter. *See Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

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<sup>27</sup> Michael Halpern & Michael Mann, Editorial, *Transparency Versus Harassment*, 348 *Sci.* 479 (May 1, 2015), <http://tinyurl.com/jumo5nc>.



Consistent with these policies, courts have regularly protected deliberative, predecisional scientific materials like those at issue in this case. *See, e.g., Formaldehyde Inst. v. Dep't of Health and Human Servs.*, 889 F.2d 1118, 1124-25 (D.C. Cir. 1989) (peer review comments); *Hooker v. U.S. Dep't of Health & Human Servs.*, 887 F. Supp. 2d 40, 57-59 (D.D.C. 2012) (internal email communications, edits to draft manuscript, and peer review comments); *ViroPharma Inc. v. Dep't of Health & Human Servs.*, 839 F. Supp. 2d 184, 192-94 (D.D.C. 2012) (draft scientific documents and internal review documents); *Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184, 189 (D.D.C. 2009) (draft scientific model that calibrated raw data); *Weinstein v. U.S. Dep't of Health & Human Servs.*, 977 F. Supp. 41 (D.D.C. 1997) (peer review materials); *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health & Human Servs.*, 844 F. Supp. 770, 782-83 (D.D.C. 1993) (draft manuscript and software program designed to manipulate raw data); *Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 115 (D.D.C. 1984) (draft reports); *Highland Mining*, 774 S.E.2d at 48-54 (drafts, data compilations and analyses, proposed edits, emails, and other communications related to research articles). The same policy concerns and reasoning discussed in these cases support the government's position here.

**A. Protecting Drafts, Correspondence, And Peer Review Materials Allows An Uninhibited Exchange Of Ideas That Is Critical To The Scientific Process.**

The deliberative process privilege recognizes that “free and uninhibited exchange and communication of opinions, ideas, and points of view” is necessary to the “wise functioning” of government. *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 n.31 (D.C. Cir. 1974). Such uninhibited communication is impossible, however, if government employees fear public disclosure of their preliminary thoughts and ideas. “[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances ... to the detriment of the decisionmaking process.” *NLRB v. Sears, Roebuck &*

*Co.*, 421 U.S. 132, 150-51 (1975). Government employees “will not communicate candidly ... if each remark is a potential item of discovery and front page news.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001). In other words, “the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl.” *Wolfe*, 839 F.2d at 773.

Accordingly, the deliberative process privilege “prevent[s] injury to the quality of agency decisions,” *Sears*, 421 U.S. at 151, by removing the “threat of cross-examination in a public tribunal,” *Montrose*, 491 F.2d at 68 n.31. The privilege ensures that government employees “feel free to provide ... their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

The work of government scientists is particularly dependent on uninhibited exchanges, and no less susceptible to the chilling effect of threatened public disclosure. This court has thus long recognized that the deliberative process privilege protects preliminary scientific drafts and correspondence because disclosure would “discourage the intellectual risk-taking so essential to technical progress.” *Chem. Mfrs*, 600 F. Supp. at 118. The “give and take of science,” UCS Letter, *supra* note 14, is the same “give-and-take of the consultative process” that Congress sought to safeguard in Exemption 5, *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Homeland Sec.*, 648 F. Supp. 2d 152, 163 (D.D.C. 2009); *see also Horsehead Indus. v. EPA*, No. 94-1299, slip op. at 15-20 (D.D.C. Oct. 1, 1996) (government scientists’ “frank exchanges of view regarding [their research] reside near the core of an agency’s deliberative process”).

Uninhibited exploration and discussion is fundamental to the scientific process. Research projects typically begin with “only rough ideas ... that are not yet fully formed.” Spinrad Decl.

¶ 14; *see also Humane Soc’y v. Super. Ct. of Yolo Cnty.*, 155 Cal. Rptr. 3d 93, 113 (Cal. Ct. App. 2013) (scientific research involves “trying new ideas, investigating lines of thinking that do not work out, suggesting ideas that turn out to be wrong”). Further, scientists do not pursue their research in isolation; they develop and refine hypotheses “through exchanges and candid debates with peers inside and outside the federal government.” Spinrad Decl. ¶ 14; *see also Chem. Mfrs.*, 600 F. Supp. at 118 (scientists “discuss hypotheses which have not matured” and “can be effectively shared only with peers in regular and confidential communication”). These exchanges take the form of informal email correspondence and formal peer review both of which are “critical to developing and releasing scientific information of the highest possible quality.” Spinrad Decl. ¶ 15.

These important exchanges can only take place, however, if scientists are given the “intellectual space to debate new ideas and give each other confidential feedback without worrying that an individual comment will be subject to public scrutiny at a later date.” Avery et al. Letter, *supra* note 16. Accordingly, there is a “well-established presumption” within the scientific community that such exchanges “are not intended to be, and will not be, shared with a wider audience.” Spinrad Decl. ¶ 20. Indeed, peer reviewers are often expressly instructed to treat the draft as privileged and confidential, as they were in this case. *See* Graff Decl. ¶¶ 17-20. “Confidentiality is essential to ensuring the participants are free to propose new ideas or explanations without fear of misinterpretation or being taken out of context.” Spinrad Decl. ¶ 20.

The preliminary work of the NOAA scientists at issue in this case thus fall comfortably within the class of materials protected by the deliberative process privilege. Requiring the disclosure of scientists’ communications, drafts, and peer review materials would have an “obvious chilling effect” on the candid, informal exchanges and debates that are crucial to the

scientific method. *Chem. Mfrs*, 600 F. Supp. at 118; *see also Formaldehyde Inst.*, 889 F.2d at 1124-25 (deeming it “indisputable,” based on scientists’ affidavits, that “release of reviewers’ editorial comments would ... have a chilling effect on ... the candor of potential reviewers of government-submitted articles”). Absent a robust “exchange of scientific understanding” among government scientists and their colleagues, “the pace of scientific progress would slow.” Spinrad Decl. ¶ 21; *see also ATI*, 756 S.E.2d at 442 (“compelled disclosure of [scientists’] unpublished thoughts, data, and personal scholarly communications would mean a fundamental disruption of the norms and expectations which have enabled research to flourish”). Such a slowdown would deprive policymakers as well as the general public of important information that helps guide their own decisions. *See AAAS et al. Letter*, *supra* note 13.

For many of the same reasons, the contributions of outside scientists through both informal correspondence and formal peer review are also generally protected by the deliberative process privilege. *See, e.g., Wash. Research Project, Inc. v. Dep’t of Health, Educ. & Welfare*, 504 F.2d 238, 249-50 (D.C. Cir. 1974) (protecting reports prepared by outside consultant peer review panels); *Formaldehyde Inst.*, 889 F.2d at 1122-25 (external peer review comments); *Hooker*, 887 F. Supp. 2d at 54-55 (correspondence with external coauthor). Peer review comments from outside scientists can “play[] essentially the same part in an agency’s process of deliberation” as would comments from other government scientists. *Klamath Water Users*, 532 U.S. at 10; *see also Dow Jones & Co., Inc. v. Dep’t of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990) (“Exemption 5 permits an agency to protect the confidentiality of communications from outside the agency so long as those communications are part and parcel of the agency’s deliberative process.”) (emphasis omitted). Indeed, because experts specializing in a given area are spread out among various institutions, the exchange and debate necessary to the

scientific process may effectively require participation by scientists outside the federal government. *See* Spinrad Decl. ¶¶ 16-18; *see also Formaldehyde Inst.*, 889 F.2d at 1122 (when government scientists “encounter problems outside their ken” it is “preferable that they enlist the help of outside experts skilled at unraveling their knotty complexities”).

If correspondence with outside scientists were not protected by Exemption 5, those scientists might alter their comments or simply refuse to collaborate with their government counterparts. *See Formaldehyde Inst.*, 889 F.2d at 1125 (disclosure of reviewers’ comments “would very likely have a chilling effect on either the candor of potential reviewers of government-submitted articles or on the ability of the government to have its work considered for review at all”); Spinrad Decl. ¶ 24 (“If an outside scientist believed that their communications with federal scientists may become public, he or she may change the way they engage with federal colleagues in a way that slows the exchange of ideas, or they may choose not to engage in this type of valuable, informal peer review at all.”); Avery et al. Letter, *supra* note 16 (releasing correspondence will “mak[e] it more difficult for NOAA scientists to collaborate with peers in academia and the private sector”); *see also ATI*, 756 S.E.2d at 442 (similar).

Similarly, compelled disclosure would also make it more difficult for the government to recruit or retain top scientists, who would likely enjoy the benefits of confidentiality in private industry or academia and thus refuse to work where public records laws “render their communications involuntarily public.” *ATI*, 756 S.E.2d at 442; *see also AAAS et al. Letter*, *supra* note 13 (releasing NOAA scientists’ emails will inhibit agencies’ ability “to attract world-class scientific talent”). “Such a loss of technical expertise in federal agencies would then greatly harm the quality of agency decisions regarding scientific issues.” Dianna G. Goldenson, *FOIA Exemption Five: Will It Protect Government Scientists From Unfair Intrusion?*, 29 B.C.

Envtl. Aff. L. Rev. 311, 314 (2002) (arguing that the deliberative process privilege should protect government scientists from unfair intrusion into scientific research).

As mentioned above (at 10), these concerns about a chilling effect are heightened in the particular context of climate science, where scientific developments “typically generate a high level of interest or controversy.” Spinrad Decl. ¶ 23; *see also Climate Science in the Political Arena: Hearing Before the H. Select Comm. on Energy Independence and Global Warming*, 111th Cong. 25-27 (2010) (testimony of Dr. Ben Santer, Department of Energy climate scientist: “I would now be leading a different life if my research suggested that there was no human effect on climate. I would not be the subject of congressional inquiries, Freedom of Information Act requests, or e-mail threats. I would not need to be concerned about the safety of my family.”).

Indeed, these concerns are front and center in this very case. The letters opposing Smith’s subpoena all warned of the chilling effects that would occur if the NOAA scientists’ deliberative materials were ordered disclosed. Requiring disclosure of scientists’ deliberative materials whether via subpoena or FOIA “could deter scientists from freely carrying out research on important national challenges” like climate change. AMS Letter, *supra* note 14.<sup>28</sup>

**B. Protecting Such Materials From Disclosure Also Helps Avoid Public Confusion.**

Protecting preliminary, deliberative scientific materials also avoids “premature disclosure of ongoing discussions that might confuse the public.” *Cleary, Gottlieb*, 844 F. Supp. at 782; *see*

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<sup>28</sup> *See also, e.g.*, AAAS et al. Letter, *supra* note 13 (compelled disclosure would “have a chilling effect on the willingness of government scientists to conduct research that intersects with policy-relevant scientific questions”); UCS Letter, *supra* note 14 (compelled disclosure creates a “chilling effect by deterring federal scientists from freely carrying out their research regardless of the political or policy implications”); Almes et al. Letter, *supra* note 15 (compelled disclosure “can create a chilling effect on both federal scientists and any other scientist with whom they collaborate or correspond”).

*also Russell*, 682 F.2d at 1048.

Scientists frequently pursue initial ideas and preliminary hypotheses in email exchanges and early drafts of a study only to abandon them later. Withholding of non-final drafts is thus appropriate because the public “could mistakenly interpret the views within a draft as the [final] views of the agency.” *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 161 F. Supp. 3d 120, 129 (D.D.C. 2016); *see also Hooker*, 887 F. Supp. 2d at 58-59 (affirming agency’s decision to withhold drafts of scientific manuscript). The same is true for the NOAA scientists’ confidential correspondence: Release of these internal deliberations could “confuse the public by disclosing tentative rationales not ultimately published” in the final Paper. *FPL Grp., Inc. v. IRS*, 698 F. Supp. 2d 66, 83 (D.D.C. 2010); *see also Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 306 F. Supp. 2d 58, 72 (D.D.C. 2004) (describing internal email as “exactly the kind of internal predecisional discussion that, if revealed, might confuse the public”). So too might the public latch onto early, candid critiques by reviewers, even if the authors subsequently bolstered their conclusions to address and assuage the reviewers’ concerns. “There is no real public interest in such documents save perhaps for satisfying public curiosity.” *Pies v. U.S. IRS*, 668 F.2d 1350, 1353 (D.C. Cir. 1981) (“Such documents, if released, may actually mislead the public.”).

The risk of public confusion is particularly acute when it comes to prepublication scientific correspondence. Scientists familiar with a particular subject matter will often communicate with each other using “shorthand and informal language in sharing ideas that are actually highly technical and complex.” Spinrad Decl. ¶ 25. “While use of informal or shorthand language is useful and appropriate to expedite discussions among peers, more formal explanations and, in many cases, caveats, would be necessary for products that are intended to be shared with a public audience.” *Id.* Moreover, “[s]cientists use many words that mean

something very different to much of the public.”<sup>29</sup> And their informal shorthand, in particular, is often “interpreted in a vastly different manner by the lay public.” Spinrad Decl. ¶ 25; *see also Humane Soc’y*, 155 Cal. Rptr. 3d at 113-14 (“researchers communicate informally, often in jargon or shorthand, ... [in] ways open to misinterpretation”). Beyond scientists’ use of jargon and shorthand, they also often use especially blunt or harsh language in critiquing each other’s work. *See, e.g.*, Halpern, *Freedom to Bully*, *supra* note 22, at 4 (“candid discussion[] among researchers ... does not cast doubt on the strengths of [the ultimate] conclusions; rather, it constitutes the typically unvarnished, yet rigorous, deliberative process by which scientists test and refine their conclusions”). Releasing scientists’ peer review materials or email exchanges can thus easily confuse the public, especially if they are taken out of context.

Indeed, this is precisely what occurred in the so-called “Climategate” manufactured controversy of 2009, when a hacker stole thousands of emails from the University of East Anglia’s Climate Research Unit. The emails were used to confuse the public by generating “media coverage ... based on email statements quoted out of context.”<sup>30</sup> For example, opponents of greenhouse gas regulations highlighted an exchange where one scientist referred to using a “trick.” The “trick,” however, was actually just a scientific technique i.e., a “trick of the trade” which had been publicly disclosed in a published, peer-reviewed journal article.<sup>31</sup>

Numerous investigations found that nothing in the hacked emails actually called into question

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<sup>29</sup> Susan Joy Hassol, *Improving How Scientists Communicate About Climate Change*, 89 *Eos* 106, 106 (Mar. 2008), <http://tinyurl.com/hkjas9g> (collecting examples).

<sup>30</sup> *Myths vs. Facts: Denial of Petitions for Reconsideration of the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, U.S. Env’tl. Prot. Agency, <http://tinyurl.com/j3xgnrf> (last visited Jan. 27, 2017).

<sup>31</sup> *See, e.g.*, *Debunking Misinformation About Stolen Climate Emails In The “Climategate” Manufactured Controversy*, Union of Concerned Scientists, <http://tinyurl.com/zto92to> (last visited Jan. 27, 2017).



the underlying climate data and research.<sup>32</sup> Public confusion from the incident, however, still persists today. Indeed, the emails are, apparently, a reason why the new President of the United States says he questions the science behind climate change.<sup>33</sup>

The deliberative process privilege protects government scientists' correspondence and non-final drafts from becoming part of a similar misinformation campaign in the future.

### **C. Protecting Such Materials Does Not Undermine Transparency.**

Notwithstanding the need to protect their deliberative preliminary materials from public disclosure, scientists do not seek to isolate their actual work from public vetting. Rather, consistent with standard scientific practice, they typically embrace transparency by publishing their research in peer-reviewed journals and making their data and methodologies available via public databases. *See* AMS Letter, *supra* note 14 (“reporting on research results fully and transparently through the peer-reviewed literature and providing the capability for other scientists to replicate that research ... is a fundamental foundation of the scientific process”). The proper way to test a scientific paper is not by sifting through email correspondence and non-final drafts. Instead, the public can test the accuracy of government science without threatening the deliberative process by independently evaluating and vetting the final results. *See, e.g.,* AAAS et al. Letter, *supra* note 13 (“part of the purpose of placing research into the

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<sup>32</sup> *See, e.g., id.* (collecting investigations); *Myths vs. Facts*, *supra* note 30; Jess Henig, *Some ‘Climategate’ Conclusions*, FactCheck.Org, Apr. 15, 2010, <http://tinyurl.com/28qfqwr>; Editorial, *Closing the Climategate*, 468 *Nature* 345 (Nov. 18, 2010), <http://tinyurl.com/gnl2l3y> (although some hacked emails exhibited “bravado” and “rudeness,” such “robust exchanges were typical in science” and reflective of the sometimes “bruising process” of peer review).

<sup>33</sup> *See, e.g., Donald Trump’s New York Times Interview: Full Transcript*, N.Y. Times (Nov. 23, 2016), <http://tinyurl.com/j3on4f3> (“[Climate change is] a very complex subject. I’m not sure anybody is ever going to really know. ... [T]hey say they have science on one side but then they also have those horrible emails that were sent between the scientists. Where was that, in Geneva or wherever five years ago? Terrible.”).

scholarly record is so other scientists can attempt to replicate, confirm, or refute it”).

Consistent with this practice, the deliberative process privilege does not prevent the disclosure of underlying data in the government’s control where that data would not expose the scientists’ deliberative process. *Compare, e.g., Sw. Ctr. for Biological Diversity v. USDA*, 170 F. Supp. 2d 931, 941 (D. Ariz. 2000) (ordering release of “raw research data,” which “itself does not expose the deliberative process”), *with Chem. Mfrs.*, 600 F. Supp. at 117-19 (exempting preliminary data from release where scientists have not yet completed a final report).<sup>34</sup>

Indeed, this distinction between underlying research data and other, more deliberative materials is reflected in the disclosure rules regarding federally funded research. *See* OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, 64 Fed. Reg. 54,926 (Oct. 8, 1999). Under those rules, federal grant recipients must turn over only “research data,” which is defined as “the recorded factual material commonly accepted in the scientific community as necessary to validate research findings.” *Id.* at 54,930. However, recognizing “the importance of ensuring that [those rules do] not interfere with the traditional scientific process” wherein “scientists need to deliberate over, develop, and pursue alternative approaches in their research,” *id.* at 54,926-54,927 this definition specifically *excludes* “preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues,” *id.* at 54930; *see also Am. Chem. Council, Inc. v. U.S. Dep’t of Health & Human Servs.*, 922 F. Supp. 2d 56, 62 (D.D.C. 2013) (same). In other words, it exempts from compelled disclosure exactly the types of deliberative, predecisional materials at

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<sup>34</sup> Of course, some data may still be exempt from disclosure for other reasons. *See, e.g.,* 5 U.S.C. § 552(b)(6) (exempting “medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”).

issue in this case.<sup>35</sup>

Moreover, as described above, NOAA here complied with all the scientific transparency norms by publicly posting on its website the datasets underlying the Hiatus Paper even before Representative Smith had requested them. *See* Moller Letter, *supra* note 3. And the agency went above and beyond by sending its scientists to explain their methodology and answer questions posed by the congressional committee in person. *See* Dolan Oct. 27 Letter, *supra* note 5. The scientific organizations highlighted NOAA's transparency in their opposition to Smith's subpoena, and "applaud[ed] the open access to data and methodologies that NOAA consistently achieves." AMS Letter, *supra* note 14; *see also* AAAS et al. Letter, *supra* note 13 ("The data and methodology of the paper in question have been publicly shared and discussed directly with committee staff."); UCS Letter, *supra* note 14 ("NOAA made all data and methodology publicly available. Not a shred of evidence of scientific misconduct has surfaced."). Thus, as NOAA noted, if anyone "doubts the integrity of the study," they have all the "tools [they] need[] to commission a competing scientific assessment." Sullivan Nov. 20 Letter, *supra* note 6.

Indeed, as the scientific organizations noted, since the Hiatus Paper's publication "there have been other peer-reviewed research papers published by university scientists and derived from other independent data sources that have also analyzed the climate hiatus." AAAS et al.

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<sup>35</sup> The deliberative process privilege also likely would not prevent disclosure of any outside funding sources for government scientists, or undue influence by other outside parties. *See, e.g.*, Justin Gillis & John Schwartz, *Deeper Ties to Corporate Cash for Doubtful Climate Researcher*, N.Y. Times, Feb. 21, 2015, <http://tinyurl.com/zm772tz> (describing FOIA request which revealed that a government astrophysicist had failed to disclose substantial outside funding). This is because in contrast to communications with non-governmental scientists who participate in formal or informal peer review, *see supra* at 16-17 communications with outside parties who act in their own self-interest are generally not considered privileged or exempt from disclosure under FOIA Exemption 5. *See, e.g.*, *Physicians Comm. for Responsible Med. v. Nat'l Insts. of Health*, 326 F. Supp. 2d 19, 29-30 (D.D.C. 2004).

Letter, *supra* note 13. Some of these papers including one published earlier this month have largely corroborated the Paper's findings that there has been no slowdown in the rate of global warming during the 21st century.<sup>36</sup> Others, meanwhile, have pushed back on some of its conclusions.<sup>37</sup>

"This is the way in which science advances," the scientific organizations explained. AAAS et al., Letter, *supra* note 13. Not through fishing expeditions into scientists' deliberative, confidential correspondence and preliminary drafts.

### **CONCLUSION**

The government's motion for summary judgment should be granted.

Respectfully submitted,

/s/ Kelsi Brown Corkran

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*Counsel for Amici Curiae*

January 27, 2017

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<sup>36</sup> See, e.g., Zeke Hausfather et al., *Assessing Recent Warming Using Instrumentally Homogenous Sea Surface Temperature Records*, 3 *Sci. Advances* (Jan. 2017), <http://tinyurl.com/hetylun>; Bala Rajaratnam et al., *Debunking the Climate Hiatus*, 133 *Climatic Change* 129 (Nov. 2015), <http://tinyurl.com/j9v228x>.

<sup>37</sup> See, e.g., John C. Fyfe et al., *Making Sense of the Early-2000s Warming Slowdown*, 6 *Nature Climate Change* 224 (Feb. 2016).

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-2088 (CRC)
	)	
U.S. DEPARTMENT OF	)	
COMMERCE,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S RESPONSE TO MOTION OF CLIMATE SCIENCE LEGAL DEFENSE  
FUND, AMERICAN METEOROLOGICAL SOCIETY, AND  
UNION OF CONCERNED SCIENTISTS FOR  
LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT**

Plaintiff Judicial Watch, Inc. (“Plaintiff” or “Judicial Watch”) hereby responds to the Motion of Climate Science Legal Defense Fund, American Meteorological Society, and Union of Concerned Scientists (collectively “*Amici*”) for Leave to File Brief as *Amici Curiae* in Support of Defendant U.S. Department of Commerce (“Defendant” or “Commerce”) (“*Amici* Motion”). ECF Doc. No. 18.

MEMORANDUM OF LAW

*Amici*’s proposed brief improperly attacks Plaintiff’s motives for requesting records under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and merely restates legal arguments already asserted in Defendant’s summary judgment motion brief (“Defendant’s Motion”). *Amici*’s proposed brief offers no unique information or perspective that has not, or could not have been, raised by Defendant. *See* Brief of Climate Science Legal Defense Fund, American Meteorological Society, and Union of Concerned Scientists as *Amici Curiae* in Support of Defendant, ECF Doc. No. 18-1 (“*Amici* Brief”); Defendant’s Motion, ECF Doc. No. 16.

“An *amicus curiae*, defined as 'friend of the court,' . . . does not represent the parties but participates only for the benefit of the Court.” *United States v. Microsoft Corp.*, 2002 U.S. Dist. LEXIS 26549, 2002 WL 319366, at \*2 (D.D.C. 2002). While no rule requires that an *amicus* be impartial, the court does consider the presence of partiality with regard to an *amici*'s admittance. *Youming Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136-38 (D.D.C. 2008).

*Amici* asserts that it can “assist the Court in resolving this case by sharing their relevant expertise about the scientific endeavor, first-hand knowledge of how scientists approach their work, and familiarity with how other courts have recently handled similar issues regarding public records requests involving scientific research.” *See Amici Motion* at 1-2. However, *Amici* serve as no “friends of the court”. Rather, the majority of *Amici*'s brief talks about “groups across the political spectrum” using FOIA as a tactic to undermine scientific studies. *Amici Brief* at 2. The bulk of “ideas, arguments, and facts” provided by *Amici* are merely recitations of and speculation about why requests for scientific records from federal and state agencies and academic institutions are made. In fact, *Amici* specifically uses Plaintiff as an example in asserting their position that records requested under FOIA are nothing more than a bullying effort to harass scientists. *Amici Brief* at 8-9. *Amici*'s opinion is very clear from the beginning Plaintiff is allegedly using FOIA to discredit a scientific study, and Defendant should not be required to release the records it is withholding because of Plaintiff's purported motives.

In a December 28, 2015 blog posting, one of the requesting *Amici*, Climate Science Legal Defense Fund, made its opinion and feelings about Plaintiff, and similar public records requests, openly clear they are fighting back. See <https://climatesciencedefensefund.org/2015/12/28/new-lawsuit-over-climate-scientists-emails/> (“FOIA lawsuits for scientists' private communications are an increasingly popular method by groups who seek to intimidate, harass, and try to discredit publicly-funded scientists. Lawsuits across the country are attempting to use FOIA and state law

equivalents to access troves of researchers' private correspondence. But CSLDF has been busy fighting back.”)

The case before the court is a straightforward lawsuit about whether Defendant has satisfied its FOIA obligations. Defendant's motion turns on whether Defendant has properly searched for and produced all responsive, non-exempt records and the propriety of Defendant's deliberative process privilege withholdings pursuant to exemption 5 under FOIA. See 5 U.S.C. § 552. This litigation, and the motion before the court, is not the proper forum for *Amici* to “fight back” with its agenda.

*Amici* assert they have “familiarity with the underlying events that led to this litigation.” *Amici* Motion at 5. However, the underlying event that led to this litigation is Defendant failed to satisfy its FOIA obligation. Proposed *Amici* have no unique knowledge and insight about the purely procedural issues. The “perspective” *Amici* proposes to provide is nothing more than a veiled attack on Plaintiff and its motives for requesting records from a federal agency. Such an attack is not permitted under FOIA. See *Chiquita Brands, Intl, Inc. v. U.S. Sec. & Exch. Comm'n*, 805 F.3d 289, 294 (D.C. Cir. 2015) (“Government agencies must generally release requested records without regard to the identity or motive of the requestor.”)

The purpose of an *amicus* brief is to assist the court. *Amici's* brief adds nothing to the court's analysis and merely restates the same cases highlighted by Defendant or simply presents similar cases whose resulting argument is duplicative of those in Defendant's brief. As a result, *Amici's* brief is inappropriate and unnecessary in this litigation.

Dated: February 10, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

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*Attorneys for Plaintiff*



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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Tuesday, March 7, 2017 8:02 AM  
**To:** Samuel Dixon - NOAA Affiliate; Steven Goodman - NOAA Federal  
**Cc:** Robert Swisher - NOAA Federal; Dennis Morgan - NOAA Federal  
**Subject:** Fwd: OCE I and OCE II: Order on Fees  
**Attachments:** Order on Fee Application.pdf

FYI (b)(5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

. Thoughts?

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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----- Forwarded message -----

**From:** Deanna Harwood - NOAA Federal <[deanna.harwood@noaa.gov](mailto:deanna.harwood@noaa.gov)>  
**Date:** Thu, Mar 2, 2017 at 6:59 PM  
**Subject:** Fwd: OCE I and OCE II: Order on Fees  
**To:** Ana Liza Malabanan <[Ana.Liza.Malabanan@noaa.gov](mailto:Ana.Liza.Malabanan@noaa.gov)>, Barry Thom <[Barry.Thom@noaa.gov](mailto:Barry.Thom@noaa.gov)>, Celeste Leroux - NOAA Federal <[Celeste.Leroux@noaa.gov](mailto:Celeste.Leroux@noaa.gov)>, Gary Stern <[Gary.Stern@noaa.gov](mailto:Gary.Stern@noaa.gov)>, Jerry Hornof <[Jerry.Hornof@noaa.gov](mailto:Jerry.Hornof@noaa.gov)>, John Almeida - NOAA Federal <[john.almeida@noaa.gov](mailto:john.almeida@noaa.gov)>, Judson Feder <[judson.feder@noaa.gov](mailto:judson.feder@noaa.gov)>, Kathryn Kempton <[Kathryn.Kempton@noaa.gov](mailto:Kathryn.Kempton@noaa.gov)>, Kimberly Katzenbarger - NOAA FEDERAL <[kimberly.katzenbarger@noaa.gov](mailto:kimberly.katzenbarger@noaa.gov)>, Kristen Gustafson - NOAA Federal <[kristen.l.gustafson@noaa.gov](mailto:kristen.l.gustafson@noaa.gov)>, Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)>, Nicolle Hill - NOAA Federal <[nicolle.hill@noaa.gov](mailto:nicolle.hill@noaa.gov)>, Samuel Rauch - NOAA Federal <[Samuel.Rauch@noaa.gov](mailto:Samuel.Rauch@noaa.gov)>, Shelby L Mendez <[Shelby.L.Mendez@noaa.gov](mailto:Shelby.L.Mendez@noaa.gov)>, Vanatta Alecia <[Alecia.Vanatta@noaa.gov](mailto:Alecia.Vanatta@noaa.gov)>, Scott Rumsey <[Scott.Rumsey@noaa.gov](mailto:Scott.Rumsey@noaa.gov)>

**Attorney-Client Privileged**

(b)(5)

[REDACTED]

[Deanna Harwood](#)  
Deputy Chief, Southwest Section  
NOAA, Office of General Counsel  
U.S. Department of Commerce

----- Forwarded message -----

From: **Wall, Robin (USACAN)** <[Robin.Wall@usdoj.gov](mailto:Robin.Wall@usdoj.gov)>

Date: Thu, Mar 2, 2017 at 2:32 PM

Subject: OCE I and OCE II: Order on Fees

To: Deanna Harwood - NOAA Federal <[deanna.harwood@noaa.gov](mailto:deanna.harwood@noaa.gov)>, "Lee, Helen" <[HLee@doc.gov](mailto:HLee@doc.gov)>

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[Redacted text block]

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(b)(5)

Please feel free to call if you want to discuss the order and next steps.

Robin M. Wall

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United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OUR CHILDREN’S EARTH  
FOUNDATION, et al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES  
SERVICE, et al.,

Defendants.

Case No. [14-cv-01130-WHO](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION FOR  
ATTORNEY’S FEES**

Re: Dkt. No. 82

Plaintiffs seek an award of \$723,202.74 in attorney’s fees and \$3,190.39 in costs for succeeding in part on their consolidated lawsuits filed under the Freedom of Information Act (FOIA) against the federal agency defendants. Dkt. 94. I conclude that plaintiffs are eligible and entitled to an award of attorney’s fees, but at a significantly reduced amount in light of requested hourly rates that are not adequately supported and unnecessary or excessive time billed.

**BACKGROUND**

Plaintiffs Our Children’s Earth Foundation and Ecological Rights Foundation are Bay Area non-profits dedicated to protecting the environment.<sup>1</sup> Plaintiffs sent a series of nine FOIA requests to National Marine Fisheries Service (NMFS) starting in May 2013. The requests concerned NMFS’s oversight of activities by Stanford University and the impact of those activities on the Central California Coast steelhead. Plaintiffs were concerned with Stanford University’s operation of Searsville Lake and Dam, which were built in 1892, and other related water diversions and infrastructure that Stanford uses to provide non-potable water for its campus. Plaintiffs believe that “Lake Water System” adversely affects the steelhead by reducing water

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<sup>1</sup> See Declaration of Annaliese Beaman (Dkt. No. 83) ¶ 2. Plaintiffs are referred to collectively as OCE.

1 flows in San Francisquito Creek and its tributaries and cutting the steelhead off from access to  
 2 upstream spawning habitat. *See* Judge Conti’s March 30, 2015 Order [Dkt. No. 59] at 3-4.  
 3 Plaintiffs attempted to enjoin Stanford’s activities in a separate lawsuit, *Our Children’s Earth*  
 4 *Foundation v. Stanford Univ.*, No. 13-cv-00402-JSW (N.D. Cal.).<sup>2</sup>

5 In response to what OCE contends were deficient responses to its first four FOIA requests,  
 6 plaintiffs filed their first lawsuit (*OCE I*) in April 2014. In that lawsuit, OCE challenged whether  
 7 NMFS’s responses to plaintiffs’ FOIA requests were adequate, whether NMFS had a pattern and  
 8 practice of tardy and incomplete responses, and whether FWS failed to meet its internal deadline  
 9 to respond to NMFS.<sup>3</sup> Plaintiffs filed their second lawsuit (*OCE II*) in September 2014, based on  
 10 the tardy or otherwise deficient responses to their second set of FOIA Requests (FOIA requests 5 -  
 11 8). In *OCE II* plaintiffs alleged that NMFS failed to adequately respond to their additional FOIA  
 12 requests, and reiterated their argument that NMFS had a pattern and practice of tardy and  
 13 incomplete responses to FOIA requests.<sup>4</sup> The lawsuits were related by Judge Conti.<sup>5</sup>

14 In *OCE I*, the parties moved for summary judgment. Plaintiffs argued that: (1) NMFS  
 15 failed to adequately describe its searches or conducted an inadequate search and withheld  
 16 documents without sufficient justification; (ii) they were entitled to a declaratory judgment that  
 17 NMFS violated FOIA’s deadlines in responding to their four requests and in three related internal  
 18 appeals, and FWS violated FOIA’s deadlines in responding to a referral of documents from  
 19 NMFS; and (iii) the alleged violations of the FOIA are a part of a pattern and practice of non-

20 \_\_\_\_\_  
 21 <sup>2</sup> The government contends that plaintiffs’ first FOIA request was filed “as discovery” for the  
 22 Stanford lawsuit. *Oppo*. 6.

23 <sup>3</sup> A second defendant in *OCE I*, Fisheries and Wildlife Service (FWS) was alleged to have failed  
 24 to respond to NMFS’s request that FWS review and release under the FOIA portions of FWS’s  
 25 documents that NMFS had in its possession.

26 <sup>4</sup> The Army Corps of Engineers (Corps) was also named as a defendant in *OCE II*, as having failed  
 27 to appropriately respond to plaintiffs’ FOIA requests.

28 <sup>5</sup> Plaintiffs filed a third lawsuit (*OCE III*) in June 2015, which was also related to 14-1130. In  
*OCE III*, plaintiffs asserted that NMFS had failed to provide a timely final decision in response to  
 OCE’s ninth FOIA request (from April 2015) regarding more “up-to-date information” on the  
 same subject matter. Judge Conti, on plaintiffs’ request and without opposition from NMFS,  
 dismissed *OCE III* as “prudentially moot.” October 2015 SJ Order at 17-18. Plaintiffs are not  
 seeking fees or costs related to that lawsuit. *Mot.* 4, n.1.

1 compliance with the FOIA's mandates, so the Court should enjoin NMFS and order it to comply  
2 with its FOIA obligations. March 30, 2015 Order at 6-7. The government opposed those  
3 arguments.

4 In an Order dated March 30, 2015 [Dkt. No. 59, Case No. 14-1130], Judge Conti: (i) ruled  
5 that NMFS failed to conduct adequate searches in response to OCE's first and third FOIA  
6 requests;<sup>6</sup> (ii) held in abeyance the determination as to whether NMFS adequately invoked FOIA  
7 Exemption (b)(6) to withhold names and contact information from responsive documents pending  
8 further supplementation of the factual record by NMFS (concerning the privacy concerns that  
9 would be implicated by release of that information); (iii) affirmed in part the withholding of some  
10 attorney-client documents, but concluded that NMFS had not met its burden to explain why  
11 certain portions of documents did not contain segregable and releasable information or why one  
12 specific document was withheld as attorney-client privileged and, therefore, held in abeyance the  
13 determination as to NMFS's withholding of those documents was appropriate; and (iv) granted  
14 plaintiffs' request for a declaratory judgment that NMFS failed to comply with the statutorily  
15 mandated response and appeal deadlines with respect to the four FOIA requests at issue. *Id.* at 8-  
16 26.<sup>7</sup> Judge Conti denied plaintiffs' motion and granted defendants' motion regarding  
17 withholdings, redactions, and timeliness. *Id.* at 28.<sup>8</sup>

18 NMFS then provided additional information to the Court concerning its withholdings and  
19 redactions, and plaintiffs submitted responses regarding the same.<sup>9</sup> In an Order dated July 20,

20 \_\_\_\_\_  
21 <sup>6</sup> Judge Conti granted plaintiffs' motion on the adequacy of the search as to the first and third  
22 FOIA requests, and granted defendants' motion as to the adequacy of the searches in response to  
the second and fourth requests. *Id.* at 12.

23 <sup>7</sup> Judge Conti, however, expressly did not reach the question of whether plaintiffs had proven that  
24 NMFS had a pattern and practice of untimely responses, because "[t]he pattern and practice and  
25 cutoff date allegations are repeated, with a fuller evidentiary record, in cross-motions for  
summary judgment pending in" *OCE II*, and the Judge intended to address them in a subsequent  
order. *Id.* at 22.

26 <sup>8</sup> Plaintiffs point out that in preparing its cross-motion for summary judgment in *OCE I*, NMFS  
27 uncovered two additional responsive documents and disclosed them in full. *See* Declaration of  
Gary Stern [Dkt. No. 41, 14-1130] ¶ 17.

28 <sup>9</sup> As part of its supplemental briefing, NMFS decided to release two previously withheld in full  
documents and to release three redacted documents that had previously been withheld in full. It

1 2015, Judge Conti addressed the issues remaining from *OCE I*, as well as the cross-motions filed  
 2 in *OCE II*. Judge Conti characterized the remaining arguments made by plaintiffs as: (i) NMFS  
 3 failed to adequately search for records responsive to two of its requests; (ii) NMFS improperly  
 4 withheld or overly redacted responsive records under two FOIA exemptions; (iii) NMFS was  
 5 defying Department of Commerce (of which NMFS is a part) regulations by cutting off their  
 6 search for responsive records at the date the FOIA request is received rather than the date the  
 7 search begins; and (iv) the request for a declaratory judgment that NMFS's and the Corps'  
 8 responses to plaintiffs' requests were untimely, and grant declaratory and injunctive relief to  
 9 remedy NMFS's alleged pattern and practice of FOIA violations. July 20, 2015 Order [Dkt. No.  
 10 70, Case No. 14-1130] at 3-4. NMFS and the Corps cross-moved for summary judgment, arguing  
 11 that their responses were adequate and declaratory and injunctive relief were unwarranted. *Id.* at  
 12 4.<sup>10</sup>

13 As to the substance of the adequacy of NMFS's responses, Judge Conti found that: (i)  
 14 NMFS had failed to provide sufficient information for the court to determine whether NMFS  
 15 conducted an adequate search, ordered NMFS to supplement the factual record, and held in  
 16 abeyance the issue of summary judgment on NMFS's search; (ii) NMFS had properly withheld  
 17 draft biological opinions under FOIA Exemption (b)(5), but did not adequately justify its  
 18 withholding or non-redaction of an email under (b)(5), and as such NMFS was required to  
 19 supplement the factual record to justify its withholding and non-redaction, and the court held in  
 20 abeyance summary judgment on the withholding of that document; and (iii) granted summary  
 21 judgment to NMFS withholding under FOIA Exemption (b)(7) of names in a report. *Id.* 5-17.

22 As to the issue of untimely responses and pattern and practice of delay and improper cutoff  
 23 dates, Judge Conti: (i) granted plaintiffs' request for declaratory relief that NMFS violated its  
 24 statutory duties with respect to the timeliness of its responses and appeals, but declined to enter

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25  
 26 also stated it was conducting a supplemental search for documents responsive to OCE's first and  
 27 third FOIA requests. Dkt. No. 60 at 4-5; *see also* Dkt. No. 59 at 19, 21.

28 <sup>10</sup> In its cross-motion pleadings in *OCE II*, NMFS decided "upon additional review" to release an  
 additional eleven documents in part and one in full. Dkt. No. 19 (14-4365) ¶ 28; Dkt. No. 18-1  
 (14-4365) ¶ 5.

1 declaratory relief against the Corps; (ii) determined that further facts were needed to address  
 2 plaintiffs' contention that NMFS was using an improper cutoff date when beginning its search for  
 3 documents and ordered supplemental briefing; and (iii) ordered plaintiffs to submit supplemental  
 4 briefing on the status of their pending FOIA requests as to the pattern and practice of delay claim.  
 5 *Id.* at 17-25. Finally, as to plaintiffs' request for injunctive relief, the Judge ordered NMFS "to  
 6 comply with FOIA and its deadlines, due to the Court's finding that the Fisheries Service has  
 7 failed to do so previously and the potential that these offenses might continue. Yet the Court,  
 8 having so ordered and having GRANTED declaratory relief, DENIES WITHOUT PREJUDICE  
 9 further injunctive relief at this time," in part because of "the fact that Plaintiffs appear to be  
 10 repeatedly making large requests in sufficiently rapid succession that the Fisheries Service is  
 11 unable to complete its response to one request before receiving a second" and recognizing  
 12 evidence of good faith and efforts on the part of NMFS to comply with its deadlines and  
 13 significantly improve its future performance. *Id.* at 26-27. The Court held in abeyance the  
 14 motions regarding NMFS's exemption claims, adequacy challenge, cutoff dates, and pattern and  
 15 practice allegations pending the supplementation of the record. *Id.* at 29-30.<sup>11</sup>

16 Following that round of supplementation, in an October 21, 2015 Order, Judge Conti  
 17 addressed the remaining issues and ruled that: (i) NMFS's declarants had addressed the concerns  
 18 over the adequacy of the search and granted NMFS summary judgment on that issue; (ii)  
 19 determined that one record had been appropriately withheld under (b)(5) based on a supplemental  
 20 *Vaughn* index and granted NMFS summary judgment on its withholdings under (b)(5); (iii) found  
 21 that NMFS cured its showing of non-segregability of withheld information based on its  
 22 supplemental *Vaughn* index, except as to one document,<sup>12</sup> and granted NMFS summary judgment  
 23 on segregability as to all documents except that one; and (iv) granted summary judgment to NMFS

24  
 25 <sup>11</sup> As part of its supplemental briefing, NMFS decided to release a redacted document that had  
 26 been withheld in full. Dkt. No. 27 (14-4365) at 2. NMFS also explained its search cut-off policy  
 27 (which OCE contends was "new"), requiring that if one or more subject-matter expert are required  
 28 to search for documents, the date each expert starts his/her search establishes the cut-off date.  
 Dkt. No. 27-4 (14-4365), ¶18(b).

<sup>12</sup> The Court ordered NMFS to produce the document at issue, or explain further why it should be  
 withheld. October 21 2015 Order at 15. NMFS decided to produce the document.



1 based on additional information as to the cutoff dates used for searches. October 21, 2015 Order  
2 [Dkt. No 72, 14-1130] at 4-17.

3 As to the pattern and practice of delay claim, Judge Conti reviewed the evidence and found  
4 that NMFS was curing its processing and response problems and backlog, and therefore denied  
5 injunctive relief. However, in light of the “unmistakable history” of untimeliness and delay, Judge  
6 Conti granted declaratory relief to plaintiffs, concluding that: “(1) that the Fisheries Service has  
7 previously been engaged in a pattern-and-practice of failure to meet FOIA deadlines; (2) that the  
8 Fisheries Service has previously provided responses that were frequently and unreasonably  
9 delayed; (3) that due to these delays the Fisheries Service effectively provided no ability to FOIA  
10 requestors to anticipate when data might be provided; and (4) that due to these delays information  
11 was often provided after a long enough period of time that the data could be out-of-date,  
12 effectively negating its value and effectuating a complete denial of information.” *Id.* at 20-21. He  
13 also granted “limited” injunctive relief to plaintiffs, requiring NMFS to provide any outstanding  
14 production in response to certain of plaintiffs’ requests within 30 days. *Id.* at 21. Any further  
15 injunctive relief was denied without prejudice, but he required NMFS to show cause as to how it  
16 was curing its prior violations and intended to continue its response-time improvements going  
17 forward. *Id.* at 22.

18 After the case was reassigned to me in November 2015, I addressed whether any issues  
19 remained to be decided following Judge Conti’s October and November 2015 Orders as well as  
20 the supplemental briefing filed by the parties regarding NMFS’s efforts to cure its past timeliness  
21 violations and ensure those would not occur in the future. In an order dated January 20, 2016, I  
22 determined that Judge Conti had resolved all pending issues, and concluded that the evidence  
23 regarding NMFS’s substantial reduction of its FOIA-response backlog and the “technical,  
24 administrative, and staffing improvements” NMFS had implemented to ensure timely processing  
25 of FOIA requests on a forward-going basis meant that continuing injunctive relief was not  
26 warranted. January 20, 2016 Order [Dkt. No. 75]. A stipulated judgment was entered on February  
27 16, 2016. Plaintiffs now seek over \$700,000 in attorney’s fees for the hours they spent litigating  
28 *OCE I* and *OCE II*, as well as costs. Defendants oppose plaintiffs’ entitlement to any fees, and

1 challenge the reasonableness of the amount sought.

## 2 LEGAL STANDARD

3 FOIA authorizes courts to “assess against the United States reasonable attorney fees and  
4 other litigation costs reasonably incurred in any case under this section in which the complainant  
5 has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E). This provision “has as its fundamental  
6 purpose the facilitation of citizen access to the courts to vindicate the public’s statutory rights,” as  
7 the fees and costs of bringing suit could otherwise “present a virtually insurmountable barrier  
8 which [would] ba[r] the average person from forcing governmental compliance with the law.”  
9 *Exner v. F.B.I.*, 443 F. Supp. 1349, 1352 (S.D. Cal. 1978).

10 A court may grant an award of attorney’s fees under 5 U.S.C. § 552(a)(4)(E) where the  
11 plaintiff establishes that it is both eligible for and entitled to an award. *See Church of Scientology*  
12 *of California v. U.S. Postal Serv.*, 700 F.2d 486, 489 (9th Cir. 1983); *Rosenfeld v. U.S. Dep’t of*  
13 *Justice*, 903 F. Supp. 2d 859, 865 (N.D. Cal. 2012). To be eligible for an award, the plaintiff must  
14 show that “(1) the filing of the action could reasonably have been regarded as *necessary* to obtain  
15 the information; and (2) the filing of the action had a *substantial causative* effect on the delivery  
16 of the information.” *Church of Scientology*, 700 F.2d at 489 (emphasis in original).

17 If the court determines that the plaintiff is eligible for attorney’s fees, the court may then,  
18 “in the exercise of its discretion, determine that [it] is *entitled* to an award of attorney’s fees.” *Id.*  
19 at 492 (emphasis in original). In making this determination, courts consider “(1) the benefit to the  
20 public, if any, deriving from the case; (2) the commercial benefit to the complainant; (3) the nature  
21 of the complainant’s interest in the records sought; and (4) whether the government’s withholding  
22 of the records sought had a reasonable basis in law.” *Id.*; *accord Long v. U.S. I.R.S.*, 932 F.2d  
23 1309, 1313 (9th Cir. 1991). “These four criteria are not exhaustive, however, and the court may  
24 take into consideration whatever factors it deems relevant in determining whether an award of  
25 attorney’s fees is appropriate.” *Long*, 932 F.2d at 1313 (internal quotation marks omitted). Once  
26 eligibility is established, “[t]he decision to award attorney’s fees is left to the sound discretion of  
27 the trial court.” *Church of Scientology*, 700 F.2d at 492.

**DISCUSSION**

**I. WHETHER PLAINTIFFS SUBSTANTIALLY PREVAILED AND ARE ELIGIBLE FOR ATTORNEY'S FEES**

The government does not contest that plaintiffs substantially prevailed in *OCE I*, but argues that plaintiffs were not successful in *OCE II*, and therefore are not eligible for fees for that portion of the litigation. As noted above, in his July and October 2015 orders, Judge Conti addressed the claims asserted in *OCE II* (as well as issues asserted in *OCE I*). In the July Order, Judge Conti granted plaintiffs' request for a declaratory judgment that NMFS's responses to plaintiffs' FOIA requests 5-8 were untimely. July 2015 Order at 20-21. That by itself constitutes "success," albeit on a discrete issue. *See Hajro v. United States Citizenship & Immigration Servs.*, 900 F. Supp. 2d 1034, 1045 (N.D. Cal. 2012) (prevailing on summary judgment and obtaining injunctive relief on claim that defendant's responses were untimely constitutes substantial success), *reversed on other grounds* by 811 F.3d 1086, 1092 (9th Cir. 2016); *Or. Nat. Desert Ass'n v. Gutierrez*, 442 F. Supp. 2d 1096, 1098 (D. Or. 2006) (determination that agency failed to provide a timely response sufficient to create entitlement to fees), *aff'd in pertinent part, rev'd in part on other grounds* by *Or. Nat. Desert Ass'n v. Locke*, 572 F.3d 610 (9th Cir. 2009).

After initially finding that NMFS provided insufficient information in its declarations and *Vaughn* index to demonstrate the adequacy of some of its searches and withholdings, when NMFS provided supplemental briefing and declarations Judge Conti concluded that the searches were adequate and the withholdings justified (except as to one document under Exemption (b)(5), which NMFS decided to release). In addition, after receiving plaintiffs' summary judgment motion and while preparing its cross-motion pleadings in *OCE II*, NMFS decided "upon additional review" to release an additional eleven documents in part and one in full. Dkt. No. 19 (14-4365) ¶ 28; Dkt. No. 18-1 (14-4365) ¶ 5. Following the next round of supplemental briefing, NMFS decided to release in part yet another document that had been withheld. Dkt. No. 27 (14-4365) at 2. The evidentiary record supports plaintiffs' contention that these documents were produced as a result of *OCE II*.<sup>13</sup> Plaintiffs, therefore, prevailed, on another discrete portion of their litigation in

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<sup>13</sup> NMFS argues that its responses to Requests 5 through 8 were not produced as a result of the

1 securing these supplemental productions under a catalyst theory. *See, e.g., Dorsen v. United States*  
 2 *SEC*, 15 F. Supp. 3d 112, 120 (D.D.C. 2014) (plaintiff prevailed where FOIA suit prompted  
 3 additional or speedier release of documents); *Judicial Watch, Inc. v. United States DOJ*, 878 F.  
 4 Supp. 2d 225, 232 (D.D.C. 2012) (catalyst theory satisfied where after a final agency response and  
 5 commencement of lawsuit, additional documents were produced).

6 More importantly, in light of the “unmistakable history” of “unreasonable” untimeliness  
 7 and delay, Judge Conti granted plaintiffs’ request for a declaratory judgment that NMFS failed to  
 8 provide them with timely responses and had a past pattern and practice of untimely responses.  
 9 That judgment, along with the limited injunctive relief (requiring NMFS to respond to plaintiffs’  
 10 then-pending FOIA requests by a date certain), confers prevailing party status on plaintiffs as well.  
 11 The government in an attempt to avoid fees for *OCE II* argues that plaintiffs did not secure any  
 12 relief in *OCE II* beyond what they would have been entitled to given the claims asserted in *OCE I*.  
 13 *Oppo*. 7-8. However, Judge Conti specifically held the pattern and practice claim in abeyance in  
 14 *OCE I* to determine it on the more complete evidentiary record presented in *OCE II*. *OCE II*,  
 15 therefore, was a necessary part to the Court’s eventual determination.

16 Similarly, the fact that further, more wide-spread injunctive relief was not granted in  
 17 response to the allegations raised in both *OCE I* and *OCE II* in the October 2015 or January 2016  
 18 Orders was due to the strong showing NMFS made on the steps the agency had taken and was  
 19 continuing to take to extinguish its backlog and implement policies and practices to ensure timely  
 20 responses in the future. The government spends much time in its brief and declarations attempting  
 21 to show that the new policies and practices NMFS implemented in order to reduce the backlog  
 22 discussed by Judge Conti and myself in the October 2015 and January 2016 Orders were not  
 23 conceived in order to respond to, or spurred on by, plaintiffs’ litigation but were underway prior to  
 24 the filing of *OCE I* and *OCE II*. *See, e.g., Oppo*. 9-10. Plaintiffs counter that argument by citing  
 25 to notes and other documents produced by NMFS staff showing that efforts to reduce the backlog

26  
 27 litigation, and cites testimony showing that NMFS began work processing and responding to these  
 28 requests before the *OCE II* complaint was filed. *See Hornof Decl.* ¶ 7. NMFS also argues that the  
 three FOIA requests subject to Judge Conti’s limited order of injunctive relief, were also being  
 processed and responses “underway” before the October 21, 2015 Order. *Id.* ¶¶ 10-11.

1 were just being formulated in June 2015 and were implemented in part to avoid litigation, like the  
2 suits at issue which were the only ones pending at the relevant time. *See, e.g.*, Reply 3-4.

3 However, in order to determine that plaintiffs are eligible for an award of attorney's fees, I  
4 need not resolve this factual dispute. That plaintiffs secured additional documents from NMFS  
5 after *OCE II* was filed and after NMFS took a closer look at its searches and withholdings and,  
6 more importantly, secured another declaratory judgment recognizing that the agency failed to  
7 provide timely responses, had engaged in a pattern and practice of tardy responses, and secured  
8 limited injunctive relief as to then-pending but not sued upon FOIA requests, is success significant  
9 enough to establish plaintiffs' eligibility for fees.<sup>14</sup>

10 In sum, plaintiffs were the prevailing parties on significant portions of both *OCE I* and  
11 *OCE II* and are eligible for an award of attorney's fees and costs.<sup>15</sup> The next step is to determine  
12 if they are entitled to them.

## 13 **II. WHETHER PLAINTIFFS ARE ENTITLED TO ATTORNEY'S FEES**

14 The factors courts consider in determining whether a plaintiff is entitled to attorney's fees  
15 include "(1) the benefit to the public, if any, deriving from the case; (2) the commercial benefit to  
16 the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether  
17 the government's withholding of the records sought had a reasonable basis in law." *Church of*

18 \_\_\_\_\_  
19 <sup>14</sup> That said, the evidence on the whole indicates that NMFS took more concrete, specific, and  
20 immediate steps following Judge Conti's Orders to extinguish its backlog and commit additional  
21 resources to speeding up its response times than the agency might have taken but-for plaintiffs'  
22 suits.

23 <sup>15</sup> Plaintiffs repeatedly imply that they were successful on their improper cut-off date challenges,  
24 arguing that their lawsuits were the catalyst for NMFS's new cut-off date policy. Mot. at 8, 10.  
25 The improper cut-off date issue was raised but not decided by Judge Conti in his March 30 Order,  
26 because the issue was also raised but supported by a fuller factual record in the *OCE II* summary  
27 judgment briefing that was pending. In his July Order, Judge Conti determined that, at most, a  
28 factual dispute existed, and again held the issue in abeyance for supplemental responses. In his  
October Order, Judge Conti found that plaintiffs had not established that NMFS used improper  
cut-off dates, and instead granted summary judgment to NMFS on plaintiffs' improper search cut-  
off date claim as to plaintiffs' *own* FOIA requests. October Order at 17. Later in the October  
Order, Judge Conti recognized that the "NMFS West Coast Region appears to have an updated  
process in place, using modern software, additional personnel, and policy changes (e.g., how the  
cut-off date changes where there are multiple SMEs assigned) to speed up its process. *See* Supp.  
Malabanan Decl. ¶¶ 15-18." *Id.* at 18. Judge Conti, however, never reached the issue of whether  
these lawsuits were the catalyst for NMFS's new, updated, or clarified policy with respect to  
search cut-off dates.

1 *Scientology*, 700 F.2d at 489. I will discuss each in turn.

2 **A. Benefit to the Public**

3 In considering the public benefit factor, courts consider “the degree of dissemination and  
4 the likely public impact that might result from disclosure.” *Church of Scientology*, 700 F.2d at  
5 493. The factor generally weighs in favor of an award where the information is broadly  
6 disseminated to the public. *See, e.g., Electronic Frontier Foundation v. Office of Dir. of Nat.*  
7 *Intelligence*, No. 07-cv-05278-SI, 2008 WL 2331959, at \*3 (N.D. Cal. June 4, 2008) (finding that  
8 the public benefit factor was satisfied where the plaintiff “immediately posted the requested  
9 information on its website” and “created press releases for public access”). Even where the degree  
10 of dissemination is limited, or where the level of public interest in the requested information itself  
11 is minimal, the public benefit factor may still favor an award “as long as there is a public benefit  
12 from the fact of . . . disclosure.” *O’Neill, Lysaght & Sun v. D.E.A.*, 951 F. Supp. 1413, 1423 (C.D.  
13 Cal. 1996).

14 Courts in this circuit have found a public benefit favoring an award, despite an absence of  
15 broad dissemination or a significant level of public interest in the requested information, where (1)  
16 the case “establishe[d] that the government may not withhold certain information pursuant to a  
17 particular FOIA exemption,” *Church of Scientology*, 700 F.2d at 493; (2) the plaintiffs were  
18 environmental nonprofits whose purpose was “to oversee and enforce compliance with the [Clean  
19 Air Act]” and the requested information was “being used to inform [the plaintiffs’] ongoing  
20 oversight and enforcement efforts,” *The Sierra Club v. United States Env’tl. Prot. Agency*, 75 F.  
21 Supp. 3d 1125, 1143-44 (N.D. Cal. 2014); and (3) the requested documents revealed a “long  
22 history of abuse” by a paid DEA informant and “expos[ed] the implications of the government  
23 dealing with untrustworthy paid informants.” *O’Neill*, 951 F. Supp. at 1423-24.

24 Plaintiffs argue that just like the plaintiffs in *Sierra Club* they “utilized the documents  
25 to advance their efforts to promote compliance with environmental laws intended to broadly  
26 benefit the public interest environmental protection. Specifically, they utilized the documents to  
27 organize public support for measures designed to persuade Stanford and NMFS to do more to  
28 protect a threatened fish species and to develop ESA citizen suits claims aiming to help the



1 survival and recovery of this threatened species.” Beaman Decl. ¶¶ 6-8; Mot. 15. Plaintiffs also  
2 disseminated the information they secured to their members, the press, and the public through  
3 messages, website postings, press releases, and interviews. Beaman Decl. ¶¶ 6-8.

4 As NMFS points out, it is unclear what role in that public outreach (if any) the information  
5 actually secured by OCE as a direct result of the filing of these lawsuits or Judge Conti’s Orders  
6 played. Beaman’s declaration is not specific on that point. *See, e.g., Cotton v. Heyman*, 63 F.3d  
7 1115, 1120 (when evaluating the public benefit prong, the court must “evaluate the specific  
8 documents at issue in the case at hand”). NMFS does not argue (or show by declaration) that the  
9 information produced to OCE after the inception of the suits or Judge Conti’s Orders issued was  
10 so ministerial or obscure that it could not have supported plaintiffs’ public interest and public  
11 disclosure goals. The Beaman declaration, while not specifically focused on documents produced  
12 as a result of this litigation, persuasively explains how the documents OCE received through its  
13 FOIA requests and its litigation play a significant role in OCE’s mission to inform the public  
14 about the activities of Stanford and the Central California Coast steelhead. Dkt. Nos. 83, 96.

15 In addition, this lawsuit effectively and publicly disclosed NMFS’s history of untimely  
16 responses and significant backlog as well as the steps NMFS was undertaking to cure those  
17 issues. That shed important light about the agency’s non-compliance with its duty under FOIA, a  
18 situation Judge Conti repeatedly referred to as “clear, undisputed, and troubling.” March 30, 2015  
19 Order at 24; *see also* July 20, 2015 Order at 19 (“In short, even though the Fisheries Service does  
20 not take the FOIA’s deadlines seriously, ‘[t]here can be no doubt that Congress [did]’”). Finally,  
21 plaintiffs secured a significant, contested legal ruling from Judge Conti: that FOIA allows both  
22 declaratory judgment and injunctive relief as remedies for untimely responses. NMFS vigorously  
23 argued that the only available remedy for a violation under FOIA was an order requiring  
24 production of withheld documents; a position that was soundly rejected by Judge Conti. March  
25 30, 2015 Order at 24-26; July 20, 2015 Order at 19-21.

26 On this record, plaintiffs have shown that this litigation through the information released  
27 and the legal principles established conferred a significant benefit on the public.  
28

**B. Commercial Benefit to the Complainant/Nature of Plaintiffs' Interests**

The second and third factors are “the commercial benefit to the complainant” and “the nature of the complainant’s interest in the records sought.” *Church of Scientology*, 700 F.2d at 492. Courts regularly consider these factors together. *See, e.g., id.* at 494; *Am. Small Bus. League v. U.S. Small Bus. Admin.*, No. 08-cv-00829-MHP, 2009 WL 1011632, at \*3 (N.D. Cal. Apr. 15, 2009); *Electronic Frontier Foundation*, 2008 WL 2331959, at \*3.

As a general matter, if a “commercial benefit will inure to the plaintiff from the information,” or if the plaintiff “intends to protect a private interest” through the FOIA litigation, then “an award of attorney’s fees is not recoverable.” *Church of Scientology*, 700 F.2d at 494. On the other hand, where the plaintiff “is indigent or a nonprofit public interest group, an award of attorney’s fees furthers the FOIA policy of expanding access to government information.” *Id.* The Ninth Circuit has instructed that, pursuant to the second and third factors, a court “should generally award fees if the complainant’s interest in the information sought was scholarly or journalistic or public-oriented,” but should not do so “if his interest was of a frivolous or purely commercial nature.” *Long*, 932 F.2d at 1316.

Plaintiffs argue that their non-profit status combined with the lack of any private commercial interest in the information they secured, strongly favors an award under these factors. *See* Beaman Decl. ¶¶ 1, 6-8. The government counters that contrary to plaintiffs’ current assertion that their goal in *OCE I* and *OCE II* was to force NMFS to provide more timely and fulsome responses to their and others’ FOIA requests, the real purpose of these lawsuits was to force NMFS to produce documents that plaintiffs could and did use in their suit against Stanford University. Declaration of Robin M. Wall [Dkt. No. 92-1], Ex. L (“Stanford Summary Judgment Papers,” noting that some of the FOIA production was used on a motion to compel and on a motion for summary judgment in the Stanford case). That purpose, according to the government, is a private one that does not make plaintiffs entitled to fees. *Oppo*. 11-13.

The cases relied on by NMFS considered private litigants who used FOIA to secure evidence in support of their private lawsuits. *See Hersh & Hersh v. U.S. Dept. of Health and Human Services*, No. 06-04234-PJH, 2008 U.S. Dist. LEXIS 110977, at \*7 (N.D. Cal. July 9,



1 2008) (denying an award of attorney’s fees where “plaintiff undertook this FOIA request for  
2 decidedly commercial purposes” when plaintiff was litigating private lawsuit against a defendant  
3 regarding defective medical devices and plaintiff failed to secure disclosure of the “vast majority”  
4 of documents it sought); *Ellis v. United States*, 941 F. Supp. 1068, 1078 (D. Utah 1996) (denying  
5 fees where documents sought for assistance in private tort suit, because while documents produced  
6 under FOIA created “some slight public benefit in bringing the government into compliance with  
7 FOIA and providing information of general interest to the public, the disclosure of the records did  
8 not add to the fund of information necessary to make important political choices”).<sup>16</sup> They do not  
9 address the situation here, where non-profit environmental advocacy organizations bring suit  
10 under FOIA as part of their ongoing efforts to shed light on how an agency is (or is not) protecting  
11 the environment, albeit with respect to a specific project.

12 Moreover, while plaintiffs were undoubtedly motivated in some part to secure documents  
13 from NMFS in order to assist their litigation against Stanford, there was a significant and separate  
14 public benefit sought and secured by plaintiffs shedding light on the actions of NMFS (as  
15 opposed to the actions of Stanford) in carrying out its agency duties and on its handling of  
16 plaintiffs’ and others’ FOIA requests.<sup>17</sup>

17 These factors weigh in favor of plaintiffs’ entitlement to fees.  
18

19  
20 <sup>16</sup> I recognize that the court in *Sierra Club v. United States EPA*, 75 F. Supp. 3d 1125, 1144 (N.D.  
21 Cal. 2014) rejected an agency’s argument that a non-profit environmental group plaintiff had a  
22 commercial interest in the FOIA litigation because they intended to bring environmental litigation,  
in part because “Plaintiffs were not pursuing a separate private lawsuit against Luminant at the  
time they initiated the FOIA request.” The court, therefore, did not directly reach the issue raised  
here.

23 <sup>17</sup> NMFS’s other cases are inapposite, as they do not address whether use of documents secured  
24 through FOIA in other litigation equals a “commercial” interest in the FOIA litigation, but stand  
25 for the proposition that having a personal interest in the records sought does not increase the  
26 access to those records under FOIA. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143  
27 n.10 (1975) (“Sears’ rights under the Act are neither increased nor decreased by reason of the fact  
28 that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the  
average member of the public. The Act is fundamentally designed to inform the public about  
agency action and not to benefit private litigants.”); *Shannahan v. IRS*, 672 F.3d 1142, 1151 (9th  
Cir. 2012) (requestors’ interest in IRS documents about themselves to use in their civil tax suit  
does not negate applicability of FOIA exemptions preventing disclosure).

**C. Reasonable Basis in Law**

The fourth factor is “whether the government’s withholding had a reasonable basis in law”; in other words, whether the government’s actions appeared to have “a colorable basis in law” or instead appeared to be carried out “merely to avoid embarrassment or to frustrate the requester.” *Church of Scientology*, 700 F.2d at 492, 492 n.6; *see also Rosenfeld*, 903 F. Supp. 2d at 870; *Am. Small Bus. League*, 2009 WL 1011632, at \*4. This factor “is not dispositive” and can be outweighed where the other relevant factors favor an award. *Rosenfeld*, 903 F. Supp. 2d at 870 (internal quotation marks omitted); *see also O’Neill*, 951 F. Supp. at 1425 (noting that the reasonable basis in law factor “in particular should not be considered dispositive”). The burden is on the government to demonstrate that its withholding was reasonable. *Sierra Club*, 75 F. Supp. 3d at 1145.

Here, Judge Conti repeatedly found in no uncertain terms that NMFS failed to provide timely responses under FOIA. *See, e.g.*, March 30, 2015 Order at 24 (with respect to NMFS’s violation of FOIA deadlines “the record is clear, undisputed, and troubling .... In short, even though the Fisheries Service does not take the FOIA’s deadlines seriously, ‘[t]here can be no doubt that Congress [did].’”); July 20, 2015 Order at 19 (“The records in both this and the related case show a clear and undisputed breach of this [FOIA response deadline] requirement.”); October 21, 2015 Order at 18-19 (“the Court has received showing [of] an unmistakable history that the Fisheries Service fails to meet its statutory deadlines under FOIA and causes Plaintiffs (and likely others similarly situated) to suffer unpredictable, unreasonable delays.”).<sup>18</sup>

Judge Conti also found that in litigating this case, NMFS repeatedly failed to explain with sufficient detail the adequacy of its searches and the reasons for its withholdings thereby necessitating additional rounds of briefing by the parties and orders by the court.<sup>19</sup> As such, I

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<sup>18</sup> Judge Conti’s repeated use of strong adjectives like “troubling” and “unreasonable” separates this case from those relied on by NMFS where fees were denied because delayed responses were caused by confusion or “bureaucratic difficulty” in handling requests. *Oppo*. at 14.

<sup>19</sup> I recognize that Judge Conti ultimately found that NMFS had conducted adequate searches and appropriately withheld all documents except one. But those conclusions were reached only after multiple rounds of briefing and decision, necessitated by NMFS’s initially deficient declarations and *Vaughn* indexes.

1 conclude that neither NMFS's general responses to the FOIA requests nor its litigation position  
2 before this Court had a reasonable basis in law.

3 In sum, plaintiffs are entitled to an award of attorney's fees. The next step is to determine  
4 the amount owed.

### 5 **III. REASONABLE AMOUNT OF ATTORNEY'S FEES AND COSTS**

6 "[O]nce the court has determined that the plaintiff is both eligible for and entitled to  
7 recover fees, the award must be given and the only room for discretion concerns the  
8 reasonableness of the amount requested." *Long*, 932 F.2d at 1314. In making this determination,  
9 the court must scrutinize the reasonableness of (i) the hourly rates and (ii) the number of hours  
10 claimed. *Id.* at 1313-14. "If these two figures are reasonable, then there is a strong presumption  
11 that their product, the lodestar figure, represents a reasonable award." *Id.* at 1314 (internal  
12 quotation marks omitted). Nevertheless, a court "may authorize an upward or downward  
13 adjustment from the lodestar figure if certain factors relating to the nature and difficulty of the  
14 case overcome this strong presumption and indicate that such an adjustment is necessary." *Id.*

#### 15 **A. Hourly Rate**

16 NMFS argues plaintiffs' hourly rates are excessively high, and that the Court should apply  
17 the hourly rates set forth in the *Laffey* matrix plus locality adjustments, which would result in a  
18 decrease of 22.9% in the requested lodestar. *Oppo.* at 20-22. As I recognized in  
19 *Public.Resource.org v. United States Internal Revenue Serv.*, No. 13-CV-02789-WHO, 2015 WL  
20 9987018, at \*6 (N.D. Cal. Nov. 20, 2015), "[a]bsent some showing that the rates stated in the  
21 matrix are in line with those prevailing in this community . . . I agree [that] that the matrix is not  
22 persuasive evidence of the reasonableness of its requested rates." As in *Public.Resource.org*, I  
23 will not bind plaintiffs to the *Laffey* matrix, especially as statutory fee awards from this District do  
24 not establish that the *Laffey* matrix rates are in line with prevailing rates for statutory fee cases in  
25 the Bay Area legal community. *See, e.g., Public.Resource.org* (awarding rates from \$205 for  
26 paralegals up to \$645 for senior/lead counsel); *Sierra Club*, 75 F. Supp. 3d at 1152-53 (approving  
27 hourly rates of \$350 to \$650 in FOIA action); *Rosenfeld*, 904 F. Supp. 2d at 1001, 1004  
28 (approving hourly rates of \$460, \$550, and \$700 in FOIA action); *Hajro v. U.S. Citizenship &*

1 *Immigration Servs.*, 900 F. Supp. 2d 1034, 1054 (N.D. Cal. 2012) (approving hourly rates of \$450  
2 to \$625 in FOIA action) *vacated and remanded on other grounds*, 2015 WL 6405473 (9th Cir.  
3 Oct. 23, 2015); *see also Hiken v. Dep't of Def.*, 836 F.3d 1037, 1039 (9th Cir. 2016) (reversing  
4 district court order awarding fees at matrix rate).

5 The rates sought by counsel in this case are, generally, higher than the rates approved in  
6 other recent FOIA cases in this District. They are also, more importantly, significantly higher than  
7 rates that were requested and approved by these *same* counsel in recent cases in this District for  
8 environmental litigation. *See, e.g., OCE v. EPA*, 13-cv-02857 (Dkt. Nos. 82, 99) (awarding fees  
9 from \$435 to \$655/hr for work through early 2015); *San Francisco Baykeeper v. West Bay*  
10 *Sanitary Dist.*, No. 09-5676, 2011 WL 6012936 (N.D. Cal. Dec. 1, 2011) (approving \$585/hr for  
11 Sproul). Plaintiffs argue this upward departure is warranted because in the past they have relied  
12 on the *Laffey* matrix with locality adjustments, but recent cases confirm those rates under-  
13 compensate them. *See, e.g., Declaration of Christopher Sproul* [Dkt. No. 88] ¶ 15; *Declaration of*  
14 *Patricia Weisselberg* [Dkt. No. 86] ¶ 9.

15 Plaintiffs undertook a “market rate” analysis and seek compensation for that research from  
16 *this* case. The analysis was performed primarily by billing attorney Christopher Hudak. Hudak  
17 reviewed fee awards in a number of different types of cases from the Northern District, including  
18 class action litigation (antitrust, wage and hour, consumer protection, and securities) as well as one  
19 anti-SLAPP case and one FOIA case. *See, e.g., Declaration of Christopher Hudak* [Dkt. No. 84]  
20 ¶¶ 11-32. The market rate analysis did not consider more than one FOIA case (despite there being  
21 a number of cases on point) nor did it directly consider cases awarding statutory fees for  
22 environmental litigation.<sup>20</sup>

23 Plaintiffs have not demonstrated that the rates they seek here are reasonable for FOIA  
24

25 \_\_\_\_\_  
26 <sup>20</sup> The OCE attorneys did rely for “data points” on the Declaration of Richard M. Pearl from a  
27 state court case, *Citizens Committee To Complete The Refuge, Inc. v. City of Newark*, Case No.  
28 RG10530015, (CA Superior Ct. County of Alameda). The Pearl declaration focused on attorney’s  
fees rates through 2014, and did review some statutory fee-shifting awards, as opposed to the class  
action attorney’s fee awards focused on by the plaintiffs here. *See, e.g., Weisselberg Decl.* ¶¶ 11-  
16; *Sproul Decl., Ex. 32; Hudak Decl.* ¶ 34.

1 litigation (or environmental fee-shifting litigation). They seek to downplay the fact that in cases  
 2 from 2014 and 2015 *these same attorneys* requested significantly lower attorney’s fee rates. I do  
 3 not believe the case law supports limiting plaintiffs to their prior requested rates, but I do believe  
 4 that any *significant* upward departure should be justified, for example, by declarations explaining  
 5 the increases in light of increased expenses from doing business and practicing in certain markets  
 6 or other factors. I also do not find plaintiffs’ focus as support for their requested hourly rates in  
 7 these cases on large scale, complex class action cases to be persuasive. That is not to say that  
 8 FOIA cases cannot be complex. But the high rates awarded for complex class action cases can be  
 9 explained in large part by the necessity in those cases for plaintiffs’ counsel to incur significant  
 10 cost outlays (for experts, document review systems, travel, depositions, etc.) as well as attorney  
 11 time (to review hundreds of thousands of documents, numerous depositions, etc.) which are not  
 12 typically required in FOIA cases and were not required in these cases.

13 Accordingly, I find that the hourly rates plaintiffs request here are not adequately  
 14 supported and are not reasonable. This conclusion is consistent with *Hiken v. Dep’t of Def.*, 836  
 15 F.3d 1037, 1044–46 (9th Cir. 2016), where the Ninth Circuit confirmed that a “reasonable rate” is  
 16 the rate prevailing “in the community” for “similar work” performed by attorneys of comparable  
 17 skill and experience and based on record evidence of prevailing historical rates. I do not find that  
 18 plaintiffs’ survey is based on the performance of “similar work” by attorneys of comparable skill  
 19 and experience.

20 Plaintiffs shall recalculate their lodestar based on hourly rates that are consistent with the  
 21 rates they requested in prior FOIA or environmental cases for the same time periods. For  
 22 example, time spent on these cases in 2015 should be sought at the same rate previously sought  
 23 and/or awarded by a court for time spent in 2015. For time in 2016 as to which plaintiffs may  
 24 have not had an hourly rate approved by another court plaintiffs are entitled to a 10% increase  
 25 over their 2015 approved-rates, absent specific justification supported by a declaration explaining  
 26 why a particular attorney or paralegal should be granted a higher percentage increase.<sup>21</sup>

27 \_\_\_\_\_  
 28 <sup>21</sup> For any biller in these cases who has not had a prior-court-submitted or approved billing rate,  
 plaintiffs shall use a prior-court-approved billing rate for an attorney or paralegal of comparable

**B. Hours Expended**

NMFS also argues that the hours sought by plaintiffs cover time and tasks that were neither necessary nor reasonable for the prosecution of these suits and asks me to reduce the requested fee amount for the following:

- A \$188,381.47 reduction for plaintiffs’ work on the claims they lost;
- A \$26,686.22 reduction for work on pleadings and other papers that were never filed;
- A \$89,442.20 reduction for work performed at the administrative stage and review of documents produced;
- A reduction for work unrelated to *OCE I* and *OCE II*; and
- A 30-50% reduction generally for excessive, redundant, and unnecessary work.<sup>22</sup>

**1. Claims Lost**

NMFS argues that plaintiffs are not entitled to \$188,381.47 in fees (calculated at the hourly rates that NMFS objects to) for “distinct” claims they lost: (i) claims against FWS and the Corps; (ii) claims regarding the adequacy of the searches in *OCE II* (based on a frivolous argument that NMFS’s declarant’s testimony was “hearsay”); (iii) unsuccessful challenges to NMFS’s withholdings; (iv) claims regarding actual and pattern and practice search cut-off dates; and (v) plaintiffs’ response to the October 21 2015 Order to Show Cause as to whether further injunctive relief was necessary.<sup>23</sup>

With respect to the \$3,506.18 incurred with *OCE III*, plaintiffs admit they do not seek to recover for that time. So there is no longer a dispute as to that time/amount. The only other unsuccessful legal theory/claim NMFS “breaks out” time for is the \$23,032.40 plaintiffs charge

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experience.

<sup>22</sup> Plaintiffs explain that before submitting their request, most billers took 10% of the time billed “off the top” to account for any potential inefficiencies or redundancies in their work. Sproul Decl. ¶¶ 92, 97; Weisselberg Decl. ¶ 41; Isaacs Decl. ¶¶ 6-7; Costa Decl. ¶ 6; Hudak Decl. ¶ 35 (worked over 100 hours, but seeking payment for approximately 30 hours).

<sup>23</sup> NMFS breaks down the \$188,381.47 (or more accurately \$188,381.48) as follows: \$23,032.40 for 37.1 hours spent on the opposition to NMFS’s showing in response to Judge Conti’s OSC; \$161,842.90 as a 50% reduction from the \$323,685.79 plaintiffs billed for pleadings, summary judgment, supplemental briefing and the joint submission; and \$3,506.18 incurred with *OCE III*.



1 for 37.1 hours spent responding to NMFS’s showing in response to Judge Conti’s Order to Show  
2 Cause. Oppo. 17. However, I find that that time was reasonable and necessary. Judge Conti’s  
3 OSC raised significant questions regarding the steps NMFS was taking to address its FOIA  
4 backlog, and NMFS filed a detailed response, supported by declarations. Plaintiffs filed a brief to  
5 contest some of the assertions made by NMFS, but that pleading was helpful and relied on by me  
6 in determining whether any live issues remained in the litigation, even though I denied plaintiffs’  
7 request for further injunctive relief as to the backlog.

8 NMFS does not break out the time spent on the other “unsuccessful” issues because  
9 plaintiffs’ billing records do not allow them to. NMFS instead argues the 595.6  
10 hours/\$323,685.79 plaintiffs billed to pleadings for the summary judgment, supplemental briefing,  
11 and the joint submission required by the October 2015 Order should be reduced by 50% to  
12 account for plaintiffs’ other losing claims/theories. Oppo. 17-18; Wall Decl., Ex. B (Summary  
13 Fee Analysis). I disagree.

14 As to claims against FWS and the Corps for their alleged part in causing repeated delays in  
15 NMFS’s FOIA responses, while plaintiffs were not ultimately successful in their claims against  
16 those entities, the claims made were part and parcel of the impermissible and excessive delay  
17 claims against NMFS. This time is compensable.

18 As to claims regarding the adequacy of the searches in *OCE II* (based in part on the  
19 argument that NMFS’s declarant’s testimony was hearsay), while plaintiffs eventually lost this  
20 claim, Judge Conti forced NMFS to submit supplemental briefing explaining the adequacy of its  
21 searches. NMFS’s initial explanations, therefore, were deficient and plaintiffs’ successfully  
22 argued that deficiency to Judge Conti in their initial and supplemental briefing. This time is  
23 compensable.

24 As to the unsuccessful challenges to NMFS’s withholdings, plaintiffs eventually lost all  
25 but one of these claims. But in the process of the initial and supplemental rounds of briefing,  
26 NMFS agreed to produce more documents and NMFS had to explain its actions in greater detail  
27 due to deficiencies in their initial briefing and declarations. This time is compensable.

28 And as to the eventually unsuccessful claim regarding NMFS’s pattern and practice of

1 applying improper search cut-off dates, while plaintiffs did not secure an order from Judge Conti  
2 finding that NMFS had an illegal pattern or practice, the record supports at least an inference that  
3 during this litigation NMFS implemented a new or clarified policy. Even assuming it was simply  
4 a clarified policy, that clarification produced a public benefit for future FOIA requestors. This  
5 time is compensable.

## 6 **2. Pleadings and Papers Never Filed**

7 NMFS argues that plaintiffs should not be compensated for 49.1 hours/\$26,686.22 for  
8 work on pleadings that were never filed, including draft amended complaints in *OCE I* and *OCE*  
9 *II*, a motion for reconsideration, and a motion for relief. Wall Decl., Ex. G (Unfiled Papers).

10 In reply, Sproul explains: (i) the work done on the unfiled SAC in May 2014 in *OCE I* was  
11 used on the motion for summary judgment in *OCE I* and is therefore compensable (Sproul Reply  
12 Decl. ¶ 5); (ii) the 3.16 hours billed in February 2015 for a “motion for relief” was in fact work  
13 done for the Notice Regarding Submitted Matter and Request For Ruling filed on March 2, 2015  
14 (*id.* ¶ 6); (iii) 13.19 hours of work in October 2014 was for a pleading filed in *OCE II*, Dkt. 58 (*id.*  
15 ¶ 7); (iv) 1.32 hours of time billed in May 2015, was cut from the request on plaintiffs’ Reply (and  
16 not currently sought); and (iv) the remaining hours that were spent on the unfiled motion for  
17 reconsideration in January 2016 are compensable because that unfiled motion was used as  
18 leverage to get NMFS to agree to a form of judgment and produce additional documents. *Id.* ¶ 8.  
19 Weisselberg also, on review, cut 0.56 of time from her entries challenged in Wall’s Ex. G, because  
20 those entries represented work on what was to become *OCE III*. Weisselberg. Reply Decl. ¶ 11.

21 Considering the declarations, I find that all of the challenged time except the time spent on  
22 the unfiled motion for reconsideration is compensable. Plaintiffs have adequately identified how  
23 the time identified by NMFS was spent or used for pleadings actually filed in this action.  
24 However, the time spent on the unfiled motion for reconsideration in January 2016 was created  
25 voluntarily by plaintiffs and used for “leverage” but was never necessary or useful for any  
26 contested decision made by me.

## 27 **3. Administrative Efforts**

28 NMFS wants a further reduction for 157.7 hours/\$89,442.20 that plaintiffs spent drafting



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1 FOIA requests, working on the agency administrative appeals, and reviewing the documents  
2 produced. Wall Decl., Ex. I. Generally, “work performed during the pre-litigation administrative  
3 phase of a FOIA request is not recoverable under FOIA.” *Elec. Privacy Info. Ctr. v. United States*  
4 *Dep't of Homeland Sec.*, 811 F. Supp. 2d 216, 237 (D.D.C. 2011); *but see Public.Resource.org*,  
5 2015 WL 9987018, at \*8 (allowing recovery for two time entries on letters seeking agency  
6 reconsideration “given the clear overlap in subject matter between the letter and this litigation, the  
7 letter’s explicit contemplation of a lawsuit, and the proximity in time between the letter and the  
8 filing of” the complaint).

9 In their Reply and supporting declarations, plaintiffs cut some of the contested time for  
10 work on the FOIA requests and administrative appeals, but kept the time spent on two specific  
11 FOIA requests in. As explained by lead counsel Sproul:

I and my co-counsel have been mindful that we are not entitled to recover for drafting all our FOIA requests and reviewing all the documents obtained for the purpose of learning the substantive content of those documents for the Plaintiffs’ citizen suit litigation against Stanford or larger public advocacy campaign related to Stanford and the San Francisquito Creek watershed. However, we have concluded that we may recover for time spent drafting FOIA requests specifically intended to garner information for use in this litigation and reviewing documents for such litigation purposes. I and my co-counsel have carefully segregated the time spent drafting FOIA requests reviewing documents such that we are seeking recovery only for the latter time. With respect to drafting FOIA requests, we are seeking to recover for time spent drafting (or appealing responses concerning) only two of the multiple FOIA requests at issue in this proceeding that Plaintiffs specifically used to gather information used as evidence against NMFS in this case: FOIA requests sent on April 3, 2014 and November 24, 2015. (the latter is Exhibit M to the Wall Declaration, (OCE I, Dkt. 92-1). The April 3, 2014 FOIA sought documents concerning the searches done by NMFS and the responses provided by NMFS to Plaintiffs in response to their FOIA requests with the aim of developing evidence that NMFS’s searches have not complied with FOIA. Plaintiffs’ November 24, 2015 FOIA request sought documents with the specific intent of trying to garner evidence that Plaintiffs’ litigation had catalyzed NMFS to respond more promptly to Plaintiffs’ FOIA requests. The aim was to develop evidence in support of catalyst theory arguments for purposes of attorney fees recovery in settlement and, if necessary, a fees motion. Plaintiffs’ November 24, 2015 FOIA Request sought documents related to NMFS’s assertions that it had instituted several FOIA reforms also with the specific intent of trying to garner evidence that Plaintiffs’ litigation had catalyzed NMFS to institute these reforms. Again, our aim was to develop evidence in support of catalyst theory arguments for

1 purposes of attorney fees recovery in settlement and, if necessary, a  
 2 fees motion. As discussed in the Reply Declaration of Patricia  
 3 Weisselberg, Plaintiffs have in fact used documents obtained in  
 4 response to their FOIA requests as exhibits supporting the catalyst  
 theory arguments they are advancing in their Fees Motion and  
 plaintiffs agree to reduce some of their time spent on drafting the  
 FOIA requests and the administrative appeals.

5 Sproul Reply Decl. ¶ 10.

6 Accordingly, Michael Costa cut 11.91 hours/\$6,148.98 for drafting FOIA requests and  
 7 appeals, except for the work he did on the April 3, 2014 and November 24, 2015 FOIA requests  
 8 that were aimed at gathering information for this lawsuit. Costa Reply Decl. ¶ 3. Jodene Isaacs  
 9 cut 11.21 hours/\$5,599.40 for drafting FOIA requests and appeals. Isaacs Reply Decl. ¶ 2.  
 10 Weisselberg cut 8.74 hours spent on FOIA appeals, included in Wall's Ex. I. Weisselberg Reply  
 Decl. ¶ 13.

11 The bulk of the remaining time appears to be for document review conducted primarily by  
 12 Costa and Isaacs. NMFS argues that document review is simply not compensable. *See, e.g.,*  
 13 *Sierra Club v. United States EPA*, 75 F. Supp. 3d 1125, 1149 (N.D. Cal. 2014) ("As Plaintiffs  
 14 received, at least in part, the relief they sought when the EPA produced the documents, the time  
 15 they expended reviewing the documents was is properly characterized as post-relief activity,  
 16 separate from the litigation."); *Citizens for Responsibility & Ethics v. United States DOJ*, 825 F.  
 17 Supp. 2d 226, 231 (D.D.C. 2011) ("Plaintiff would have had to expend this time had DOJ timely  
 18 produced the documents without litigation; the cost of reviewing documents produced in response  
 19 to a FOIA request is simply the price of making such a request.").

20 Plaintiffs respond that in this case, where the adequacy of NMFS's searches and  
 21 withholdings were central claims, plaintiffs needed to spend significant amounts of time reviewing  
 22 the documents to support those claims in litigation. That might be true but plaintiffs'  
 23 withholding claims were almost totally rejected (except for one document) and plaintiffs'  
 24 inadequate search claims were likewise mostly unsuccessful (except for two narrow wins in *OCE*  
 25 *I*). Plaintiffs also do not cite any case law allowing for recovery of time spent reviewing document  
 26 productions where that review is necessary for a plaintiff to be able to challenge the adequacy of  
 27 an agency's search or the propriety of withholdings.  
 28

1 Based on the declarations, I find that the Costa time spent on the two identified FOIA  
 2 requests is compensable, given the overlap in subject matter between requests and this litigation as  
 3 well as the proximity in time between those requests and the filing of pleadings in this case. The  
 4 time spent reviewing the documents produced is not compensable.

5 **4. Work Unrelated to *OCE I* and *OCE II***

6 NMFS argues that plaintiffs should not be compensated for 8.9 hours/\$4,461.23 billed by  
 7 Sproul, Weisselberg, Isaacs, and Costa that it contends is unrelated to *OCE I* and *OCE II*,  
 8 including litigation with Stanford and entries related to FWS and the Corps. Wall Decl., Ex. H  
 9 (Unrelated Matters). In Reply, Weisselberg explains the relevance of her entries listed on Exhibit  
 10 H to *OCE I* and *OCE II*. Weisselberg Reply Decl. ¶ 12. Sproul also addresses the 8.9 hours listed  
 11 in Exhibit H, and other than two mistakes accounting for 0.35/hours (which were cut in the Reply)  
 12 adequately explains that those hours billed were necessary for *OCE I* and *OCE II*. Sproul Reply  
 13 Decl. ¶ 9; *see also* Costa Reply Decl. ¶ 16. This time is compensable.

14 NMFS also argues that plaintiffs have (perhaps inadvertently) claimed time for work on  
 15 *OCE III*, despite their claim that they are not seeking that time. In its Opposition and supporting  
 16 declaration, NMFS identified 5.9 hours/\$3,506.18 it contends was incurred on *OCE III*. *See* Wall  
 17 Decl., Ex. D. As noted above, this time is not compensable.

18 **5. Reduction for Excessive or Redundant Work**

19 NMFS asks the Court to reduce by 30-50% any fee award to account for excessive,  
 20 cumulative, and inefficient billing. *Oppo.* at 24. NMFS specifically challenges: (i) the 158 hours  
 21 spent on the opening attorney's fees motion and declarations; (ii) 249 hours on summary judgment  
 22 and supplemental briefing in *OCE I*; (iii) 263.8 hours on summary judgment and supplemental  
 23 briefing in *OCE II*; (iv) 157.7 hours on the "administrative phase" including record review; and (v)  
 24 the fact that five attorneys worked on the case, which NMFS contends is excessive given the  
 25 nature of these cases and is demonstrated by the 173.7 hours/\$107,885.73 billed for telephone  
 26 calls and email correspondence between counsel for "coordination" purposes. Wall Decl., Ex. F  
 27 (Coordination Activities).

28 In their Reply declarations, two of the billing attorneys exercised "more" billing judgment

1 to cut hours in light of potential redundancy. *See* Costa Reply Decl. ¶ 4 (cutting 4.05  
2 hours/\$2,136.38); Isaacs Reply Decl. ¶ 3 (cutting just over 14 hours/\$7,087.91). No other  
3 reductions for excessive or redundant work appear to have been made, other than the 10%  
4 “off the top” that each of the billing attorneys took off their time initially.

5 The time spent on the opening attorney’s fees motion and declarations is excessive and  
6 unreasonable. In particular, plaintiffs should not be compensated for the time Hudak spent  
7 (unsuccessfully as addressed above) surveying cases in order to determine what billing rates  
8 should be used for plaintiffs in this fee motion. Moreover, the time spent in drafting the fee  
9 motion which itself does not raise any unique issues or issues of first impression is excessive.  
10 Plaintiffs purport to be experienced FOIA and environmental litigators; submission of fee petitions  
11 is a regular part of that work. I recognize that reviewing the time records, exercising billing  
12 judgment, and creating supporting declarations will take significant time in each case no matter  
13 how experienced counsel is. But the time spent on the *brief* appears to be excessive in and of  
14 itself. A 25% reduction in the time spent on the opening attorney’s fees motion is appropriate, as  
15 is elimination of the time Hudak spent on his inapposite attorney’s fees survey.

16 As to time spent on the Reply brief and declarations (which NMFS did not have the  
17 opportunity to attack), I conclude that the time spent on the brief itself is reasonable, but not the  
18 time spent reviewing the time slips and submitting supplemental declarations, because much of  
19 *that* time was spent accounting for errors pointed out by NMFS and then making additional  
20 reductions for improper or otherwise redundant billing. Only 50% of the time spent on the  
21 declarations in support of the Reply is compensable.

22 As to the 249 hours spent on summary judgment and supplemental briefing in *OCE I* as  
23 well as the 263.8 hours spent on summary judgment and supplemental briefing in *OCE II*, I find  
24 that the time is reasonable and compensable. The summary judgment briefing was extensive,  
25 detailed and addressed a number of issues where there was little precedent. In these circumstances  
26 I cannot say the time spent was unreasonable.

27 As to the 157.7 hours on the “administrative phase” including record review, as noted  
28 above, plaintiffs have voluntarily cut all time on drafting the FOIA requests, except for time Costa

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1 spent on two, and I have already found that time spent reviewing the documents produced is not  
2 compensable.

3 Finally, as to the time spent on coordination between counsel, I find that 173.7 hours is  
4 excessive. While this case was complex in the sense that there were a large number of FOIA  
5 requests at issue, at least three lawsuits filed, and multiple rounds of summary judgment and  
6 additional briefing required, the sheer number of attorneys involved many of whom it appears  
7 were involved in part because of the Stanford litigation meant that there was an excessive  
8 amount of “coordination.” A 25% reduction in the amount of time spent on coordination is  
9 appropriate.

10 **C. Costs**

11 Plaintiffs seek \$3,190.39 in costs. Dkt. No. 94. NMFS does not oppose the amount of  
12 costs, but argues instead that in light of the limited nature of plaintiffs’ success and the agency’s  
13 good faith, costs are not warranted. Oppo. at 24-25. Having concluded that plaintiffs are  
14 substantially prevailing and that the agency’s defenses were without a reasonable basis in law, an  
15 award of costs is appropriate. Plaintiffs are awarded \$3,190.39 in costs.

16 **CONCLUSION**

17 For the foregoing reasons, plaintiffs will be awarded attorney’s fees, but at a significantly  
18 reduced amount, and are awarded \$3,190.39 in costs.

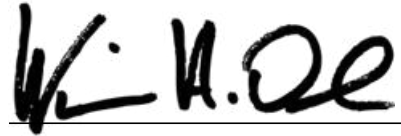
19 Within twenty days of the date of this Order, plaintiffs shall, after meeting and conferring  
20 with defense counsel, submit a *joint* supplemental brief and proposed judgment containing a  
21 revised request for attorney’s fees that excludes all of the time I have identified above as not being  
22 compensable. The parties shall make all reasonable efforts to reach agreement on the time to be  
23 included in light of the time that has been excluded by this Order. If the parties cannot agree, any  
24 remaining disputes shall be explained in no more than two pages.

25 Plaintiffs must also recalculate their lodestar, using hourly rates that were approved for  
26 them in past years and using a rate for 2016 that is no more than 10% above their 2015 rates,  
27 unless otherwise justified. At the time the joint supplemental brief and proposed judgment is filed,  
28 plaintiffs shall submit a declaration explaining and identifying: (i) the rates for each biller for each

1 year billed; (ii) the case(s) for which each biller's rates have been requested and approved; (iii) the  
2 basis for the 2016 hourly rates sought; and (iv) the basis for any hourly rate sought for a biller who  
3 has not had her or his time approved by a prior court order.

4 **IT IS SO ORDERED.**

5 Dated: March 1, 2017

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8 William H. Orrick  
9 United States District Judge  
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United States District Court  
Northern District of California

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Tuesday, February 7, 2017 1:27 PM  
**To:** Jonelle Dilley - NOAA Federal; Jackie Rolleri - NOAA Federal  
**Subject:** Fwd: Weekly FOIA Incoming and High Visibility Requests  
**Attachments:** Weekly FOIA Incoming and High Visibility Requests Report 01252017-02012017.xls;  
FOIA Request - DOC-NOAA-2017-000331.pdf; CREW v DOC - Complaint.PDF

Here is the weekly report below.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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**From:** Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)>  
**Date:** Thu, Feb 2, 2017 at 4:58 PM  
**Subject:** Weekly FOIA Incoming and High Visibility Requests  
**To:** Stephen Lipps - NOAA Federal <[stephen.lipps@noaa.gov](mailto:stephen.lipps@noaa.gov)>, John Almeida - NOAA Federal <[john.almeida@noaa.gov](mailto:john.almeida@noaa.gov)>, "Holmes, Colin" <[cholmes@doc.gov](mailto:cholmes@doc.gov)>, Robert Moller - NOAA Federal <[robert.moller@noaa.gov](mailto:robert.moller@noaa.gov)>, Scott Smullen - NOAA Federal <[scott.smullen@noaa.gov](mailto:scott.smullen@noaa.gov)>, Jeff Dillen - NOAA Federal <[jeff.dillen@noaa.gov](mailto:jeff.dillen@noaa.gov)>, Kristen Gustafson - NOAA Federal <[kristen.l.gustafson@noaa.gov](mailto:kristen.l.gustafson@noaa.gov)>  
**Cc:** Tom Taylor <[tom.taylor@noaa.gov](mailto:tom.taylor@noaa.gov)>, Kimberly Katzenbarger - NOAA FEDERAL <[kimberly.katzenbarger@noaa.gov](mailto:kimberly.katzenbarger@noaa.gov)>, Charles <[charles.green@noaa.gov](mailto:charles.green@noaa.gov)>, Dennis Morgan - NOAA Federal <[dennis.morgan@noaa.gov](mailto:dennis.morgan@noaa.gov)>, Stacey Nathanson - NOAA Federal <[stacey.nathanson@noaa.gov](mailto:stacey.nathanson@noaa.gov)>, Robert Swisher - NOAA Federal <[robert.swisher@noaa.gov](mailto:robert.swisher@noaa.gov)>, Steven Goodman - NOAA Federal <[Steven.Goodman@noaa.gov](mailto:Steven.Goodman@noaa.gov)>, Samuel Dixon - NOAA Affiliate <[samuel.dixon@noaa.gov](mailto:samuel.dixon@noaa.gov)>, Lola Stith - NOAA Affiliate <[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)>, Zachary Goldstein - NOAA Federal <[Zachary.Goldstein@noaa.gov](mailto:Zachary.Goldstein@noaa.gov)>, Douglas Perry - NOAA Federal <[Douglas.A.Perry@noaa.gov](mailto:Douglas.A.Perry@noaa.gov)>, Nkolika Ndubisi - NOAA Federal <[nkolika.ndubisi@noaa.gov](mailto:nkolika.ndubisi@noaa.gov)>, Jeri Dockett - NOAA Affiliate <[jeri.dockett@noaa.gov](mailto:jeri.dockett@noaa.gov)>

Good Afternoon,

Attached is this week's report. Please note one request received from Public Citizen, Inc., seeking all records regarding restrictions from the Trump Administration, or internally, on what NOAA employees can or cannot discuss external to the bureau. (DOC-2017-000497). Additionally, a request was received from the Center for Biological Diversity seeking records regarding the ACOE Nationwide Permits Program. (DOC-NOAA-2017-000539).

(b)(5)

In litigation, NOAA was served with a new FOIA litigation, *CREW v. DOC*. The original request was seeking copies of questionnaires submitted to NOAA by any representative of President-elect Donald Trump's transition team. A copy of CREW's original request as well as the complaint are attached.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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Rec'd in LEO on  
FOIA Summons  
1/13  
1-31-17

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

Citizens for Responsibility and Ethics in Washing

*Plaintiff*

v.

Department of Commerce

*Defendant*

Civil Action No. 17-cv-00135

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant's name and address)*

Department of Commerce  
1401 Constitution Ave., N.W.  
Washington, D.C. 20230

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Adam J. Rappaport  
Citizens for Responsibility and Ethics in Washington  
455 Massachusetts Ave., N.W., Sixth Floor  
Washington, D.C. 20001

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*ANGELA D. CAESAR, CLERK OF COURT*

Date: 01/25/2017

Jacqueline M. Francis

*Signature of Clerk or Deputy Clerk*

Digitally signed by Jacqueline M. Francis  
DN: cn=Jacqueline M. Francis, o=United States District Court for  
the District of Columbia, ou,  
email=jacqueline\_m\_francis@usdc.uscourts.gov, c=US  
Date: 2017.01.25 08:49:11 -0500

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>CITIZENS FOR RESPONSIBILITY AND</b>	)	
<b>ETHICS IN WASHINGTON</b>	)	
455 Massachusetts Ave., N.W., Sixth Floor	)	
Washington, D.C. 20001	)	
	)	Civil Action No.
Plaintiff,	)	
	)	
v.	)	
	)	
<b>U.S. DEPARTMENT OF COMMERCE</b>	)	
1401 Constitution Avenue, N.W.	)	
Washington, D.C. 20230,	)	
	)	
Defendant.	)	
_____	)	

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, for injunctive, declaratory, and other appropriate relief. Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) challenges the failure of the National Oceanic and Atmospheric Administration (“NOAA”), a component agency of the U.S. Department of Commerce (“DOC”) to disclose to CREW records related to questionnaires submitted to NOAA by representatives of President-elect Donald Trump’s transition team.

2. This case seeks declaratory relief that DOC is in violation of the FOIA, 5. U.S.C. § 552(a)(6)(E)(i), by failing to provide CREW with all responsive records, and injunctive relief ordering the defendant DOC and its component agency NOAA to process and release to CREW immediately the requested records in their entirety.

**Jurisdiction and Venue**

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331, and 28 U.S.C. §§ 2201(a) and 2202. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

**Parties**

4. Plaintiff CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the tax code. CREW is committed to protecting the rights of citizens to be informed about the activities of government officials and agencies, and to ensuring the integrity of government officials and agencies. CREW seeks to empower citizens to have an influential voice in government decisions and in the governmental decision-making process through the dissemination of information about public officials and their actions. To advance its mission, CREW uses a combination of research, litigation, and advocacy. As part of its research, CREW uses government records made available to it under the FOIA.

5. Defendant DOC is an agency within the meaning of 5 U.S.C. § 552(f) and 5 U.S.C. § 701. NOAA is a component agency within DOC. DOC is the federal agency with possession and control of the requested records and is responsible for fulfilling plaintiff's FOIA requests.

**FACTUAL BACKGROUND**

6. In early December 2016, news outlets reported that President-elect Donald J. Trump's transition team had sent an extensive questionnaire to the Department of Energy that included a request for the names of all agency employees or contractors who have attended conferences related to climate change policy as well as e-mails and documents associated with

the conferences. Coral Davenport, Climate Change Conversations are Targeted in Questionnaire, *New York Times*, Dec. 9, 2016, available at <http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html>.

7. The questionnaire raised concerns about potential retaliation against Department of Energy staff by the incoming administration. Brakkton Booker, Trump Questionnaire Raises Concerns About Retaliation Against Energy Department Staff, *NPR*, Dec. 10, 2016, available at <http://www.npr.org/sections/thetwo-way/2016/12/10/505105258/trump-questionnaire-raises-concerns-about-retaliation-against-energy-department>. The Department of Energy declined to provide individual names to transition team while acknowledging that some of the questions “left many in our workforce unsettled.” Joe Davidson, Energy Dept. Rejects Trump’s Request to Name Climate-Change Workers, Who Remain Worried, *Washington Post*, Dec. 13, 2016, available at [https://www.washingtonpost.com/news/powerpost/wp/2016/12/13/energy-dept-rejects-trumps-request-to-name-climate-change-workers-who-remain-worried/?utm\\_term=.9f1b05b29d6f](https://www.washingtonpost.com/news/powerpost/wp/2016/12/13/energy-dept-rejects-trumps-request-to-name-climate-change-workers-who-remain-worried/?utm_term=.9f1b05b29d6f).

8. It is unknown if President-elect Trump’s transition team sent similar questionnaires to other departments and agencies, including NOAA, seeking the names of employees or contractors worked on climate change policy and/or documents and correspondence related to climate change.

**Plaintiff’s FOIA Request and Request for Expedited Processing**

9. By letter dated on December 16, 2016 and delivered by the FOIAonline system, plaintiff requested under the FOIA copies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump’s transition team, including representatives of

Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect.

10. On that same day, NOAA acknowledged receiving the request.

11. By form letter dated January 4, 2017, NOAA granted CREW's request for a fee waiver.

12. To date, NOAA has not otherwise responded to CREW request.

13. NOAA has not provided CREW with a determination on its request, including an identification of what documents the agency plans to release, what documents the agency plans to withhold, and why – the determination the FOIA requires agencies to make of non-expedited requests with 20 business days of receiving a FOIA request.

14. Because NOAA has failed to make a determination under the FOIA on CREW's request, CREW has now exhausted all applicable administrative remedies.

### **PLAINTIFF'S CLAIMS FOR RELIEF**

#### **CLAIM ONE**

#### **(Wrongful Withholding Of Non-Exempt Records)**

15. Plaintiff repeats and re-alleges paragraphs 1-15.

16. Plaintiff properly asked for records within the custody and control of DOC and its component agency NOAA.

17. Defendant DOC and its component agency NOAA wrongfully withheld agency records requested by plaintiff by failing to comply with the statutory time limit for making a determination on non-expedited FOIA requests, and by withholding from disclosure records responsive to plaintiff's FOIA request.

18. Therefore, by failing to release the records as plaintiff specifically requested, defendant violated the FOIA.


19. Plaintiff is therefore entitled to injunctive and declaratory relief with respect to the expedited processing and disclosure of the requested records.

**Requested Relief**

WHEREFORE, plaintiff respectfully requests that this Court:

- (1) Order defendant DOC and its component agency NOAA to complete the processing of plaintiff's December 16, 2016 FOIA request and disclose all non-exempt documents immediately to plaintiff;
- (2) Issue a declaration that plaintiff is entitled to expedited processing and disclosure of the requested records;
- (3) Provide for expeditious proceedings in this action;
- (4) Retain jurisdiction of this action to ensure no agency records are wrongfully withheld;
- (5) Award plaintiff its cost and reasonable attorneys' fees in this action; and
- (6) Grant such other relief as the Court may deem just and proper.

Respectfully submitted,



Adam J. Rappaport  
arappaport@citizensforethics.org  
(D.C. Bar No. 479866)  
Stuart C. McPhail  
smcphail@citizensforethics.org  
(D.C. Bar No. 1032529)  
Citizens for Responsibility and Ethics  
in Washington  
455 Massachusetts Ave. N.W., Sixth Floor  
Washington, D.C. 20001  
Phone: (202) 408-5565  
Facsimile: (202) 588-5020

January 20, 2017

*Attorneys for Plaintiff*

**CIVIL COVER SHEET**

JS-44 (Rev. 7/16 DC)

<p><b>I. (a) PLAINTIFFS</b> Citizens for Responsibility and Ethics in Washington</p> <p>(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF <u>11001</u> (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) Adam J. Rappaport, Stuart C. McPhail Citizens for Responsibility and Ethics in Washington 455 Massachusetts Ave., N.W., Washington, D.C. 20001 202-408-5565</p>	<p><b>DEFENDANTS</b> Department of Commerce</p> <p>COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT <u>11001</u> (IN U.S. PLAINTIFF CASES ONLY) <small>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</small></p> <p>ATTORNEYS (IF KNOWN)</p>
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<p><b>II. BASIS OF JURISDICTION</b> (PLACE AN x IN ONE BOX ONLY)</p> <p><input type="radio"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="radio"/> 2 U.S. Government Defendant</p> <p><input type="radio"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)</p>	<p><b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) <b>FOR DIVERSITY CASES ONLY!</b></p> <table style="width:100%; border-collapse: collapse;"> <thead> <tr> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td style="text-align: center;"><input type="radio"/> 4</td> <td style="text-align: center;"><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="radio"/> 5</td> <td style="text-align: center;"><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="radio"/> 6</td> <td style="text-align: center;"><input type="radio"/> 6</td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4	Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5	Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6
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Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4																				
Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5																				
Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6																				

**IV. CASE ASSIGNMENT AND NATURE OF SUIT**

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

<p><input type="radio"/> <b>A. Antitrust</b></p> <p><input type="checkbox"/> 410 Antitrust</p>	<p><input type="radio"/> <b>B. Personal Injury/Malpractice</b></p> <p><input type="checkbox"/> 310 Airplane</p> <p><input type="checkbox"/> 315 Airplane Product Liability</p> <p><input type="checkbox"/> 320 Assault, Libel &amp; Slander</p> <p><input type="checkbox"/> 330 Federal Employers Liability</p> <p><input type="checkbox"/> 340 Marine</p> <p><input type="checkbox"/> 345 Marine Product Liability</p> <p><input type="checkbox"/> 350 Motor Vehicle</p> <p><input type="checkbox"/> 355 Motor Vehicle Product Liability</p> <p><input type="checkbox"/> 360 Other Personal Injury</p> <p><input type="checkbox"/> 362 Medical Malpractice</p> <p><input type="checkbox"/> 365 Product Liability</p> <p><input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability</p> <p><input type="checkbox"/> 368 Asbestos Product Liability</p>	<p><input type="radio"/> <b>C. Administrative Agency Review</b></p> <p><input type="checkbox"/> 151 Medicare Act</p> <p><u>Social Security</u></p> <p><input type="checkbox"/> 861 HIA (1395ff)</p> <p><input type="checkbox"/> 862 Black Lung (923)</p> <p><input type="checkbox"/> 863 DIWC/DIWW (405(g))</p> <p><input type="checkbox"/> 864 SSID Title XVI</p> <p><input type="checkbox"/> 865 RSI (405(g))</p> <p><u>Other Statutes</u></p> <p><input type="checkbox"/> 891 Agricultural Acts</p> <p><input type="checkbox"/> 893 Environmental Matters</p> <p><input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)</p>	<p><input type="radio"/> <b>D. Temporary Restraining Order/Preliminary Injunction</b></p> <p>Any nature of suit from any category may be selected for this category of case assignment.</p> <p>*(If Antitrust, then A governs)*</p>
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<p><input type="radio"/> <b>E. General Civil (Other)</b></p> <p><u>Real Property</u></p> <p><input type="checkbox"/> 210 Land Condemnation</p> <p><input type="checkbox"/> 220 Foreclosure</p> <p><input type="checkbox"/> 230 Rent, Lease &amp; Ejectment</p> <p><input type="checkbox"/> 240 Torts to Land</p> <p><input type="checkbox"/> 245 Tort Product Liability</p> <p><input type="checkbox"/> 290 All Other Real Property</p> <p><u>Personal Property</u></p> <p><input type="checkbox"/> 370 Other Fraud</p> <p><input type="checkbox"/> 371 Truth in Lending</p> <p><input type="checkbox"/> 380 Other Personal Property Damage</p> <p><input type="checkbox"/> 385 Property Damage Product Liability</p>	<p style="text-align: center;"><b>OR</b></p> <p><input type="radio"/> <b>F. Pro Se General Civil</b></p> <p><u>Bankruptcy</u></p> <p><input type="checkbox"/> 422 Appeal 27 USC 158</p> <p><input type="checkbox"/> 423 Withdrawal 28 USC 157</p> <p><u>Prisoner Petitions</u></p> <p><input type="checkbox"/> 535 Death Penalty</p> <p><input type="checkbox"/> 540 Mandamus &amp; Other</p> <p><input type="checkbox"/> 550 Civil Rights</p> <p><input type="checkbox"/> 555 Prison Conditions</p> <p><input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement</p> <p><u>Property Rights</u></p> <p><input type="checkbox"/> 820 Copyrights</p> <p><input type="checkbox"/> 830 Patent</p> <p><input type="checkbox"/> 840 Trademark</p> <p><u>Federal Tax Suits</u></p> <p><input type="checkbox"/> 870 Taxes (US plaintiff or defendant)</p> <p><input type="checkbox"/> 871 IRS-Third Party 26 USC 7609</p>	<p><u>Forfeiture/Penalty</u></p> <p><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881</p> <p><input type="checkbox"/> 690 Other</p> <p><u>Other Statutes</u></p> <p><input type="checkbox"/> 375 False Claims Act</p> <p><input type="checkbox"/> 376 Qui Tam (31 USC 3729(a))</p> <p><input type="checkbox"/> 400 State Reapportionment</p> <p><input type="checkbox"/> 430 Banks &amp; Banking</p> <p><input type="checkbox"/> 450 Commerce/ICC Rates/etc.</p> <p><input type="checkbox"/> 460 Deportation</p> <p><input type="checkbox"/> 462 Naturalization Application</p> <p><input type="checkbox"/> 465 Other Immigration Actions</p>	<p><input type="checkbox"/> 470 Racketeer Influenced &amp; Corrupt Organization</p> <p><input type="checkbox"/> 480 Consumer Credit</p> <p><input type="checkbox"/> 490 Cable/Satellite TV</p> <p><input type="checkbox"/> 850 Securities/Commodities/Exchange</p> <p><input type="checkbox"/> 896 Arbitration</p> <p><input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision</p> <p><input type="checkbox"/> 950 Constitutionality of State Statutes</p> <p><input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)</p>
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<input type="radio"/> <b>G. Habeas Corpus/ 2255</b>  <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> <b>H. Employment Discrimination</b>  <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation)  *(If pro se, select this deck)*	<input checked="" type="radio"/> <b>I. FOIA/Privacy Act</b>  <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act)  *(If pro se, select this deck)*	<input type="radio"/> <b>J. Student Loan</b>  <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> <b>K. Labor/ERISA (non-employment)</b>  <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> <b>L. Other Civil Rights (non-employment)</b>  <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input type="radio"/> <b>M. Contract</b>  <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> <b>N. Three-Judge Court</b>  <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

**V. ORIGIN**  
 1 Original Proceeding  
  2 Removed from State Court  
  3 Remanded from Appellate Court  
  4 Reinstated or Reopened  
  5 Transferred from another district (specify)  
  6 Multi-district Litigation  
  7 Appeal to District Judge from Mag. Judge  
  8 Multi-district Litigation – Direct File

**VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)**  
 5 U.S.C. Section 552 - DOC has failed to produce records in response to plaintiff's FOIA request.

<b>VII. REQUESTED IN COMPLAINT</b>	CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/>	DEMAND \$ _____	JURY DEMAND: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
<b>VIII. RELATED CASE(S) IF ANY</b>	(See instruction)	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	If yes, please complete related case form

DATE: 1/20/2017	SIGNATURE OF ATTORNEY OF RECORD
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**INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44**  
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.



December 16, 2016

**BY FOIAonline**

National Oceanic and Atmospheric Administration  
Public Reference Facility (SOU1000)  
1315 East-West Highway (SSMC3)  
Room 9719  
Silver Spring, Maryland 20910

**Re: Freedom of Information Act Request**

Dear Freedom of Information Officer:

Citizens for Responsibility and Ethics in Washington (“CREW”) makes this request for records pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and National Oceanic and Atmospheric Administration (“NOAA”) regulations.

CREW requests copies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump’s transition team, including representatives of Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect.

Please search for responsive records regardless of format, medium, or physical characteristics. We seek records of any kind, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical material. Our request includes without limitation all correspondence, letters, emails, text messages, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request also includes any attachments to emails and other records.

If it is your position any portion of the requested records is exempt from disclosure, CREW requests that you provide it with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. See 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. See *Mead Data Central v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

**Fee Waiver Request**

In accordance with 5 U.S.C. § 552(a)(4)(A) and NOAA regulations, CREW requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a

better understanding of relevant government procedures by CREW and the general public in a significant way. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Moreover, the request primarily and fundamentally is for non-commercial purposes. *See, e.g., McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

In early December, news outlets reported that President-elect Trump's transition team had sent an extensive questionnaire to the Department of Energy that included a request for the names of all agency employees or contractors who have attended conferences related to climate change policy as well as e-mails and documents associated with the conferences.<sup>1</sup> The questionnaire raised concerns about potential retaliation against Energy Department staff by the incoming administration.<sup>2</sup> The Energy Department declined to provide individual names to transition team while acknowledging that some of the questions "left many in our workforce unsettled."<sup>3</sup>

The requested records would shed light on whether the Trump transition team has sought similar information at other government agencies that have worked on climate change policy.

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the public's right to be aware of the activities of government officials, to ensuring the integrity of those officials, and to highlighting and working to reduce the influence of money on politics. CREW uses a combination of research, litigation, and advocacy to advance its mission. CREW intends to analyze the information responsive to this request and to share its analysis with the public through reports, press releases, or other means. In addition, CREW will disseminate any documents it acquires from this request to the public through its website, [www.citizensforethics.org](http://www.citizensforethics.org), and through [www.scribd.com](http://www.scribd.com). The release of information obtained through this request is not in CREW's financial interest.

CREW further requests that it not be charged search or review fees for this request pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) because CREW qualifies as a member of the news media. *See Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (holding non-profit a "representative of the news media" and broadly interpreting the term to include "any person or organization which regularly publishes or disseminates information to the public").

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<sup>1</sup> Coral Davenport, *Climate Change Conversations are Targeted in Questionnaire*, *New York Times*, Dec. 9, 2016, available at <http://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html>.

<sup>2</sup> Brakkton Booker, *Trump Questionnaire Raises Concerns About Retaliation Against Energy Department Staff*, *NPR*, Dec. 10, 2016, available at <http://www.npr.org/sections/thetwo-way/2016/12/10/505105258/trump-questionnaire-raises-concerns-about-retaliation-against-energy-department>.

<sup>3</sup> Joe Davidson, *Energy Dept. Rejects Trump's Request to Name Climate Change Workers, Who Remain Worried*, *Washington Post*, Dec. 13, 2016, available at [https://www.washingtonpost.com/news/powerpost/wp/2016/12/13/energy-dept-rejects-trumps-request-to-name-climate-change-workers-who-remain-worried/?utm\\_term=.ade20de7da3e](https://www.washingtonpost.com/news/powerpost/wp/2016/12/13/energy-dept-rejects-trumps-request-to-name-climate-change-workers-who-remain-worried/?utm_term=.ade20de7da3e).

CREW routinely and systematically disseminates information to the public in several ways. CREW's website receives tens of thousands of page views every month. The website includes a blog that reports on and analyzes newsworthy developments regarding government ethics, corruption, and money in politics, as well as numerous reports CREW has published to educate the public about these issues. In addition, CREW posts all of the documents it receives under the FOIA at [www.scribd.com](http://www.scribd.com), and those documents have been visited hundreds of thousands of times.

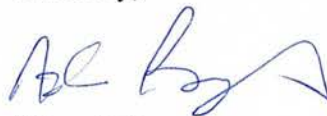
Under these circumstances, CREW satisfies fully the criteria for a fee waiver.

### **Conclusion**

If you have any questions about this request or foresee any problems in fully releasing the requested records, please contact me at (202) 408-5565 or [arappaport@citizensforethics.org](mailto:arappaport@citizensforethics.org). CREW also welcomes the opportunity to discuss with you whether and to what extent this request can be narrowed or modified to better enable NOAA to process it within the FOIA's deadlines. In addition, if CREW's request for a fee waiver is not granted in full, please contact our office immediately upon making such a determination.

Where possible, please produce records in electronic format. Please send the requested records to me either at [arappaport@citizensforethics.org](mailto:arappaport@citizensforethics.org) or at Adam J. Rappaport, Citizens for Responsibility and Ethics in Washington, 455 Massachusetts Ave., N.W., 6th Floor, Washington, D.C. 20001. Thank you for your assistance in this matter.

Sincerely,



Adam J. Rappaport  
Chief Counsel

Tracking Number	Type	Requester
DOC-NOAA-2017-000539	Referral	Jamie Pang
DOC-NOAA-2017-000492	Request	Michael Ravnitzky
DOC-NOAA-2017-000536	Request	Peter R. Ehrhardt
DOC-NOAA-2017-000530	Request	Raymond Tubb
DOC-NOAA-2017-000534	Request	Robert C. Stober
DOC-NOAA-2017-000533	Request	Lynn Manolopoulos
DOC-NOAA-2017-000532	Request	Corin Hoggard
DOC-NOAA-2017-000510	Request	Russ Rector
DOC-NOAA-2017-000497	Request	Rachel Clattenburg

DOC-NOAA-2017-000499	Request	Zeenat Mian
DOC-OS-2017-000428	Other	Robert Faturechi
DOC-OS-2017-000308	Other	Michael Best
DOC-OS-2017-000489	Search Pending	Jimmy Metcalf

Requester Organization	Submitted	Assigned To
CENTER FOR BIOLOGICAL DIVERSITY	01/30/2017	Tawand Hodge Tonic
	01/24/2017	Lola Stith
Atty at Law	01/30/2017	NMFS
WGXA ABC16/FOX24	01/27/2017	NWS
Hershoff, Lupino & Yagel, LLP	01/27/2017	NOS
Davis Wr.ght Tremain LLP	01/27/2017	NOS
ABC30 Action News	01/27/2017	NWS
	01/26/2017	Tawand Hodge Tonic
Public Citizen	01/25/2017	USEC

	01/25/2017	Kehaupuaokal Kamaka
ProPublica	01/25/2017	NOAA
	01/26/2017	NOAA
The Humane Society of the United States	02/01/2017	NOAA

Case File Assigned To	Perfected?	Due	Closed Date	Status
Tawand Hodge Tonic	Yes	03/01/2017	TBD	Research Records
Lola Stith	No	TBD	01/31/2017	Closed
NMFS	Yes	03/02/2017	TBD	Assignment Determination
NWS	Yes	03/02/2017	TBD	Assignment Determination
NOS	Yes	02/27/2017	TBD	Assignment Determination
NOS	Yes	02/28/2017	TBD	Assignment Determination
NWS	Yes	03/02/2017	TBD	Assignment Determination
Tawand Hodge Tonic	Yes	02/28/2017	TBD	Assignment Determination
USEC	Yes	03/02/2017	TBD	Assignment Determination



Kehaupuaokal Kamaka	Yes	02/23/2017	TBD	Assignment Determination
James Davis	Yes	02/27/2017	TBD	Open
James Davis	Yes	02/27/2017	TBD	Open
Harriette Boyd	Yes	02/10/2017	TBD	Open

**Dispositions**

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Not an agency record

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**Detail**

the

Clean Water Act, 33 U.S.C. § 1344, is/was sought pursuant to nationwide permits ("NWP"), generated since February 21, 2012 through the date of the agency's search for responsive records, in the following divisions of the U.S. Army Corps of Engineers ("ACOE"): North Atlantic; South Atlantic; South Pacific; Northwestern, Pacific Ocean; Headquarters;

2. All verification letters for NWPs, generated since February 21, 2012 through the date of the agency's search for responsive records, in the following divisions of the ACOE: North Atlantic; South Atlantic; South Pacific; Northwestern; Pacific Ocean; Headquarters;

3. All NWPs issued, approved, authorized, verified, and/or relied upon for specific activities or discharges by the North Atlantic, South Atlantic, South Pacific, Pacific Ocean; and Northwestern ACOE Divisions, and/or by ACOE Headquarters, in calendar years 2011 and 2012 through the date of the agency's search for responsive records;

4. All notices of intent to sue ACOE, dated within four years of the date of the agency's search for records, alleging violations of the Endangered Species Act and/or Clean Water Act in connection with the ACOE's NWP program;

5. All requests for reauthorization of activities pursuant to 2007 NWP 21 received by any ACOE division from Feb. 21, 2012 through the date of the agency's search for responsive records1

;

6. All biological opinions, biological assessments, letters of concurrence, and letters reflecting determinations of "no effect", pursuant to Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), for any projects covered under any NWPs, dated from February 21, 2012 through the date of the agency's search for responsive records;

**\*\*SEE SUPPORTING FILE FOR ADDTL DETAIL\*\***

A copy of the home page for <http://intranet.mcmurdo.usap.gov> A copy of each page connected to that home page

All documents in the possession or control of NOAA related or pertaining in any way to Charter Halibut Permit CHP permit No.4751C issued to Tom Floyd et al and Crooked Creek Guide and RV Park

to me: We would like a list of documents reflecting or showing the days that the Department of Defense Doppler Radar sites operated by the WFO at Atlanta/Peachtree City, GA and located in Jeffersonville, Georgia and covering Robins Air Force Base, and the site operated by the WFO at Jacksonville, FL, located in South

UTV LITTLE BULLY. A copy of the Captain of the Port Order 15-002 is attached. The undersigned attorney has been retained by SeaTow Islamorada SeaTow Islamorada was contracted to provide services to LITTLE BULLY

Information Act (FOIA) for copies of any documents relevant to the natural resource damages assessment referenced in paragraph 116 (concerning Quendall Terminals, located at 4503 Lake Washington Boulevard North, Renton, WA (&quot;Quendall Site&quot;)) of the enclosed Proof of Claim of the United States of America.

request includes but is not limited to a request for the habitat equivalency analysis (HEA) referenced in

Service from a whitehouse.gov email address between Jan. 20, 2017, and Jan. 23, 2017. I prefer to receive records in electronic form both for convenience and cost concerns.

Provide all MMIR transfer information (shared/unshared) available to the present. Also, I would like the record(s) in Excel format and correlate the information by date

request:

<br />

<br /> 1. All records of communications from or on behalf of the Trump Administration and/or the Trump Transition Team to the National Oceanic and Atmospheric Administration (NOAA) providing guidance on which agency matters NOAA employees may or may not publicly discuss and/or regulating how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request. Background discussion of the concerns motivating this request is provided in the January 24, 2017, article in Politico by Andrew Restuccia, Alex

Please provide information of HMMA's Hawaiian monk seal duties as specified on the cooperative grant with NOAA.

All correspondence between employees at the under secretary level or above and Todd Ricketts from Jan. 1, from any member or part of the transition team, as well as any emails which include any or all of the following terms or phrases: • Trump • Transition • President-Elect • New administration • New boss

any and all records received from, sent to, or that otherwise reference Scott Falk, Nominee of the Administrator, since November 9, 2016; and any and all FOIA request responses related to the request in

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**From:** Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>  
**Sent:** Wednesday, February 22, 2017 1:18 PM  
**To:** Mark Graff - NOAA Federal  
**Subject:** FW: JW's Brief - JW v. Dep't of Commerce  
**Attachments:** Dkt. 21 - 1 - Proposed Order.pdf; Dkt. 21 - Opposition to Summary Judgment.pdf; Dkt. 22 - 2 - Proposed Order.pdf; Dkt. 22 - Cross Motion for Partial Summary Judgment.pdf

fyi

Ruth Ann Lowery, Attorney-Advisor  
NOAA Office of General Counsel  
Fisheries & Protected Resources Section  
1315 East-West Highway, SSMC III, Room 15114  
Silver Spring, MD 20910  
(301)713-9671  
Fax: (301) 713-0658

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**From:** Ruth Ann Lowery - NOAA Federal [mailto:[ruthann.lowery@noaa.gov](mailto:ruthann.lowery@noaa.gov)]  
**Sent:** Wednesday, February 22, 2017 1:18 PM  
**To:** Kristen Gustafson - NOAA Federal  
**Cc:** Adam Issenberg ([adam.issenberg@noaa.gov](mailto:adam.issenberg@noaa.gov)); Rod Vieira ([rod.vieira@noaa.gov](mailto:rod.vieira@noaa.gov))  
**Subject:** FW: JW's Brief - JW v. Dep't of Commerce

Fyi. We'll be talking to DOC/DOJ about this at 3:00.

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor  
NOAA Office of General Counsel  
Fisheries & Protected Resources Section  
1315 East-West Highway, SSMC III, Room 15114  
Silver Spring, MD 20910  
(301)713-9671  
Fax: (301) 713-0658

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><(((o>`.,.,.~.,.,><(((o>.,.,.~.,.,><(((o>

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**From:** Snell, Kevin (CIV) [<mailto:Kevin.Snell@usdoj.gov>]  
**Sent:** Wednesday, February 22, 2017 8:37 AM  
**To:** Myers, Jordan (Federal); Davidson, Hillary (Federal)  
**Cc:** ruthann.lowery; Rose Stanley - NOAA Federal; Vieira, Rodney (Federal)  
**Subject:** JW's Brief - JW v. Dep't of Commerce

Filed late last night. (b)(5)

[REDACTED]

[REDACTED]

[REDACTED].

I have a handful of things I need to do this morning and early afternoon but I should have some time to discuss later this afternoon or tomorrow morning. Let me know what you think.

Thanks!

Kevin

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-2088 (CRC)
	)	
U.S. DEPARTMENT OF	)	
COMMERCE,	)	
	)	
Defendant.	)	
_____	)	

**[PROPOSED] ORDER**

Upon consideration of the Cross-Motions for Summary Judgment, it is hereby ORDERED that Plaintiff’s Motion for Summary Judgment is GRANTED and Defendant’s Motion for Summary Judgment is DENIED.

**SO ORDERED.**

Date:

\_\_\_\_\_

Christopher R. Cooper  
United States District Judge



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
	)	
<i>Plaintiff,</i>	)	
	)	Civ. No. 1:15-cv-2088 (CRC)
v.	)	
	)	
U.S. DEPARTMENT OF COMMERCE,	)	
	)	
<i>Defendant.</i>	)	
	)	

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**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S  
OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND IN  
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch (“Plaintiff” or “Judicial Watch”), by counsel, respectfully submits this memorandum in opposition to Defendant Department of Commerce’s (“Defendant” or “Commerce Department”) motion for summary judgment and to support Plaintiff’s cross-motion for summary judgment.

**INTRODUCTION**

Defendant has failed to provide all records in its possession, or at least the reasonably segregable, non-exempt portions of such records, and has, therefore, unreasonably withheld material responsive to Plaintiff’s FOIA request. Failing to meet its burden of proof, Defendant cannot justify the withholding of responsive documents as validly exempt under FOIA and should be ordered to disclose the improperly withheld records.

Defendant is improperly withholding information and records asserting Exemption 5 under FOIA. However, the information and documents Defendant is withholding do not validly fall within the parameters of Exemption 5 as part of the “deliberative process privilege” as intended by Congress. The “deliberative” nature of the records being withheld is factual,

investigative, scientific research related to a study published in a non-agency, peer-review journal, *Science*. The information reflects no policy or law of the agency. Therefore, the information and records being withheld are not validly exempt from disclosure under FOIA.<sup>1</sup>

### **BACKGROUND**

In June, 2015, the independent, scientific, peer-review journal *Science* published a scientific study by Thomas Karl and eight other scientists, entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* (“Karl Study”) See Defendant’s Statement of Material Facts (“Def’s SOF”) ¶6, ECF 16 (attached to Defendant’s Motion for Summary Judgment). The Karl Study specifically set out to investigate and formulate a conclusion regarding the “pause” or “slowdown” in global warming as reported the previous year (September 2013-November 2014) by the Intergovernmental Panel on Climate Change (“IPCC”). See Pl.’s SOF ¶ 1. The IPCC report concluded that the upward global surface temperature trend from 1998-2012 was lower than that from 1951-2012. See Def’s SOF ¶ 1. The Karl Study claimed that the ‘pause’ or ‘slowdown’ in global warming reported in the IPCC report never existed. See Plaintiff’s Statement of Material Facts (“Pl.’s SOF”) ¶ (attached herein).

Following publication of the Karl Study, Congressman Lamar Smith, Chairman of the House Committee on Science, Space, and Technology Committee, issued a subpoena requesting communications and documents related to the Karl Study. See Pl. SOF ¶ 11. NOAA officials did not comply with the subpoenas and refused to turn over internal discussions among the scientists who authored the Karl Study claiming confidentiality. *Id.*

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<sup>1</sup> Plaintiff initially challenged the adequacy of Defendant’s search for responsive records. Having reviewed the Declaration of Mark Graff submitted with Defendant’s motion for summary judgment, Plaintiff is no longer challenging the adequacy of the search. Plaintiff has no objection to Defendant withholding phone numbers of NOAA scientists pursuant to Exemption 6 under FOIA for privacy considerations. Plaintiff’s Opposition and Cross-Motion for Summary Judgment addresses only its challenges to Defendant’s B5 assertions.

On October 30, 2015, Plaintiff submitted a FOIA request to NOAA, *Seeking access to:*

1. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the methodology and utilization of Night Marine Air Temperatures to adjust ship and buoy temperature data.
2. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the use of other global temperature datasets for both NOAA's in-house dataset improvements and monthly press releases conveying information to the public about global temperatures.
3. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the utilization and consideration of satellite bulk atmospheric temperature readings for use in global temperature datasets.
4. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to a subpoena issued for the aforementioned information by Congressman Lamar smith on October 13, 2015.<sup>2</sup>

*See* Complaint ("Compl.") ¶5, ECF No. 1.

Plaintiff filed this FOIA lawsuit on December 2, 2015 after NOAA violated its obligations in 5 U.S.C. § 552, the Freedom of Information Act ("FOIA"). *See* Compl. ¶¶ 7-10. On February 4, 2016, counsel for NOAA contacted Plaintiff to discuss the request. *See* Pl.'s SOF 1. Plaintiff agreed to narrow its request and limit the agency's search parameters to the topics specifically identified in its request. *See* Def.'s SOF ¶ 22. On May 27, 2016, Plaintiff received 102 pages of records produced in full and 90 pages of records produced in part. *See* Fourth Joint Status Report, ECF No. 12 ¶ 2. NOAA informed Plaintiff it was withholding 8,013 pages of records in full as duplicative or exempt under FOIA. *See* Fourth Joint Status Report, ECF No. 12. Plaintiff requested NOAA provide a draft *Vaughn* index to review the specific

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<sup>2</sup> Plaintiff is not challenging Defendant's production of records related to this portion of the FOIA request.

exemptions and withholdings being asserted. *See* Fifth & Sixth Joint Status Reports, ECF Nos. 13 & 14. Following review of the draft *Vaughn* index, Plaintiff narrowed the issues and specific records it was challenging and informed Defendant it was challenging the documents withheld under Exemptions 5 and 6 and the adequacy of the search. *See* Pl.'s SOF ¶ 2 On September 16, 2016, Plaintiff received an additional 44 pages of responsive records previously withheld by Defendant. *See* Def's SOF ¶32. On December 15, 2016, Plaintiff received 62 additional records previously withheld. *See* Def's SOF ¶ 33.

On February 4, 2017, DailyMail.com, a British news blog website, reported that a high level whistleblower from NOAA, Dr. John J. Bates, former NOAA scientist had evidence that the Karl Study “was based on misleading, ‘unverified’ data.” *See* Pl.'s SOF 4. The article reports the Karl Study was never subject to NOAA’s “rigorous internal evaluation process.” *See* Pl.'s SOF 5. Dr. Bates accused Tom Karl of “insisting on decisions and scientific choices that maximized warming and minimized documentation...in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy.” *Id.* The article reports it learnt [*sic*] “that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming.” *Id.* “[t]he land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings ‘unstable.’”

### **LEGAL STANDARD**

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). In FOIA cases, agency decisions to “withhold or disclose information under FOIA are reviewed *de novo*.” *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 256 (D.D.C. 2004). In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the requester. *Weisberg v. U.S. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

Also in FOIA litigation, but unlike in most other federal litigation, the agency defending the action, not the plaintiff, must prove. 5 U.S.C. § 552(a)(4)(B) (“the burden is on the agency to sustain its action”); *accord Military Audit Project v. Casey*, 656 F.2d 724, 739 (D.C. Cir. 1981). “[T]he agency must demonstrate beyond material doubt that its search was ‘reasonably calculated to uncover all relevant documents.’” *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (*quoting Truitt v. U.S. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)).

FOIA requires complete disclosure of requested agency information unless the information falls into one of FOIA’s nine exemptions. 5 U.S.C. § 552(b); *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7-8 (2001); *See also Dep’t of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (discussing the history and purpose of FOIA and the structure of FOIA exemptions). “These limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Id.* Because of FOIA’s goal of promoting agency disclosure, the exemptions are to be construed narrowly. *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136, 150-151 (1989). “[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.” *U.S. Department of State v. Ray*, 502 U.S. 164, 173 (1991).

## ARGUMENT

### 1. Defendant Improperly Applies the Deliberative Process Privilege

Defendant is withholding information and records responsive to Plaintiff's FOIA request asserting the deliberative process privilege under Section 5 of FOIA. The withheld documents reflect communications among scientists related to factual data and conclusions of the scientific investigation reported in the Karl Study. *See Vaughn* index, Exhibit 1 to Declaration of Mark Graff ("Vaughn index"), ECF No. 16-2. The withheld records do not contain suggestions or recommendations on legal or policy matters. *See Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). Rather, any recommendations or opinions in the documents are of a scientific, factual, and investigatory nature. The information and records are related to a scientific research study published in a non-agency, peer review journal, *Science*. The communications and analysis do not reflect the "agency policy" envisioned by Congress as requiring protection from disclosure. *See Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1437 (D.C. Cir. 1992) (a "salient characteristic" of information eligible for protection under deliberative process privilege is its "association with a significant *policy* decision") (emphasis in original).

#### a. Scientific deliberations and decisions are not policy-related

Deliberative process covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated," *Sears, Roebuck & Co.*, 421 U.S. at 150 (internal quotation marks omitted). Congress did not intend to shield the public from the scientific discovery and research process. To withhold information under the deliberative process privilege, an agency must demonstrate that the information would "reveal 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *In*

*re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)). Further, the information must be “pre-decisional and it must be deliberative[,]” and the agency should “not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual.” *Id.* (citations omitted).

Scientific deliberations are not equivalent to policy deliberations. Scientific studies, such as this one, are objective, factual presentations of research and investigatory reports. The material is not part of the policy-making process and does not fall into the category of predecisional deliberative memoranda under Exemption 5. The deliberative process privilege is a limited privilege. In applying the deliberative process privilege, courts assess the substance of the records requested to determine if the information is purely factual or policy-related; (2) whether factual material is “reasonably segregable”, and (3) whether the material is both predecisional and deliberative. *See Nat’l Wildlife Fed’n*, 861 F.2d at 1118-20; *Senate of P.R. v. U.S. Dep’t of Justice*, 823 F.2d 574 (D.C. Cir. 1987).

To be part of the deliberative process, the document must be part of the decision-making process, or, as the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) has described, “[must] reflect[] the give-and-take of the consultative process.” *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). “[T]he agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process.” *Id.* at 868.

To determine whether the Defendant’s claim that the documents are validly being withheld, it is crucial to understand the function the documents serve within the agency. *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 858 (D.C. Cir. 1980); *NLRB v. Sears*,

*Roebuck & Co.*, 421 U.S. 132 (1975). Defendant asserts the drafts and information withheld contain opinions and recommendations of the authors and responses to peer review which qualify the material as “deliberations”. Defendant’s Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment (“Def.’s SJM”), ECF No. 16 at 10. However, such opinions, recommendations and peer responses are part of a *scientific deliberation* process and are not shielded from public disclosure under FOIA. Here, Defendant misconstrues the internal functioning of the scientific deliberative process. The withheld communications are not the documents Congress intended to be protected under the deliberative process privilege. *See Coastal States*, 617 F.2d at 867. They are not “suggestions or recommendations as to what agency policy should be.” *Id.*

Rather, the “deliberative” information and documents Defendant is attempting to withhold are more “resource opinion” relating to the applicability of existing and discovered - science to a certain set of existing and developing - data and methodology. Shielding such deliberations from the public is unnecessary and no protection from disclosure exists under FOIA.

Defendant provides the declaration of Dr. Richard W. Spinard who points to the “exchange and debate among peers as the mechanism that allows us to ensure that the scientific products we develop and release to the public are robustly developed and accurately tested. Such rigorous vetting is critical to developing and releasing scientific information of the highest possible quality to inform the public and decision-makers.” Spinrad Decl. ¶ 15.

Communications among the authors and their peers involve discussions about the tests, results, data, conclusions, etc., and analysis, theory, and presentation. Def.’s SJM at 10. Scientific answers and discoveries are realized through this open forum discussion and scientific progress



is advanced. However, Defendant argues that revealing the collaboration among scientists and disclosing these discussions will hinder the “robustness of the scientific progress.” Spinrad Decl. ¶ 24. However, the purpose of Exemption 5’s deliberative process protection specifically relates to agency policy-making. What purpose does Exemption 5 shield scientific deliberations that do not amount to agency policy? Scientific deliberations contemplate real, conclusive answers derived from concrete, measurable findings. Policy deliberations consider theoretical opinions and ideas molded into creating a rule or law. Congress’ intention to shield the theoretical “molding process” of policy deliberations cannot be concluded to similarly apply to the investigative research process of scientific deliberations.

Here, *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001) is instructive. There is no support for application of exemption 5 to scientific deliberations (as opposed to policy deliberations) in the statutory text, which the Supreme Court has “insisted be read strictly in order to serve FOIA’s mandate of broad disclosure”, which was expected and intended to affect Government operations (refusing to read an “Indian trust” exemption into the statute noting “as a general rule we are hesitant to construe statutes in light of legislative inaction” *citing Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983)).

Dr. Richard W. Spinrad asserts “these requests for input often lead to candid discussions and debates that can be thought of as a type of informal peer review that fulfills a valuable role in developing scientific thought and promoting scientific understanding.” Decl. ¶19. However, Candid discussions and informal peer review do not lead to the development of or advising on agency policy. Rather, these discussions among peers involve analysis and application of factual material and investigative techniques that “generate new ideas” in science. There is no advising

on agency policy. Rather, such deliberations are part of the scientific process in any research endeavor—the end result of which is not creation of policy, but factual, scientific discovery.

The D.C. Circuit has held that information is part of the deliberative process if disclosing such materials would expose the agency's decision-making process in such a way to discourage candid discussion within agency and undermine the agency's ability to perform its functions. *Dudman*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). Here, Defendant's Motion for Summary Judgment Memorandum and supporting declarations repeatedly state that disclosure of the withheld information and documents would inhibit candid internal discussions" and "chill the open and frank exchange of comments and opinions." Def.'s SJM at 10; Spinrad Decl. ¶¶ 22, 23, 27; Graff Decl. ¶ 64. However, the communications and deliberations related to the Karl Study at issue here do not reflect agency policy, there is no force of law. The purpose of these communications and deliberations was to adequately and accurately publish scientific findings in a peer-review journal, not to create agency policy. FOIA—and Congress in creating specific statutory exemptions—does not apply to the scientific method statutorily. Nor has it been held by courts it was the intention of Congress for exemption 5 to be so expansive as to encompass all intellectual or developmental discussions among peers. Exemption 5 relates to policy deliberations specifically. Even courts that have edged on judicial expansion of the meaning of deliberative process have cautioned and not done what Defendants *Seek* here.

In *Petroleum Information Corp. v. U.S. DOI*, 976 F.2d 1429, 1435 (D.C. Cir. 1992), the D.C. Cir. held that factual information should be shielded by the privilege, or not, according to "whether the agency has plausibly demonstrated the involvement of a policy judgment in the decisional process relevant to the requested documents." *See Mink*, 410 U.S. at 87 (privilege designed to promote "frank discussion of legal and policy matters") (quoting S.REP. No. 813,

89<sup>th</sup> Cong., 1<sup>st</sup> Sess. 9 (1965)); *id.* at 89 (“Exemption 5 requires different treatment for material reflecting deliberative or policy-making processes” and “purely factual, investigative matters”); *Coastal States*, 617 F.2d at 869 (resting conclusion that documents were not within Exemption 5 in part on ground that the documents did not “discuss the wisdom or merits of a particular agency policy, or recommend new agency policy”). “Conversely, when material could not reasonably be said to reveal an agency’s or official’s mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable.” *Petroleum Information Corp. v. DOI*, 976 F. 2d at 1435; *See Playboy Enterprises v. Department of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) (holding that fact report was not within privilege because compilers’ mission was simply “to investigate the facts,” and because report was not “intertwined with the policy-making process.”) Here, Defendant cannot point to any agency policy sought to be protected. Rather, Defendant asks the court to conclude a sufficient justification for applying Exemption 5 to scientific deliberations analogous to policy-making deliberations of an agency. The deliberations are comments among the authors and scientific community peers there is no agency policy decision. Defendant fails to point to any agency policy at issue that warrants Exemption 5 privilege protection. The results of research are factual, not deliberative, information and are not the discussions Congress intended to protect under the deliberative process privilege. *See Hennessey*, 1997 WL 537998 (“report does not bear on a policy-oriented judgment of the kind contemplated by Exemption 5” *citing Petroleum Info*, 976 F.2d at 1437); *Ethyl Corp. v. EPA*, 25 F.3d 1241 (4<sup>th</sup> Cir. 1994) (“privilege does not protect a document which is merely peripheral to actual policy formulation”); *Chi Tribune Co., v. HHS*, No. 95 C 3917, 1997 U.S. Dist. LEXIS 2308 (N.D. Ill. Feb. 26, 1997) (magistrate’s recommendation) (scientific judgments not protectable when they do not address agency policymaking.) Disclosure of the

scientific discussions within the withheld records will not “impinge[] on the policymaking decisional processes intended to be protected by this exemption.” *EPA v. Mink*, 410 U.S. 73, 92. The disclosure sought by Plaintiff will not reveal the deliberative process that Exemption 5 protects.

Disclosure of records under FOIA is required unless it squarely falls within one of the enumerated exemptions as written and specifically intended by Congress. Defendant argues this transparency requirement Congress placed on federal agencies will halt scientific progress by hampering scientists from discussing factual, scientific processes and findings. *See* Def’s SJM at 10, 20; Spinrad Decl. ¶¶ 21, 23, 24.

It cannot be possible that a scientist performing his duties would be less “frank” or “honest” if he or she knew the document might be made public. Here, withholding the communications serves no legitimate policy interest of the government. *See Coastal States*, 617 F.2d 854, 869.

Dr. Richard W. Spinard asserts “This would narrow the range of perspectives taken into account in generating our scientific products and therefore reduce the overall robustness of the scientific process.” Decl. ¶ 24. However, “robustness of the scientific process” is not statutorily protected under FOIA. Science is not Policy. While deliberations about judgments, opinions, and theories are part of the scientific research process, such exchanges among non-policy decision-makers are not protected from disclosure under FOIA. Such communications are necessary and play a major role in development of science and furthering research, but the substantive nature of scientific research is objective reporting of facts and findings, not subjective policy decisions.

## **2. The Evidence Revealed by Dr. John Bates Shows Misconduct Sufficient to Defeat Privilege**

In this Circuit, the government misconduct exception to the deliberative process privilege applies in two circumstances. First, the “deliberative process privilege disappears altogether when there is any reason to believe government misconduct occurred.” *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) (internal quotations omitted). And second, “where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve the public’s interest in honest, effective government.” *Id.* at 738 (internal quotations omitted). There is more than enough “reason to believe” government misconduct may have occurred here. Former top NOAA scientist recently revealed to DailyMail.com that the Karl Study is based on “unverified” data and was never subject to rigorous internal evaluation process. *See* Pl.’s SOF. Dr. Bates reports the Karl Study was never subject to NOAA’s “rigorous internal evaluation process.” *See* Pl.’s SOF. Dr. Bates accused Tom Karl of “insisting on decisions and scientific choices that maximized warming and minimized documentation...in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy.” *Id.* The article reports “that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming.” *Id.* “[t]he land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings ‘unstable.’” This is not mere speculation. Rather, Dr. Bates purports to have “irrefutable evidence”. *Id.*

This standard has been further elaborated by this Court. For instance, documents that constitute “circumstantial evidence” of wrongdoing should be released under the misconduct exception. *Alexander v. FBI*, 186 F.R.D. 154, 164 (D.D.C. 1999).

This Court has held that the government misconduct exception applies to documents withheld under FOIA. *Nat’l Whistleblower Ctr. v. HHS*, 903 F. Supp. 2d 59, 66 (D.D.C. 2012) (“With respect to Defendant’s legal argument, there is no authority supporting its contention that the government-misconduct exception cannot apply in FOIA cases.”).

In addition, a finding that the government misconduct exception applies does not require the Court to make a “determination as to the ultimate question of the lawfulness of Defendant’s actions,” but only requires a finding of sufficient “misconduct.” *Nat’l Whistleblower Ctr. v. HHS*, 903 F. Supp. 2d 59, 69 (D.D.C. 2012)

Even if the Court determined the communications are deliberative, NOAA must produce the records because the government misconduct exception applies here.

Government misconduct can be “nefarious” or “extreme” or a “serious breach of the responsibilities of representative government,” in which to apply the exception. *ICM Registry, LLC v. U.S. Dep’t of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008). Misleading the public about scientific data...is nefarious and extreme wrongdoing. Coupled with NOAA’s refusal to comply with Representative Smith’s congressional subpoena, there is ample evidence to *See* that government misconduct is an issue here.

The misconduct here is arguably more nefarious and extreme than the alleged misuse of the IRS at issue in *Tax Reform Research Grp. V. Internal Revenue Serv*, 419 F.Supp. 415, 426 (D.D.C. 1976), in which the exception was found to apply

### **3. Defendant Failed to Produce Reasonably Segregable Information**

The segregability analysis required by FOIA cannot be understated. In *Mead Data Central v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977), the Court held that “even where specific exemptions apply, the agency is required to conduct a segregability analysis and determine if any non-exempt portions of the record can be released.” This requirement is so essential that, “before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld ... [and] [i]f the district court approves withholding without such a finding, remand is required even if the requester did not raise the issue of segregability before the court.” *Sussman*, 494 F.3d at 1116 (internal citations omitted); *See also Soucie v. David*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971) (non-exempt material may be protected only if it is “inextricably intertwined” with exempt information).

Defendants’ declaration offers only the barest, conclusory statement that the withheld information is not segregable. *See* Def’s SJM at 22. This is inadequate to meet Defendant’s burden in FOIA litigation. Conclusory language in agency declarations that provides no specific basis for segregability findings by district courts may be found inadequate. *See Dorsett v. United States Dep’t of the Treasury*, 307 F. Supp. 2d 28, 41 (D.D.C. 2004) (denying summary judgment in part “[b]ecause of [agency’s] inadequate and conclusory segregability explanation,” and ordering renewed motion with affidavit solely addressing segregability); *Animal Legal Def. Fund v. Dept. of Air Force*, 44 F. Supp. 2d 295, 301 (D.C. Cir. 1999) (conclusory statement regarding segregability are “patently insufficient”); *Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep’t of State*, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992) (finding that “boilerplate” statement that “no segregation of nonexempt, meaningful information can be made for disclosure” is “entirely insufficient”); *See also Patterson v. IRS*, 56 F.3d 832, 839 (7th Cir. 1995) (“[B]ecause

the [agency declaration] lumps all of the withheld information together in justifying nondisclosure, the district court could not have independently evaluated whether exempt information alone was being withheld or deleted in each instance.”)

#### **4. *In Camera* Review is Warranted**

Courts have departed from routine reliance on agency affidavits where exemptions are not sufficiently proven, or where other good cause may exist to order release information under FOIA. The Court has “the option to conduct *in camera* review.” *Juarez v. DOJ*, 518 F.3d 54, 59-60 (D.C. Cir. 2008); *Allen v. CIA*, 636 F.2d 1287, 1298 (D.C. Cir. 1980) (“Where the agency fails to meet that burden, a not uncommon event, the court may employ a host of procedures that will provide it with sufficient information to make its *de novo* determination, including *in camera* inspection.”). Here, the court should undergo an *in camera* review to determine the appropriateness of Defendants’ asserted claims of deliberative process privilege.

Because the requested records are “few in number and of short length,” the Court may reasonably review the responsive records *in camera*. *Allen*, 636 F.2d at 1298. *In camera* review is “particularly appropriate” in cases like this one, where the “agency affidavits are insufficiently detailed to permit meaningful review of exemption claims.” *Quinon & Strafer v. Federal Bureau of Investigation*, 86 F.3d 1222, 1228 (D.C. Cir. 1996). In addition, as the D.C. Circuit Court has explained:

In cases that involve a strong public interest in disclosure there is also a greater call for *in camera* inspection... When citizens request information to ascertain whether a particular agency is properly serving its public function, the agency often deems it in its best interest to stifle or inhibit the probes. It is in these instances that the judiciary plays an important role in reviewing the agency’s withholding of information. But since it is in these instances that the representations of the agency are most likely to be protective and perhaps less than accurate, the need for *in camera* inspection is greater. *Allen*, 636 F.2d at 1299.



The public interest in disclosure, and the distinct possibility of the agency being “protective” of information given the circumstances, dictates such a review here.

**Conclusion**

For all of the foregoing reasons and the reasons, Plaintiff’s cross-motion for summary judgment should be granted and the material should be produced to Plaintiff.

Dated: February 21, 2017

Respectfully submitted,

/s/ Lauren M. Burke

Lauren M. Burke

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*Counsel for Plaintiff*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-2088 (CRC)
	)	
U.S. DEPARTMENT OF	)	
COMMERCE,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S RESPONSE TO DEFENDANT’S STATEMENT OF MATERIAL FACTS  
NOT IN DISPUTE AND PLAINTIFF’S STATEMENT OF MATERIAL FACTS IN  
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Local Civil Rule 7(h), respectfully submits this response to Defendant’s Statement of Material Facts Not in Dispute (ECF 25-5) and Plaintiff’s Statement of Material Facts in Support of Cross-Motion for Summary Judgment:

**I. Plaintiff’s Response to Defendants’ Statement of Material Facts Not in Dispute.**

General Objection

As an initial matter, Plaintiff objects that Defendant’s statement does not comply with Local Civil Rule 7(h)(1). The failure to comply with the requirement to file a proper statement of material facts in “making or opposing a motion for summary judgment may be fatal to the delinquent party’s position.” *Gardels v. Central Intelligence Agency*, 637 F.2d 770, 773 (D.C. Cir. 1980); *see also Adagio Investment Holding Ltd. v. Federal Deposit Insurance Corp.*, 338 F. Supp.2d 71, 75 (D.D.C. 2004); *Smith Property Holdings, 4411 Connecticut L.L.C. v. U.S.*, 311 F. Supp. 2d 69, 78 (D.D.C. 2004); *Robertson v. American Airlines*, 239 F. Supp.2d 5, 8-9 (D.D.C.

2002). Defendants' statement of material facts contains an improper mix of fact and legal conclusions and therefore fails to "assist the court in isolating the material facts, distinguishing disputed from undisputed facts, and identifying the pertinent parts of the record . . ." *Robertson*, 239 F. Supp. 2d at 9 (citations omitted).

Specific Objections

1. Not disputed.
2. Not disputed. as plaintiff lacks sufficient knowledge to confirm or deny whether Defendant directed its search efforts as described. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the asymmetrical distribution of knowledge between a FOIA requester and an agency in FOIA cases).
3. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.
4. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.
5. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.
6. Not disputed.
7. Disputed
8. Disputed
9. Disputed
10. Disputed
11. Disputed

12. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

13. Disputed

14. Disputed.

15. Disputed

16. Disputed

17. Disputed

18. Not disputed

19. Not disputed

20. Not disputed

21. Not disputed

22. Not disputed

23. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

24. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

25. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

26. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

27. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

28. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

29. Not disputed

30. Not disputed

31. Not disputed as to supplemental productions. Otherwise, disputed.

32. Not disputed

33. Not disputed

34. Not disputed as to NOAA's asserted exemption

35. Not disputed as to NOAA's asserted exemption

**II. Plaintiff's Statement of Material Facts Not in Dispute in Support of Cross-Motion for Summary Judgment.**

1. On February 4, 2016, counsel for NOAA contacted Plaintiff to discuss the request.

2. Following review of the draft *Vaughn* index, Plaintiff narrowed the issues and specific records it was challenging and informed Defendant it was challenging the documents withheld under Exemptions 5 and 6 and the adequacy of the search.

3. On February 4, 2017, David Rose from Britain's Mail on Sunday column on the DailyMail.com blog website published an article entitled: Exposed: How World Leaders Were Duped Into Investing Billions Over Manipulated Global Warming Data. The article can be found on the DailyMail.com website at:

<http://www.dailymail.co.uk/sciencetech/article-4192182/World-leaders-duped-manipulated-global-warming-data.html>

4. The article reported that a high level whistleblower from NOAA, Dr. John J. Bates, former NOAA scientist had evidence that the Karl Study "was based on misleading, 'unverified'

data.”

5. The article reports the Karl Study was never subject to NOAA’s “rigorous internal evaluation process.”

6. Dr. Bates accused Tom Karl of “insisting on decisions and scientific choices that maximized warming and minimized documentation...in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy.”

7. The article reports it learnt [sic] “that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming.”

8. Additionally, “The land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings ‘unstable.’”

9. The article reports that the Karl Study specifically set out to investigate and formulate a conclusion regarding the “pause” or “slowdown” in global warming as reported by the Intergovernmental Panel on Climate Change (“IPCC”).

10. The article reports that the Karl Study claimed that the ‘pause’ or ‘slowdown’ in global warming reported in the IPCC report never existed.

11. Following publication of the Karl Study, Congressman Lamar Smith, Chairman of the House Committee on Science, Space, and Technology Committee, issued a subpoena requesting communications and documents related to the Karl Study.

12. NOAA officials did not comply with the congressional subpoenas and refused to turn over internal discussions among the scientists who authored the Karl Study claiming confidentiality.

Dated: February 21, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ Lauren M. Burke

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*Attorneys for Plaintiff*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-2088 (CRC)
	)	
U.S. DEPARTMENT OF	)	
COMMERCE,	)	
	)	
Defendant.	)	
_____	)	

**[PROPOSED] ORDER**

Upon consideration of the Cross-Motions for Summary Judgment, it is hereby ORDERED that Plaintiff’s Motion for Summary Judgment is GRANTED and Defendant’s Motion for Summary Judgment is DENIED.

**SO ORDERED.**

Date:

\_\_\_\_\_

Christopher R. Cooper  
United States District Judge



**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-2088 (CRC)
	)	
U.S. DEPARTMENT OF	)	
COMMERCE,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby cross-moves for summary judgment against Defendant U.S. Department of Commerce. As grounds therefor, Plaintiff respectfully refers the Court to the accompanying “Brief in Support of Plaintiff’s Cross-Motion for Summary Judgment and in Opposition to Defendants’ Motion for Summary Judgment,” and “Plaintiff’s Response to Defendants’ Statement of Material Facts Not in Dispute and Statement of Material Facts in Support of Cross-Motion for Partial Summary Judgment.”

Dated: February 21, 2017

Respectfully submitted,

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*Attorneys for Plaintiff*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
	)	
<i>Plaintiff,</i>	)	
	)	Civ. No. 1:15-cv-2088 (CRC)
v.	)	
	)	
U.S. DEPARTMENT OF COMMERCE,	)	
	)	
<i>Defendant.</i>	)	
_____	)	

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S  
OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND IN  
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch (“Plaintiff” or “Judicial Watch”), by counsel, respectfully submits this memorandum in opposition to Defendant Department of Commerce’s (“Defendant” or “Commerce Department”) motion for summary judgment and to support Plaintiff’s cross-motion for summary judgment.

**INTRODUCTION**

Defendant has failed to provide all records in its possession, or at least the reasonably segregable, non-exempt portions of such records, and has, therefore, unreasonably withheld material responsive to Plaintiff’s FOIA request. Failing to meet its burden of proof, Defendant cannot justify the withholding of responsive documents as validly exempt under FOIA and should be ordered to disclose the improperly withheld records.

Defendant is improperly withholding information and records asserting Exemption 5 under FOIA. However, the information and documents Defendant is withholding do not validly fall within the parameters of Exemption 5 as part of the “deliberative process privilege” as intended by Congress. The “deliberative” nature of the records being withheld is factual,

investigative, scientific research related to a study published in a non-agency, peer-review journal, *Science*. The information reflects no policy or law of the agency. Therefore, the information and records being withheld are not validly exempt from disclosure under FOIA.<sup>1</sup>

### **BACKGROUND**

In June, 2015, the independent, scientific, peer-review journal *Science* published a scientific study by Thomas Karl and eight other scientists, entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* (“Karl Study”) See Defendant’s Statement of Material Facts (“Def’s SOF”) ¶6, ECF 16 (attached to Defendant’s Motion for Summary Judgment). The Karl Study specifically set out to investigate and formulate a conclusion regarding the “pause” or “slowdown” in global warming as reported the previous year (September 2013-November 2014) by the Intergovernmental Panel on Climate Change (“IPCC”). See Pl.’s SOF ¶ 1. The IPCC report concluded that the upward global surface temperature trend from 1998-2012 was lower than that from 1951-2012. See Def’s SOF ¶ 1. The Karl Study claimed that the ‘pause’ or ‘slowdown’ in global warming reported in the IPCC report never existed. See Plaintiff’s Statement of Material Facts (“Pl.’s SOF”) ¶ (attached herein).

Following publication of the Karl Study, Congressman Lamar Smith, Chairman of the House Committee on Science, Space, and Technology Committee, issued a subpoena requesting communications and documents related to the Karl Study. See Pl. SOF ¶ 11. NOAA officials did not comply with the subpoenas and refused to turn over internal discussions among the scientists who authored the Karl Study claiming confidentiality. *Id.*

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<sup>1</sup> Plaintiff initially challenged the adequacy of Defendant’s search for responsive records. Having reviewed the Declaration of Mark Graff submitted with Defendant’s motion for summary judgment, Plaintiff is no longer challenging the adequacy of the search. Plaintiff has no objection to Defendant withholding phone numbers of NOAA scientists pursuant to Exemption 6 under FOIA for privacy considerations. Plaintiff’s Opposition and Cross-Motion for Summary Judgment addresses only its challenges to Defendant’s B5 assertions.

On October 30, 2015, Plaintiff submitted a FOIA request to NOAA, *Seeking access to:*

1. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the methodology and utilization of Night Marine Air Temperatures to adjust ship and buoy temperature data.
2. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the use of other global temperature datasets for both NOAA's in-house dataset improvements and monthly press releases conveying information to the public about global temperatures.
3. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the utilization and consideration of satellite bulk atmospheric temperature readings for use in global temperature datasets.
4. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to a subpoena issued for the aforementioned information by Congressman Lamar smith on October 13, 2015.<sup>2</sup>

*See* Complaint ("Compl.") ¶5, ECF No. 1.

Plaintiff filed this FOIA lawsuit on December 2, 2015 after NOAA violated its obligations in 5 U.S.C. § 552, the Freedom of Information Act ("FOIA"). *See* Compl. ¶¶ 7-10. On February 4, 2016, counsel for NOAA contacted Plaintiff to discuss the request. *See* Pl.'s SOF 1. Plaintiff agreed to narrow its request and limit the agency's search parameters to the topics specifically identified in its request. *See* Def.'s SOF ¶ 22. On May 27, 2016, Plaintiff received 102 pages of records produced in full and 90 pages of records produced in part. *See* Fourth Joint Status Report, ECF No. 12 ¶ 2. NOAA informed Plaintiff it was withholding 8,013 pages of records in full as duplicative or exempt under FOIA. *See* Fourth Joint Status Report, ECF No. 12. Plaintiff requested NOAA provide a draft *Vaughn* index to review the specific

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<sup>2</sup> Plaintiff is not challenging Defendant's production of records related to this portion of the FOIA request.

exemptions and withholdings being asserted. *See* Fifth & Sixth Joint Status Reports, ECF Nos. 13 & 14. Following review of the draft *Vaughn* index, Plaintiff narrowed the issues and specific records it was challenging and informed Defendant it was challenging the documents withheld under Exemptions 5 and 6 and the adequacy of the search. *See* Pl.'s SOF ¶ 2 On September 16, 2016, Plaintiff received an additional 44 pages of responsive records previously withheld by Defendant. *See* Def's SOF ¶32. On December 15, 2016, Plaintiff received 62 additional records previously withheld. *See* Def's SOF ¶ 33.

On February 4, 2017, DailyMail.com, a British news blog website, reported that a high level whistleblower from NOAA, Dr. John J. Bates, former NOAA scientist had evidence that the Karl Study “was based on misleading, ‘unverified’ data.” *See* Pl.’s SOF 4. The article reports the Karl Study was never subject to NOAA’s “rigorous internal evaluation process.” *See* Pl.’s SOF 5. Dr. Bates accused Tom Karl of “insisting on decisions and scientific choices that maximized warming and minimized documentation...in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy.” *Id.* The article reports it learnt [*sic*] “that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming.” *Id.* “[t]he land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings ‘unstable.’”

### **LEGAL STANDARD**

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). In FOIA cases, agency decisions to “withhold or disclose information under FOIA are reviewed *de novo*.” *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 256 (D.D.C. 2004). In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the requester. *Weisberg v. U.S. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

Also in FOIA litigation, but unlike in most other federal litigation, the agency defending the action, not the plaintiff, must prove. 5 U.S.C. § 552(a)(4)(B) (“the burden is on the agency to sustain its action”); *accord Military Audit Project v. Casey*, 656 F.2d 724, 739 (D.C. Cir. 1981). “[T]he agency must demonstrate beyond material doubt that its search was ‘reasonably calculated to uncover all relevant documents.’” *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (*quoting Truitt v. U.S. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)).

FOIA requires complete disclosure of requested agency information unless the information falls into one of FOIA’s nine exemptions. 5 U.S.C. § 552(b); *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7-8 (2001); *See also Dep’t of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (discussing the history and purpose of FOIA and the structure of FOIA exemptions). “These limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Id.* Because of FOIA’s goal of promoting agency disclosure, the exemptions are to be construed narrowly. *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136, 150-151 (1989). “[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.” *U.S. Department of State v. Ray*, 502 U.S. 164, 173 (1991).

## ARGUMENT

### 1. Defendant Improperly Applies the Deliberative Process Privilege

Defendant is withholding information and records responsive to Plaintiff's FOIA request asserting the deliberative process privilege under Section 5 of FOIA. The withheld documents reflect communications among scientists related to factual data and conclusions of the scientific investigation reported in the Karl Study. *See Vaughn* index, Exhibit 1 to Declaration of Mark Graff ("Vaughn index"), ECF No. 16-2. The withheld records do not contain suggestions or recommendations on legal or policy matters. *See Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). Rather, any recommendations or opinions in the documents are of a scientific, factual, and investigatory nature. The information and records are related to a scientific research study published in a non-agency, peer review journal, *Science*. The communications and analysis do not reflect the "agency policy" envisioned by Congress as requiring protection from disclosure. *See Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1437 (D.C. Cir. 1992) (a "salient characteristic" of information eligible for protection under deliberative process privilege is its "association with a significant *policy* decision") (emphasis in original).

#### a. Scientific deliberations and decisions are not policy-related

Deliberative process covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated," *Sears, Roebuck & Co.*, 421 U.S. at 150 (internal quotation marks omitted). Congress did not intend to shield the public from the scientific discovery and research process. To withhold information under the deliberative process privilege, an agency must demonstrate that the information would "reveal 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *In*

*re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)). Further, the information must be “pre-decisional and it must be deliberative[,]” and the agency should “not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual.” *Id.* (citations omitted).

Scientific deliberations are not equivalent to policy deliberations. Scientific studies, such as this one, are objective, factual presentations of research and investigatory reports. The material is not part of the policy-making process and does not fall into the category of predecisional deliberative memoranda under Exemption 5. The deliberative process privilege is a limited privilege. In applying the deliberative process privilege, courts assess the substance of the records requested to determine if the information is purely factual or policy-related; (2) whether factual material is “reasonably segregable”, and (3) whether the material is both predecisional and deliberative. *See Nat’l Wildlife Fed’n*, 861 F.2d at 1118-20; *Senate of P.R. v. U.S. Dep’t of Justice*, 823 F.2d 574 (D.C. Cir. 1987).

To be part of the deliberative process, the document must be part of the decision-making process, or, as the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) has described, “[must] reflect[] the give-and-take of the consultative process.” *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). “[T]he agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process.” *Id.* at 868.

To determine whether the Defendant’s claim that the documents are validly being withheld, it is crucial to understand the function the documents serve within the agency. *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 858 (D.C. Cir. 1980); *NLRB v. Sears*,



*Roebuck & Co.*, 421 U.S. 132 (1975). Defendant asserts the drafts and information withheld contain opinions and recommendations of the authors and responses to peer review which qualify the material as “deliberations”. Defendant’s Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment (“Def.’s SJM”), ECF No. 16 at 10. However, such opinions, recommendations and peer responses are part of a *scientific deliberation* process and are not shielded from public disclosure under FOIA. Here, Defendant misconstrues the internal functioning of the scientific deliberative process. The withheld communications are not the documents Congress intended to be protected under the deliberative process privilege. *See Coastal States*, 617 F.2d at 867. They are not “suggestions or recommendations as to what agency policy should be.” *Id.*

Rather, the “deliberative” information and documents Defendant is attempting to withhold are more “resource opinion” relating to the applicability of existing and discovered - science to a certain set of existing and developing - data and methodology. Shielding such deliberations from the public is unnecessary and no protection from disclosure exists under FOIA.

Defendant provides the declaration of Dr. Richard W. Spinard who points to the “exchange and debate among peers as the mechanism that allows us to ensure that the scientific products we develop and release to the public are robustly developed and accurately tested. Such rigorous vetting is critical to developing and releasing scientific information of the highest possible quality to inform the public and decision-makers.” Spinrad Decl. ¶ 15.

Communications among the authors and their peers involve discussions about the tests, results, data, conclusions, etc., and analysis, theory, and presentation. Def.’s SJM at 10. Scientific answers and discoveries are realized through this open forum discussion and scientific progress

is advanced. However, Defendant argues that revealing the collaboration among scientists and disclosing these discussions will hinder the “robustness of the scientific progress.” Spinrad Decl. ¶ 24. However, the purpose of Exemption 5’s deliberative process protection specifically relates to agency policy-making. What purpose does Exemption 5 shield scientific deliberations that do not amount to agency policy? Scientific deliberations contemplate real, conclusive answers derived from concrete, measurable findings. Policy deliberations consider theoretical opinions and ideas molded into creating a rule or law. Congress’ intention to shield the theoretical “molding process” of policy deliberations cannot be concluded to similarly apply to the investigative research process of scientific deliberations.

Here, *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001) is instructive. There is no support for application of exemption 5 to scientific deliberations (as opposed to policy deliberations) in the statutory text, which the Supreme Court has “insisted be read strictly in order to serve FOIA’s mandate of broad disclosure”, which was expected and intended to affect Government operations (refusing to read an “Indian trust” exemption into the statute noting “as a general rule we are hesitant to construe statutes in light of legislative inaction” *citing Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983)).

Dr. Richard W. Spinrad asserts “these requests for input often lead to candid discussions and debates that can be thought of as a type of informal peer review that fulfills a valuable role in developing scientific thought and promoting scientific understanding.” Decl. ¶19. However, Candid discussions and informal peer review do not lead to the development of or advising on agency policy. Rather, these discussions among peers involve analysis and application of factual material and investigative techniques that “generate new ideas” in science. There is no advising

on agency policy. Rather, such deliberations are part of the scientific process in any research endeavor—the end result of which is not creation of policy, but factual, scientific discovery.

The D.C. Circuit has held that information is part of the deliberative process if disclosing such materials would expose the agency's decision-making process in such a way to discourage candid discussion within agency and undermine the agency's ability to perform its functions. *Dudman*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). Here, Defendant's Motion for Summary Judgment Memorandum and supporting declarations repeatedly state that disclosure of the withheld information and documents would inhibit candid internal discussions" and "chill the open and frank exchange of comments and opinions." Def.'s SJM at 10; Spinrad Decl. ¶¶ 22, 23, 27; Graff Decl. ¶ 64. However, the communications and deliberations related to the Karl Study at issue here do not reflect agency policy, there is no force of law. The purpose of these communications and deliberations was to adequately and accurately publish scientific findings in a peer-review journal, not to create agency policy. FOIA—and Congress in creating specific statutory exemptions—does not apply to the scientific method statutorily. Nor has it been held by courts it was the intention of Congress for exemption 5 to be so expansive as to encompass all intellectual or developmental discussions among peers. Exemption 5 relates to policy deliberations specifically. Even courts that have edged on judicial expansion of the meaning of deliberative process have cautioned and not done what Defendants *Seek* here.

In *Petroleum Information Corp. v. U.S. DOI*, 976 F.2d 1429, 1435 (D.C. Cir. 1992), the D.C. Cir. held that factual information should be shielded by the privilege, or not, according to "whether the agency has plausibly demonstrated the involvement of a policy judgment in the decisional process relevant to the requested documents." *See Mink*, 410 U.S. at 87 (privilege designed to promote "frank discussion of legal and policy matters") (quoting S.REP. No. 813,

89<sup>th</sup> Cong., 1<sup>st</sup> Sess. 9 (1965)); *id.* at 89 (“Exemption 5 requires different treatment for material reflecting deliberative or policy-making processes” and “purely factual, investigative matters”); *Coastal States*, 617 F.2d at 869 (resting conclusion that documents were not within Exemption 5 in part on ground that the documents did not “discuss the wisdom or merits of a particular agency policy, or recommend new agency policy”). “Conversely, when material could not reasonably be said to reveal an agency’s or official’s mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable.” *Petroleum Information Corp. v. DOI*, 976 F. 2d at 1435; *See Playboy Enterprises v. Department of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) (holding that fact report was not within privilege because compilers’ mission was simply “to investigate the facts,” and because report was not “intertwined with the policy-making process.”) Here, Defendant cannot point to any agency policy sought to be protected. Rather, Defendant asks the court to conclude a sufficient justification for applying Exemption 5 to scientific deliberations analogous to policy-making deliberations of an agency. The deliberations are comments among the authors and scientific community peers there is no agency policy decision. Defendant fails to point to any agency policy at issue that warrants Exemption 5 privilege protection. The results of research are factual, not deliberative, information and are not the discussions Congress intended to protect under the deliberative process privilege. *See Hennessey*, 1997 WL 537998 (“report does not bear on a policy-oriented judgment of the kind contemplated by Exemption 5” *citing Petroleum Info*, 976 F.2d at 1437); *Ethyl Corp. v. EPA*, 25 F.3d 1241 (4<sup>th</sup> Cir. 1994) (“privilege does not protect a document which is merely peripheral to actual policy formulation”); *Chi Tribune Co., v. HHS*, No. 95 C 3917, 1997 U.S. Dist. LEXIS 2308 (N.D. Ill. Feb. 26, 1997) (magistrate’s recommendation) (scientific judgments not protectable when they do not address agency policymaking.) Disclosure of the

scientific discussions within the withheld records will not “impinge[] on the policymaking decisional processes intended to be protected by this exemption.” *EPA v. Mink*, 410 U.S. 73, 92. The disclosure sought by Plaintiff will not reveal the deliberative process that Exemption 5 protects.

Disclosure of records under FOIA is required unless it squarely falls within one of the enumerated exemptions as written and specifically intended by Congress. Defendant argues this transparency requirement Congress placed on federal agencies will halt scientific progress by hampering scientists from discussing factual, scientific processes and findings. *See* Def’s SJM at 10, 20; Spinrad Decl. ¶¶ 21, 23, 24.

It cannot be possible that a scientist performing his duties would be less “frank” or “honest” if he or she knew the document might be made public. Here, withholding the communications serves no legitimate policy interest of the government. *See Coastal States*, 617 F.2d 854, 869.

Dr. Richard W. Spinard asserts “This would narrow the range of perspectives taken into account in generating our scientific products and therefore reduce the overall robustness of the scientific process.” Decl. ¶ 24. However, “robustness of the scientific process” is not statutorily protected under FOIA. Science is not Policy. While deliberations about judgments, opinions, and theories are part of the scientific research process, such exchanges among non-policy decision-makers are not protected from disclosure under FOIA. Such communications are necessary and play a major role in development of science and furthering research, but the substantive nature of scientific research is objective reporting of facts and findings, not subjective policy decisions.

## **2. The Evidence Revealed by Dr. John Bates Shows Misconduct Sufficient to Defeat Privilege**

In this Circuit, the government misconduct exception to the deliberative process privilege applies in two circumstances. First, the “deliberative process privilege disappears altogether when there is any reason to believe government misconduct occurred.” *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) (internal quotations omitted). And second, “where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve the public’s interest in honest, effective government.” *Id.* at 738 (internal quotations omitted). There is more than enough “reason to believe” government misconduct may have occurred here. Former top NOAA scientist recently revealed to DailyMail.com that the Karl Study is based on “unverified” data and was never subject to rigorous internal evaluation process. *See* Pl.’s SOF. Dr. Bates reports the Karl Study was never subject to NOAA’s “rigorous internal evaluation process.” *See* Pl.’s SOF. Dr. Bates accused Tom Karl of “insisting on decisions and scientific choices that maximized warming and minimized documentation...in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy.” *Id.* The article reports “that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming.” *Id.* “[t]he land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings ‘unstable.’” This is not mere speculation. Rather, Dr. Bates purports to have “irrefutable evidence”. *Id.*

This standard has been further elaborated by this Court. For instance, documents that constitute “circumstantial evidence” of wrongdoing should be released under the misconduct exception. *Alexander v. FBI*, 186 F.R.D. 154, 164 (D.D.C. 1999).

This Court has held that the government misconduct exception applies to documents withheld under FOIA. *Nat’l Whistleblower Ctr. v. HHS*, 903 F. Supp. 2d 59, 66 (D.D.C. 2012) (“With respect to Defendant’s legal argument, there is no authority supporting its contention that the government-misconduct exception cannot apply in FOIA cases.”).

In addition, a finding that the government misconduct exception applies does not require the Court to make a “determination as to the ultimate question of the lawfulness of Defendant’s actions,” but only requires a finding of sufficient “misconduct.” *Nat’l Whistleblower Ctr. v. HHS*, 903 F. Supp. 2d 59, 69 (D.D.C. 2012)

Even if the Court determined the communications are deliberative, NOAA must produce the records because the government misconduct exception applies here.

Government misconduct can be “nefarious” or “extreme” or a “serious breach of the responsibilities of representative government,” in which to apply the exception. *ICM Registry, LLC v. U.S. Dep’t of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008). Misleading the public about scientific data...is nefarious and extreme wrongdoing. Coupled with NOAA’s refusal to comply with Representative Smith’s congressional subpoena, there is ample evidence to *See* that government misconduct is an issue here.

The misconduct here is arguably more nefarious and extreme than the alleged misuse of the IRS at issue in *Tax Reform Research Grp. V. Internal Revenue Serv*, 419 F.Supp. 415, 426 (D.D.C. 1976), in which the exception was found to apply

### **3. Defendant Failed to Produce Reasonably Segregable Information**

The segregability analysis required by FOIA cannot be understated. In *Mead Data Central v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977), the Court held that “even where specific exemptions apply, the agency is required to conduct a segregability analysis and determine if any non-exempt portions of the record can be released.” This requirement is so essential that, “before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld ... [and] [i]f the district court approves withholding without such a finding, remand is required even if the requester did not raise the issue of segregability before the court.” *Sussman*, 494 F.3d at 1116 (internal citations omitted); *See also Soucie v. David*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971) (non-exempt material may be protected only if it is “inextricably intertwined” with exempt information).

Defendants’ declaration offers only the barest, conclusory statement that the withheld information is not segregable. *See* Def’s SJM at 22. This is inadequate to meet Defendant’s burden in FOIA litigation. Conclusory language in agency declarations that provides no specific basis for segregability findings by district courts may be found inadequate. *See Dorsett v. United States Dep’t of the Treasury*, 307 F. Supp. 2d 28, 41 (D.D.C. 2004) (denying summary judgment in part “[b]ecause of [agency’s] inadequate and conclusory segregability explanation,” and ordering renewed motion with affidavit solely addressing segregability); *Animal Legal Def. Fund v. Dept. of Air Force*, 44 F. Supp. 2d 295, 301 (D.C. Cir. 1999) (conclusory statement regarding segregability are “patently insufficient”); *Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep’t of State*, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992) (finding that “boilerplate” statement that “no segregation of nonexempt, meaningful information can be made for disclosure” is “entirely insufficient”); *See also Patterson v. IRS*, 56 F.3d 832, 839 (7th Cir. 1995) (“[B]ecause



the [agency declaration] lumps all of the withheld information together in justifying nondisclosure, the district court could not have independently evaluated whether exempt information alone was being withheld or deleted in each instance.”)

#### **4. *In Camera* Review is Warranted**

Courts have departed from routine reliance on agency affidavits where exemptions are not sufficiently proven, or where other good cause may exist to order release information under FOIA. The Court has “the option to conduct *in camera* review.” *Juarez v. DOJ*, 518 F.3d 54, 59-60 (D.C. Cir. 2008); *Allen v. CIA*, 636 F.2d 1287, 1298 (D.C. Cir. 1980) (“Where the agency fails to meet that burden, a not uncommon event, the court may employ a host of procedures that will provide it with sufficient information to make its *de novo* determination, including *in camera* inspection.”). Here, the court should undergo an *in camera* review to determine the appropriateness of Defendants’ asserted claims of deliberative process privilege.

Because the requested records are “few in number and of short length,” the Court may reasonably review the responsive records *in camera*. *Allen*, 636 F.2d at 1298. *In camera* review is “particularly appropriate” in cases like this one, where the “agency affidavits are insufficiently detailed to permit meaningful review of exemption claims.” *Quinon & Strafer v. Federal Bureau of Investigation*, 86 F.3d 1222, 1228 (D.C. Cir. 1996). In addition, as the D.C. Circuit Court has explained:

In cases that involve a strong public interest in disclosure there is also a greater call for *in camera* inspection... When citizens request information to ascertain whether a particular agency is properly serving its public function, the agency often deems it in its best interest to stifle or inhibit the probes. It is in these instances that the judiciary plays an important role in reviewing the agency’s withholding of information. But since it is in these instances that the representations of the agency are most likely to be protective and perhaps less than accurate, the need for *in camera* inspection is greater. *Allen*, 636 F.2d at 1299.

The public interest in disclosure, and the distinct possibility of the agency being “protective” of information given the circumstances, dictates such a review here.

**Conclusion**

For all of the foregoing reasons and the reasons, Plaintiff’s cross-motion for summary judgment should be granted and the material should be produced to Plaintiff.

Dated: February 21, 2017

Respectfully submitted,

*/s/ Lauren M. Burke*

Lauren M. Burke

DC Bar No. 472919

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425 Third Street SW, Suite 800

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(202) 646-5172

*Counsel for Plaintiff*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-2088 (CRC)
	)	
U.S. DEPARTMENT OF	)	
COMMERCE,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S RESPONSE TO DEFENDANT’S STATEMENT OF MATERIAL FACTS  
NOT IN DISPUTE AND PLAINTIFF’S STATEMENT OF MATERIAL FACTS IN  
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Local Civil Rule 7(h), respectfully submits this response to Defendant’s Statement of Material Facts Not in Dispute (ECF 25-5) and Plaintiff’s Statement of Material Facts in Support of Cross-Motion for Summary Judgment:

**I. Plaintiff’s Response to Defendants’ Statement of Material Facts Not in Dispute.**

General Objection

As an initial matter, Plaintiff objects that Defendant’s statement does not comply with Local Civil Rule 7(h)(1). The failure to comply with the requirement to file a proper statement of material facts in “making or opposing a motion for summary judgment may be fatal to the delinquent party’s position.” *Gardels v. Central Intelligence Agency*, 637 F.2d 770, 773 (D.C. Cir. 1980); *see also Adagio Investment Holding Ltd. v. Federal Deposit Insurance Corp.*, 338 F. Supp.2d 71, 75 (D.D.C. 2004); *Smith Property Holdings, 4411 Connecticut L.L.C. v. U.S.*, 311 F. Supp. 2d 69, 78 (D.D.C. 2004); *Robertson v. American Airlines*, 239 F. Supp.2d 5, 8-9 (D.D.C.

2002). Defendants’ statement of material facts contains an improper mix of fact and legal conclusions and therefore fails to “assist the court in isolating the material facts, distinguishing disputed from undisputed facts, and identifying the pertinent parts of the record . . .” *Robertson*, 239 F. Supp. 2d at 9 (citations omitted).

Specific Objections

1. Not disputed.
2. Not disputed. as plaintiff lacks sufficient knowledge to confirm or deny whether Defendant directed its search efforts as described. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the asymmetrical distribution of knowledge between a FOIA requester and an agency in FOIA cases).
3. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.
4. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.
5. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.
6. Not disputed.
7. Disputed
8. Disputed
9. Disputed
10. Disputed
11. Disputed

12. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

13. Disputed

14. Disputed.

15. Disputed

16. Disputed

17. Disputed

18. Not disputed

19. Not disputed

20. Not disputed

21. Not disputed

22. Not disputed

23. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

24. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

25. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

26. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

27. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

28. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

29. Not disputed

30. Not disputed

31. Not disputed as to supplemental productions. Otherwise, disputed.

32. Not disputed

33. Not disputed

34. Not disputed as to NOAA's asserted exemption

35. Not disputed as to NOAA's asserted exemption

**II. Plaintiff's Statement of Material Facts Not in Dispute in Support of Cross-Motion for Summary Judgment.**

1. On February 4, 2016, counsel for NOAA contacted Plaintiff to discuss the request.

2. Following review of the draft *Vaughn* index, Plaintiff narrowed the issues and specific records it was challenging and informed Defendant it was challenging the documents withheld under Exemptions 5 and 6 and the adequacy of the search.

3. On February 4, 2017, David Rose from Britain's Mail on Sunday column on the DailyMail.com blog website published an article entitled: Exposed: How World Leaders Were Duped Into Investing Billions Over Manipulated Global Warming Data. The article can be found on the DailyMail.com website at:

<http://www.dailymail.co.uk/sciencetech/article-4192182/World-leaders-duped-manipulated-global-warming-data.html>

4. The article reported that a high level whistleblower from NOAA, Dr. John J. Bates, former NOAA scientist had evidence that the Karl Study "was based on misleading, 'unverified'

data.”

5. The article reports the Karl Study was never subject to NOAA’s “rigorous internal evaluation process.”

6. Dr. Bates accused Tom Karl of “insisting on decisions and scientific choices that maximized warming and minimized documentation...in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy.”

7. The article reports it learnt [sic] “that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming.”

8. Additionally, “The land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings ‘unstable.’”

9. The article reports that the Karl Study specifically set out to investigate and formulate a conclusion regarding the “pause” or “slowdown” in global warming as reported by the Intergovernmental Panel on Climate Change (“IPCC”).

10. The article reports that the Karl Study claimed that the ‘pause’ or ‘slowdown’ in global warming reported in the IPCC report never existed.

11. Following publication of the Karl Study, Congressman Lamar Smith, Chairman of the House Committee on Science, Space, and Technology Committee, issued a subpoena requesting communications and documents related to the Karl Study.

12. NOAA officials did not comply with the congressional subpoenas and refused to turn over internal discussions among the scientists who authored the Karl Study claiming confidentiality.

Dated: February 21, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ Lauren M. Burke

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*Attorneys for Plaintiff*



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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Tuesday, March 7, 2017 9:45 AM  
**To:** Lola Stith - NOAA Affiliate  
**Cc:** Beverly Smith - NOAA Federal  
**Subject:** Re: HEADS UP RE: FEE WAIVER REQUEST Fwd: FOIA REQUEST #DOC-NOAA-2017-000631 SIMPSON

Hi Guys--

(b)(5) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) [REDACTED] (C)

Confidentiality Notice: This e mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.

On Mon, Mar 6, 2017 at 11:28 AM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:  
Hi Bev (b)(5) [REDACTED]. Mark will be back in the office tomorrow and can weigh in on this. I defer to his guidance regarding this matter.

Lola

On Mon, Mar 6, 2017 at 9:25 AM, Beverly Smith - NOAA Federal <beverly.smith@noaa.gov> wrote:  
Lola,

(b)(5) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

----- Forwarded message -----

From: **Marianne Cufone** <mcufone@recirculatingfarms.org>  
Date: Sat, Mar 4, 2017 at 11:55 AM  
Subject: Re: FOIA REQUEST #DOC-NOAA-2017-000631 SIMPSON - REQUEST FOR SCOPE CLARIFICATION CONFERENCE CALL

To: [beverly.smith@noaa.gov](mailto:beverly.smith@noaa.gov)

Cc: Benjamin Simpson <[benjamin@my.loyno.edu](mailto:benjamin@my.loyno.edu)>, Emily Posner <[emilyposnerlaw@gmail.com](mailto:emilyposnerlaw@gmail.com)>, Jason Galjour <[jmgaljou@my.loyno.edu](mailto:jmgaljou@my.loyno.edu)>

Hi Ms. Smith: This is Marianne Cufone. I am the Prof of the Environmental Policy Lab that the students working on the Barataria Bay issue are in this semester. I'd like to join in the call Monday. Is it possible for me to call in separately? I will not be in the same location as the rest of the participants. Please advise.

Thank you,  
Marianne

On Fri, Mar 3, 2017 at 11:35 PM, Benjamin Simpson <[benjamin@my.loyno.edu](mailto:benjamin@my.loyno.edu)> wrote:

Begin forwarded message:

**From:** Beverly Smith - NOAA Federal <[beverly.smith@noaa.gov](mailto:beverly.smith@noaa.gov)>  
**Subject:** Re: FOIA REQUEST #DOC-NOAA-2017-000631 SIMPSON - REQUEST FOR SCOPE CLARIFICATION CONFERENCE CALL  
**Date:** March 2, 2017 at 3:01:41 PM CST  
**To:** Benjamin Simpson <[benjamin@my.loyno.edu](mailto:benjamin@my.loyno.edu)>  
**Cc:** Jason Galjour <[jmgaljou@my.loyno.edu](mailto:jmgaljou@my.loyno.edu)>, Sophia Howard <[sophia.howard@noaa.gov](mailto:sophia.howard@noaa.gov)>, Beverly Smith <[beverly.smith@noaa.gov](mailto:beverly.smith@noaa.gov)>

Dear Mr. Simpson:

Thank you for the quick reply. I will set the conference call for **Monday, March 6, 1:30-2:30 p.m. (Eastern Standard Time)**. I will call you, therefore, via e-mail reply please provide a telephone number.

Sincerely,  
Beverly

On Thu, Mar 2, 2017 at 3:46 PM, Benjamin Simpson <[benjamin@my.loyno.edu](mailto:benjamin@my.loyno.edu)> wrote:  
Dear Ms. Smith,

Thank you for your prompt attention to this matter. We will be available to discuss the scope of our request on Monday March 6, from 1:00-3:00pm if that still works for you. We will also be joined in the call by the supervising attorneys for our Environmental Policy Lab. Thank you again for your assistance.

Sincerely,

Ben Simpson

On Mar 2, 2017, at 10:10 AM, Beverly Smith - NOAA Federal <[beverly.smith@noaa.gov](mailto:beverly.smith@noaa.gov)> wrote:

Benjamin P. Simpson

Loyola University New Orleans

College of Law | Juris Doctor Candidate 2018

[Benjamin@my.loyno.edu](mailto:Benjamin@my.loyno.edu)

Jason M. Galjour

Loyola University New Orleans

College of Law | Juris Doctor Candidate 2018

[jmgaljou@my.loyno.edu](mailto:jmgaljou@my.loyno.edu)

RE: Freedom of Information Act (FOIA) Request #DOC-NOAA-2017-000631

Dear Messrs. Simpson and Galjour:

I am the Freedom of Information Act (FOIA) Coordinator for NOAA's National Marine Fisheries Service, Southeast Region (SER), and I am in receipt of your FOIAonline FOIA request #DOC-NOAA-2016-000631 that was received by our office on February 21, 2017. You seek information on behalf of Recirculating Farms Coalition regarding the impact that the Gulf menhaden purse seine fishery has on bottlenose dolphins in Barataria Bay. You specifically seek the following records:

- The most recent stock assessment data for the Barataria Bay Estuarian System Stock of Common Bottlenose Dolphins.
- All data concerning unusual mortality events in Atlantic bottlenose dolphins in the Gulf of Mexico from 2009 to present.
- All information regarding the LOF designation for the Gulf menhaden (*Brevoortia patronus* hereinafter "Gulf menhaden") purse seine fishery.
- All data recorded by independent observers on Gulf menhaden fishing boats from 1992 to present.
- Any information pertaining to takings of Common Bottlenose Dolphins in and around Barataria Bay.
- Visual representations and GPS data on Gulf menhaden landings from recent years.

- All reported incidental takings of Common Bottlenose Dolphins around Barataria Bay.
- All reported bycatch data from the Gulf menhaden purse seine fishery.
- All communications concerning the Gulf menhaden fishery (including memos, documents, emails, text messages, phone conversations, and all correspondence)

This is to request a conference call with you to discuss the scope of your request. We want to ensure that we are accurately interpreting the terms of your request before we commence a search for records. Further, our discussion may provide us with an idea of the volume of responsive records at issue.

I anticipate that the conference call will include Sophia Howard, FOIA Coordinator, Southeast Fisheries Science Center (SEFSC) and myself, as well as subject matter expert scientists from SEFSC and SER.

Via e-mail reply, please let me know a date and time (Eastern Standard Time, EST; for a duration of one hour) that you are available during the week of March 6-10, 2017, as follows:

Monday, March 6: 1-3 p.m.  
Wednesday, March 8: 1-3 p.m.  
Friday, March 10: 1-3 p.m.

#### **REQUEST TOLLING**

Pursuant to 5 U.S.C. 552(a)(6)(A), our time to respond is tolled until we concluded the scope clarification process and we agree on what it is that you seek. This does not start your time running again from the beginning, but it does stop the clock until we conclude the scope clarification process.

If we do not hear from you within 30 calendar days from the date of this e-mail, we will assume that you do not wish to proceed and your request will be administratively closed.

If you have any questions, please do not hesitate to contact me at [727-551-5762](tel:727-551-5762) or [beverly.smith@noaa.gov](mailto:beverly.smith@noaa.gov), or the NOAA FOIA Public Liaison Robert Swisher at [301-628-5755](tel:301-628-5755).

Sincerely,  
Beverly J. Smith  
FOIA Coordinator  
Southeast Region  
NOAA's National Marine Fisheries Service  
[727-551-5762](tel:727-551-5762)

--

Beverly J. Smith  
FOIA Coordinator  
Southeast Region  
NOAA's National Marine Fisheries Service  
[727-551-5762](tel:727-551-5762)

--

Marianne Cufone  
Executive Director  
Recirculating Farms Coalition  
[www.recirculatingfarms.org](http://www.recirculatingfarms.org)

Check us out on [Facebook](#) and [Twitter](#)!

--

Beverly J. Smith  
FOIA Coordinator  
Southeast Region  
NOAA's National Marine Fisheries Service  
[727-551-5762](tel:727-551-5762)

--

[Lola Stith](#)  
Contractor - The Ambit Group, LLC  
NOAA Office of the Chief Information Officer (OCIO)  
(c (b)(6) [REDACTED])  
[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)

---

**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Tuesday, March 7, 2017 11:12 AM  
**To:** Andre Sivels - NOAA Federal  
**Cc:** Robert Swisher - NOAA Federal; Dennis Morgan - NOAA Federal; Lola Stith - NOAA Affiliate  
**Subject:** Re: Records Management Self Assessment w/FIOA questions

Hi Andre,

NOAA FOIA has completed its portion of NARA's compliance survey below in Red. Please see responses below, and if you could please copy me on the final response to the survey. Thanks Andre!

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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On Mon, Mar 6, 2017 at 12:31 PM, Andre Sivels - NOAA Federal <[andre.sivels@noaa.gov](mailto:andre.sivels@noaa.gov)> wrote:

Hello Mark

Each year NARA requires all agencies to complete an annual self-assessment of their program. This year our assessment has a few questions related to the FOIA Program. Can you answer the following questions below and return to me by Monday, March 13th? Thanks

Andre

(b) (5)

(b)(5)

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

(301) 628-5658 (O)

(b)(6) (C)

[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)

(b)(5)

(b) (5)



(b) (5)

(b) (5)

(b) (5)

(b) (5)

--  
Andre Sivels  
NOAA Records Officer  
U.S. Department of Commerce  
1305 East-West Highway- Rm 7439  
Silver Spring, MD 20910  
Phone: 301628-0946  
Fax: [301-713-1169](tel:301-713-1169)

---

**From:** Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>  
**Sent:** Thursday, February 23, 2017 11:51 AM  
**To:** Mark Graff - NOAA Federal  
**Subject:** Re: DOC-NOAA-2017-000586  
**Attachments:** Generic tasker consultation NOS.docx

Hi Mark - Please find the draft tasker for the subject FOIA request attached. Please sign/return to me so I can include it in the request files.

Gracias,

Lola

On Thu, Feb 23, 2017 at 7:57 AM, Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)> wrote:

Hi Lola--

In this request, (b)(5) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
[\(301\) 628-5658](tel:3016285658) (O)  
(b)(6) [REDACTED] (C)

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--  
Lola Stith  
Contractor - The Ambit Group, LLC  
NOAA Office of the Chief Information Officer (OCIO)  
(c (b)(6) [REDACTED])  
[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)

(b) (5)



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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Tuesday, March 7, 2017 11:13 AM  
**To:** Dennis Morgan - NOAA Federal; Lola Stith - NOAA Affiliate  
**Cc:** Robert Swisher - NOAA Federal  
**Subject:** Fwd: Records Management Self Assessment w/FIOA questions

If you could add to the list of data calls, this is NOAA FOIA's portion of the Records Manager's NARA compliance survey, which I just completed and responded back to Andre.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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----- Forwarded message -----

**From:** Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)>  
**Date:** Tue, Mar 7, 2017 at 11:12 AM  
**Subject:** Re: Records Management Self Assessment w/FIOA questions  
**To:** Andre Sivels - NOAA Federal <[andre.sivels@noaa.gov](mailto:andre.sivels@noaa.gov)>  
**Cc:** Robert Swisher - NOAA Federal <[robert.swisher@noaa.gov](mailto:robert.swisher@noaa.gov)>, Dennis Morgan - NOAA Federal <[dennis.morgan@noaa.gov](mailto:dennis.morgan@noaa.gov)>, Lola Stith - NOAA Affiliate <[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)>

Hi Andre,

NOAA FOIA has completed its portion of NARA's compliance survey below in Red. Please see responses below, and if you could please copy me on the final response to the survey. Thanks Andre!

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
[\(301\) 628-5658](tel:3016285658) (O)  
(b)(6) (C)

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On Mon, Mar 6, 2017 at 12:31 PM, Andre Sivels - NOAA Federal <[andre.sivels@noaa.gov](mailto:andre.sivels@noaa.gov)> wrote:  
Hello Mark

Each year NARA requires all agencies to complete an annual self-assessment of their program. This year our assessment has a few questions related to the FOIA Program. Can you answer the following questions below and return to me by Monday, March 13th? Thanks

Andre

**The ability to find records is essential for a successful FOIA program. The following questions related to your agency's FOIA program may need consultation with your agency's FOIA Officer.**

(b) (5)

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)  
[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)

(b) (5)

(b) (5)

(b) (5)

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(b) (5)

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(b) (5)

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Andre Sivels  
NOAA Records Officer  
U.S. Department of Commerce  
1305 East-West Highway- Rm 7439  
Silver Spring, MD 20910  
Phone: 301628-0946  
Fax: [301-713-1169](tel:301-713-1169)

---

**From:** Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>  
**Sent:** Thursday, February 23, 2017 12:06 PM  
**To:** Mark Graff - NOAA Affiliate  
**Subject:** Weekly FOIA Incoming and High Visibility Requests 02.15.17 - 02.22.17 (DRAFT FOR YOUR USE)  
**Attachments:** Weekly FOIA Incoming and High Visibility Requests 02.15.17 - 02.22.17.xls

See attachment.

--

Lola Stith  
Contractor - The Ambit Group, LLC  
NOAA Office of the Chief Information Officer (OCIO)  
(c (b)(6))  
[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)



Tracking Number	Type	Requester
DOC-NOAA-2017-000631	Request	Benjamin P. Simpson
DOC-NOAA-2017-000659	Request	Dan Fountain
DOC-NOAA-2017-000655	Request	Zeenat Mian
DOC-NOAA-2017-000650	Request	Shaun Williams
DOC-NOAA-2017-000647	Request	Judson Witham
DOC-NOAA-2017-000632	Request	David Gotfredson
DOC-NOAA-2017-000633	Request	Nicole Daiker
DOC-NOAA-2016-001701	Initial Review	Margaret Townsend
DOC-NOAA-2017-000499	Final Review	Zeenat Mian
DOC-OS-2017-000554	Other	Adam Kengor
DOC-OS-2017-000555	Request Detail Task	Adam Kengor
DOC-OS-2017-000578	Request Detail Task	Derek Kravitz

Requester Organization	Submitted	Assigned To	Case File Assigned To	Perfected?
Recirculating Farms Coalition	02/15/2017	Beverly J. Smith	Beverly J. Smith	Yes
	02/21/2017	NOAA	NOAA	No
	02/21/2017	NOAA	NOAA	No
	02/17/2017	NOAA	NOAA	No
	02/17/2017	Amanda J. Patterson	Amanda J. Patterson	Yes
KFMB CBS News 8	02/15/2017	Tawand Hodge Tonic	Tawand Hodge Tonic	Yes
	02/15/2017	Tawand Hodge Tonic	Tawand Hodge Tonic	Yes
	02/15/2017	Samuel B. Dixon	Tawand Hodge Tonic	Yes
	02/15/2017	NOAA FOIA Office	Kehaupuaokal Kamaka	Yes
Mr.	02/15/2017	NOAA	Harriette Boyd	Yes
Mr.	02/15/2017	NOAA	Harriette Boyd	No
ProPublic	02/22/2017	USEC	Harriette Boyd	No

Due	Closed Date	Status	Dispositions
03/21/2017	TBD	Assignment Determination	
TBD	TBD	Submitted	
TBD	TBD	Submitted	
TBD	TBD	Initial Evaluation	
03/20/2017	TBD	Assignment Determination	
03/21/2017	TBD	Assignment Determination	
03/21/2017	TBD	Assignment Determination	
02/15/2017	02/15/2017	Closed	Partial grant/partial denial
02/15/2017	02/23/2017	Closed	Full grant
03/03/2017	TBD	Open	
03/03/2017	TBD	Open	
03/08/2017	TBD	Open	

**Detail**

Information Act, 5 USC § 552, et seq. Specifically, Recirculating Farms Coalition requests the following records from the National Marine Fisheries Service: • The most recent stock assessment data for the Barataria Bay Estuarine System Stock of Common Bottlenose Dolphins. • All data concerning unusual mortality events in Atlantic bottlenose dolphins in the Gulf of Mexico from 2009 to present. • All information regarding the LOF designation for the Gulf menhaden (*Brevoortia patronus* hereinafter "Gulf menhaden") purse seine fishery. • All

Huron bounded by 45° 40' N on the north, 45° 20' N on the south, 83° 20' W on the east, and 83° 40' W on the west. 1. Maps, search logs, or other records detailing the area covered, either within or outside the Thunder Bay National Marine Sanctuary, by NOAA vessels and/or personnel during bathymetric

I request to receive a copy of any letters produced by Office of NOAA General Counsel and signed by NOAA to he served in the US Navy within in Naval Fleet Atlantic as a Dental Technician and Fleet Marine Forces Field Service Medical Technician; Fleet Marine Forces Atlantic between October 1st 1969--October 15th 1971 Mr.

Department of Interior to produce there Charts and Maps of this 1,500 acre DEAD ZONE that lays from WEST of the Bridge and Sediment Basin and Wastes Delta at Fort Ticonderoga and the area 20+ Miles up the Lake. It should be noted, adding BILLIONS of Gallons of Leachate and Chemical Laden Waters from Lake George, Champlain Canal, Gels Falls Feeder Canal and the Hudson River ..... ADDED Vastly Toxic Materials from Genera Electric, Hercules Chemical, Finch Pruyn and Gels Falls Mills as well as the Imperial Chemical and

Mammal Program covering the time period January 1, 2016 to present. 2) All MMIR dispositions (deaths, escapes, releases) related to mammals in the Navy's Marine Mammal Program covering the time period January

I am requesting the inventory of cetaceans held in captivity today. Cetaceans that are alive today. Held at any marine park, seaquarium, or aquarium in the United States Wild caught cetaceans

U.S.C. §§ 1251-1387 ("CWA"), for the Dominion Chesterfield Power Station's VPDES permit in Virginia, since the date of the search for the Center's previous request on this subject, DOC-NOAA-2016-001389.

Please provide information of HMMA's Hawaiian monk seal duties as specified on the cooperative grant with NOAA.

qualifications and anything in writing or electronic format such as resumes and supporting documents, that shows these qualifications of successful, selected applicants to announcement BIS-OEE 2014-0003, and BIS-OEE-2014-

qualifications and anything in writing or electronic format such as resumes and supporting documents, that shows these qualifications of successful, selected applicants to announcement BIS-OEE 2014-0013, BIS-OEE-2014-

Authorities (NC SES) hired between January 20, 2017 and present (the return of this request), as specified in this memo: <https://www.chcoc.gov/content/temporary-transition-schedule-c-authority-and-temporary-transition-senior->

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Thursday, February 23, 2017 4:45 PM  
**To:** Sarah Brabson - NOAA Federal  
**Subject:** NOAA4600 PTA  
**Attachments:** NOAA4600 PTA 02122017 MM MS mhg.pdf

Hey Sarah--

Here is the PTA for this one. (b)(5)

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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**U.S. Department of Commerce  
NOAA**



**Privacy Threshold Analysis  
for the  
Northwest Fisheries Science Center  
NOAA4600**

**U.S. Department of Commerce Privacy Threshold Analysis**  
**Northwest Fisheries Science Center**  
**NOAA4600**

**Unique Project Identifier:** [Number]

**Introduction:** This Privacy Threshold Analysis (PTA) is a questionnaire to assist with determining if a Privacy Impact Assessment (PIA) is necessary for this IT system. This PTA is primarily based from the Office of Management and Budget (OMB) privacy guidance and the Department of Commerce (DOC) IT security/privacy policy. If questions arise or further guidance is needed in order to complete this PTA, please contact your Bureau Chief Privacy Officer (BCPO).

**Description of the information system and its purpose:**

NOAA4600 supports the mission of the Northwest Fisheries Science Center (NWFSC). “Scientists at the NWFSC conduct leading-edge research and analyses that provide the foundation for management decisions to protect, recover, restore, and sustain ecosystems and living marine resources in the Pacific Northwest.” NWFSC researchers are dedicated to producing scientific products that will strengthen decision-making at all levels, enhance socio-economic benefits, support sustainable resource use, and conserve biological diversity.

The NWFSC supports 4 major science and research themes:

1. Ecosystem Approach to Management for the California Current Large Marine Ecosystem
2. Habitats to Support Sustainable Fisheries and Recovered Populations
3. Recovery, Rebuilding and Sustainability of Marine and Anadromous Species
4. Oceans and Human Health Key Roles:
  - Provide current, relevant information to support science-based stewardship of natural resources. The primary mission of the NWFSC is to provide multi-disciplinary scientific and technical information to the Northwest Regional Office of NOAA Fisheries, other NOAA line offices, co-managers, stakeholders and other constituents to inform decision and policy-making processes.
  - Foster scientific literacy and expertise. In order to achieve the national missions of NOAA, the NWFSC must ensure that Center research results reach the broader science, education, and public communities within the region and beyond. The Center has the additional responsibility to help train the next generation of fisheries scientists.

The E-Government Act of 2002 defines “information system” by reference to the definition section of Title 44 of the United States Code. The following is a summary of the definition: “Information system” means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information. See: 44. U.S.C. § 3502(8).

**Questionnaire:**

1. What is the status of this information system?

- This is a new information system. *Continue to answer questions and complete certification.*
- This is an existing information system with changes that create new privacy risks. *Complete chart below, continue to answer questions, and complete certification.*

Changes That Create New Privacy Risks (CTCNPR)			
a. Conversions		d. Significant Merging	g. New Interagency Uses
b. Anonymous to Non-Anonymous		e. New Public Access	h. Internal Flow or Collection
c. Significant System Management Changes		f. Commercial Sources	i. Alteration in Character of Data
j. Other changes that create new privacy risks (specify):			

This is an existing information system in which changes do not create new privacy risks. *Skip questions and complete certification.*

2. Is the IT system or its information used to support any activity which may raise privacy concerns?

NIST Special Publication 800-53 Revision 4, Appendix J, states “Organizations may also engage in activities that do not involve the collection and use of PII, but may nevertheless raise privacy concerns and associated risk. The privacy controls are equally applicable to those activities and can be used to analyze the privacy risk and mitigate such risk when necessary.” Examples include, but are not limited to, audio recordings, video surveillance, building entry readers, and electronic purchase transactions.

Yes. *Please describe the activities which may raise privacy concerns.*

No

3. Does the IT system collect, maintain, or disseminate business identifiable information (BII)?

As per DOC Privacy Policy: “For the purpose of this policy, business identifiable information consists of (a) information that is defined in the Freedom of Information Act (FOIA) as "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." (5 U.S.C.552(b)(4)). This information is exempt from automatic release under the (b)(4) FOIA exemption. "Commercial" is not confined to records that reveal basic commercial operations" but includes any records [or information] in which the submitter has a commercial interest" and can include information submitted by a nonprofit entity, or (b) commercial or other information that, although it may not be exempt from release under FOIA, is exempt from disclosure by law (e.g., 13 U.S.C.).”

Yes, the IT system collects, maintains, or disseminates BII about: *(Check all that apply.)sustainable fisheries permits.*

- Companies
- Other business entities



No, this IT system does not collect any BII.

4. Personally Identifiable Information

4a. Does the IT system collect, maintain, or disseminate personally identifiable information (PII)?

As per OMB 07-16, Footnote 1: "The term 'personally identifiable information' refers to information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc... alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc..."

Yes, the IT system collects, maintains, or disseminates PII about: *(Check all that apply.)*

- DOC employees
- Contractors working on behalf of DOC
- Members of the public

No, this IT system does not collect any PII.

***If the answer is "yes" to question 4a, please respond to the following questions.***

4b. Does the IT system collect, maintain, or disseminate PII other than user ID?

Yes, the IT system collects, maintains, or disseminates PII other than user ID.

No, the user ID is the only PII collected, maintained, or disseminated by the IT system.

4c. Will the purpose for which the PII is collected, stored, used, processed, disclosed, or disseminated (context of use) cause the assignment of a higher PII confidentiality impact level?

Examples of context of use include, but are not limited to, law enforcement investigations, administration of benefits, contagious disease treatments, etc.

Yes, the context of use will cause the assignment of a higher PII confidentiality impact level.

No, the context of use will not cause the assignment of a higher PII confidentiality impact level.

***If any of the answers to questions 2, 3, 4b, and/or 4c are “Yes,” a Privacy Impact Assessment (PIA) must be completed for the IT system. This PTA and the approved PIA must be a part of the IT system’s Assessment and Authorization Package.***

### CERTIFICATION

X  I certify the criteria implied by one or more of the questions above **apply** to the NOAA4600 IT System and as a consequence of this applicability, a PIA was approved by DOC on 10/5/15.

I certify the criteria implied by the questions above **do not apply** to the NOAA4500 IT System and as a consequence of this non-applicability, a PIA for this IT system is not necessary.

Name of Information System Security Officer (ISSO) or System Owner (SO):  Michael McCully

Signature of ISSO or SO:   Digitally signed by MCCULLY MICHAEL JAMAAL 13 80349554 Date: 2017 02 12 16:46:03 08'00'  Date:  02122017

Name of Information Technology Security Officer (ITSO):  Richard Miner

Signature of ITSO:   Digitally signed by MINER RICHARD SCOTT 13986 04519 Date: 2017 02 22 14:52:55 05'00'  Date:  02/22/2017

Name of Authorizing Official (AO):  Mark Strom

Signature of AO:  STROM.MARK.S Digitally signed by STROM MARK S DR 1365882890 0 Date: 2017 02 14 08:05:52 08'00' .DR.1365882890  Date:  02142017

Name of Bureau Chief Privacy Officer (BCPO):

Signature of BCPO:  GRAFF.MARK.HY Digitally signed by GRAFF MARK HYRUM 1514447892 DN: c, US, o, U.S. Government, ou, DoD, ou, PKI, ou, OTHER, cn, GRAFF MARK HYRUM 1514447892 Date: 2017 02 23 16:37 08 05'00' RUM.1514447892  Date:

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Thursday, February 23, 2017 4:49 PM  
**To:** Sarah Brabson - NOAA Federal  
**Subject:** NOAA4930 PTA  
**Attachments:** NOAA4930 PTA 20170222 mhg.pdf

No issues--this is good to go. Signed and attached.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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**U.S. Department of Commerce  
NOAA**



**Privacy Threshold Analysis  
for the  
Southwest Fisheries Science Center - Local Area Network  
NOAA4930**

## U.S. Department of Commerce Privacy Threshold Analysis

### NOAA4930 / SWFSC LAN

#### **Unique Project Identifier: NOAA4930**

**Introduction:** This Privacy Threshold Analysis (PTA) is a questionnaire to assist with determining if a Privacy Impact Assessment (PIA) is necessary for this IT system. This PTA is primarily based from the Office of Management and Budget (OMB) privacy guidance and the Department of Commerce (DOC) IT security/privacy policy. If questions arise or further guidance is needed in order to complete this PTA, please contact your Bureau Chief Privacy Officer (BCPO).

**Description of the information system and its purpose:** NOAA4930 is a General Support System supporting approximately 375 users consisting of scientific, administrative, and support staff distributed among the California cities of La Jolla, Monterey, and Santa Cruz. There are a variety hardware platforms and operating systems interconnected on this network system. The systems are designed and configured to support the staff in meeting the agency mission.

The primary functions provided include:

- Network File Storage, Sharing, and Printing
- Internet Access
- NMFS Wide Area Network Connectivity
- Administrative Support Systems
- Scientific Database Access
- Scientific Statistical Data Analysis
- Geographic Information Systems
- Web Based Information Dissemination
- Telecommunications

The categories of data inputted, stored and processed include administrative, scientific, statistical, economic, research and development, and technical.

The E-Government Act of 2002 defines “information system” by reference to the definition section of Title 44 of the United States Code. The following is a summary of the definition: “Information system” means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information. See: 44. U.S.C. § 3502(8).

**Questionnaire:**

1. What is the status of this information system?

- This is a new information system. *Continue to answer questions and complete certification.*
- This is an existing information system with changes that create new privacy risks. *Complete chart below, continue to answer questions, and complete certification.*

Changes That Create New Privacy Risks (CTCNPR)					
a. Conversions		d. Significant Merging		g. New Interagency Uses	
b. Anonymous to Non-Anonymous		e. New Public Access		h. Internal Flow or Collection	
c. Significant System Management Changes		f. Commercial Sources		i. Alteration in Character of Data	
j. Other changes that create new privacy risks (specify):					

- This is an existing information system in which changes do not create new privacy risks. *Skip questions and complete certification.*

2. Is the IT system or its information used to support any activity which may raise privacy concerns?

NIST Special Publication 800-53 Revision 4, Appendix J, states “Organizations may also engage in activities that do not involve the collection and use of PII, but may nevertheless raise privacy concerns and associated risk. The privacy controls are equally applicable to those activities and can be used to analyze the privacy risk and mitigate such risk when necessary.” Examples include, but are not limited to, audio recordings, video surveillance, building entry readers, and electronic purchase transactions.

- Yes. *Please describe the activities which may raise privacy concerns.*

No

3. Does the IT system collect, maintain, or disseminate business identifiable information (BII)?

As per DOC Privacy Policy: “For the purpose of this policy, business identifiable information consists of (a) information that is defined in the Freedom of Information Act (FOIA) as “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” (5 U.S.C.552(b)(4)). This information is exempt from automatic release under the (b)(4) FOIA exemption. “Commercial” is not confined to records that reveal basic commercial operations” but includes any records [or information] in which the submitter has a commercial interest” and can include information submitted by a nonprofit entity, or (b) commercial or other information that, although it may not be exempt from release under FOIA, is exempt from disclosure by law (e.g., 13 U.S.C.).”

- Yes, the IT system collects, maintains, or disseminates BII about: *(Check all that apply.)*

- Companies
- Other business entities

No, this IT system does not collect any BII.

4. Personally Identifiable Information

4a. Does the IT system collect, maintain, or disseminate personally identifiable information (PII)?

As per OMB 07-16, Footnote 1: "The term 'personally identifiable information' refers to information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc... alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc..."

Yes, the IT system collects, maintains, or disseminates PII about: *(Check all that apply.)*

- DOC employees
- Contractors working on behalf of DOC
- Members of the public

No, this IT system does not collect any PII.

***If the answer is "yes" to question 4a, please respond to the following questions.***

4b. Does the IT system collect, maintain, or disseminate PII other than user ID?

Yes, the IT system collects, maintains, or disseminates PII other than user ID.

No, the user ID is the only PII collected, maintained, or disseminated by the IT system.

4c. Will the purpose for which the PII is collected, stored, used, processed, disclosed, or disseminated (context of use) cause the assignment of a higher PII confidentiality impact level?

Examples of context of use include, but are not limited to, law enforcement investigations, administration of benefits, contagious disease treatments, etc.

Yes, the context of use will cause the assignment of a higher PII confidentiality impact level.



X   No, the context of use will not cause the assignment of a higher PII confidentiality impact level.

***If any of the answers to questions 2, 3, 4b, and/or 4c are “Yes,” a Privacy Impact Assessment (PIA) must be completed for the IT system. This PTA and the approved PIA must be a part of the IT system’s Assessment and Authorization Package.***

# CERTIFICATION

X  I certify the criteria implied by one or more of the questions above **apply** to the NOAA4930 and as a consequence of this applicability, I will perform and document a PIA for this IT system.

I certify the criteria implied by the questions above **do not apply** to the NOAA4930 and as a consequence of this non-applicability, a PIA for this IT system is not necessary.

Name of Information System Security Officer (ISSO) or System Owner (SO): Samer Tominna

Signature of SO: TOMINNA.SAMER.FAWZI.12 31763593 Digitally signed by TOMINNA.SAMER.FAWZI.1231763593  
DN: c US, o U.S. Government, ou DoD, ou PKI,  
ou OTHER, cn TOMINNA.SAMER.FAWZI.1231763593  
Date: 2017.02.14 10:47:04 -08'00' Date: 02/14/17

Name of Information Technology Security Officer (ITSO): Bill Stearn

Signature of ITSO:  Digitally signed by MINER.RICHARD.SCOTT.1398604519  
Date: 2017.02.22 15:36:52 05'00' Date: \_\_\_\_\_

Name of Authorizing Official (AO): Kristen Koch

Signature of AO: KOCH.KRISTEN.CLARE.136 5892284 Digitally signed by KOCH.KRISTEN.CLARE.1365892284  
DN: c US, o U.S. Government, ou DoD, ou PKI,  
ou OTHER, cn KOCH.KRISTEN.CLARE.1365892284  
Date: 2017.02.22 12:02:01 -08'00' Date: \_\_\_\_\_

Name of Bureau Chief Privacy Officer (BCPO): Mark Graff

Signature of BCPO: GRAFF.MARK.HYR UM.1514447892 Digitally signed by GRAFF.MARK.HYRUM.1514447892  
DN: c US, o U.S. Government, ou DoD, ou PKI,  
ou OTHER, cn GRAFF.MARK.HYRUM.1514447892  
Date: 2017.02.23 16:46:55 -05'00' Date: \_\_\_\_\_





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**From:** Lorna Martin-Gross - NOAA Federal <lorna.martin-gross@noaa.gov>  
**Sent:** Wednesday, February 8, 2017 6:46 AM  
**To:** Lola Stith - NOAA Affiliate  
**Cc:** Mark Graff - NOAA Federal; Arlyn Penaranda - NOAA Federal; Samuel Dixon - NOAA Affiliate  
**Subject:** Fwd: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

Could you approve the final interim for release? (b)(5)

Let me know if you have questions.

Thank you,

Lorna

----- Forwarded message -----

**From:** Scott Doyle <[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)>  
**Date:** Tue, Feb 7, 2017 at 6:06 PM  
**Subject:** Re: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)  
**To:** [lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov), [foia@noaa.gov](mailto:foia@noaa.gov)  
**Cc:** [lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)

I have received only 119 documents. It is my understanding that there over 392 pages of Foia material. I have not received the all of the documents. Can you provide we with a date when I can expect the remaining ?

Sincerely  
Scott Doyle

-----Original Message-----

**From:** Lorna Martin-Gross - NOAA Federal <[lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)>  
**To:** Scott Doyle <[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)>  
**Cc:** Lola Stith - NOAA Affiliate <[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)>  
**Sent:** Mon, Nov 21, 2016 1:13 pm  
**Subject:** RE: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

Hello Mr. Doyle,

The DOC OIG documents are pending approval for release from an office outside of OLE. As soon as approval is granted, the documents will be released to you via FOIAonline. This FOIA is still open for DOC OSY, they are processing a response. Ms. Stith is the POC for the reimbursement.

Kind regards,

**Ms. Lorna Martin-Gross**  
*OLE Records Manager*  
Office: [301-427-8244](tel:301-427-8244)

**From:** Scott Doyle [mailto:[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)]  
**Sent:** Friday, November 18, 2016 4:29 PM  
**To:** [lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov); [lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)  
**Subject:** Re: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

Nothing from OIG, today was the day it was estimated to upload its docs. OSY has now had close to 3 months and nothing from them.

Can you check and give me a update next week.

Also the reimbursement had not be paid.

Scott Doyle

-----Original Message-----

From: Lorna Martin-Gross - NOAA Federal <[lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)>  
To: lola.m.stith <[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)>  
Cc: scottdoyle137 <[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)>  
Sent: Wed, Nov 2, 2016 2:05 pm  
Subject: FW: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

Ms. Stith,

Please provide Mr. Doyle with an update of his fee reimbursement.

Thank you,

**Ms. Lorna Martin-Gross**

*OLE Records Manager*  
Office: [301-427-8244](tel:301-427-8244)

**From:** Scott Doyle [mailto:[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)]  
**Sent:** Wednesday, November 02, 2016 1:51 PM  
**To:** [lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)  
**Subject:** Re: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

I have not received my reimbursement and update.?

-----Original Message-----

From: Lorna Martin-Gross - NOAA Federal <[lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)>  
To: Scott Doyle <[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)>  
Sent: Tue, Oct 18, 2016 1:39 pm  
Subject: RE: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

Hello Mr. Doyle,

If you did not hear back from Ms. Stith yesterday, based on her email response to you on 10/14, I recommend you follow-up with her directly. The NOAA FOIA office handles all FOIA related funds and they will be the first to know the status.

Kind regards,

**Ms. Lorna Martin-Gross**

*OLE Records Manager*  
Office: [301-427-8244](tel:301-427-8244)

**From:** Scott Doyle [mailto:[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)]  
**Sent:** Tuesday, October 18, 2016 1:15 PM  
**To:** [lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)  
**Subject:** Re: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

Thank you for the response.

Can you please let me know when the refund has been issued.

Scott

-----Original Message-----

From: Lorna Martin-Gross - NOAA Federal <[lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)>  
To: Scott Doyle <[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)>  
Cc: arlyn.penaranda <[arlyn.penaranda@noaa.gov](mailto:arlyn.penaranda@noaa.gov)>; foia <[foia@noaa.gov](mailto:foia@noaa.gov)>  
Sent: Tue, Oct 18, 2016 12:58 pm  
Subject: RE: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

Hello Mr. Doyle,

I understand your concern about not having received the remaining documents responsive to your FOIA request, DOC-NOAA-2016-001270. I will address each item of your email as it was written:

1. "I have not received my reimbursement as per the email below. That was well over a 2 months ago."

***The NOAA FOIA office is following up on the status of your refund.***

2. "I have not received all the additional FOIA documents that were originally identified. Can you give me an idea when I will receive them and reason for the continued delay?"

***The latest follow-up with the Department of Commerce was this morning. DOC's Office of Inspector General (OIG) estimates to have the documents uploaded into FOIAonline by November 18, 2016. DOC's Office of Security (OSY) has not provided an estimate, but we will continue to check the status. Once the OIG documents are uploaded into FOIAonline, you will be provided a second interim release letter with instructions to access responsive documents to your request. When the documents are provided by DOC OSY, a third interim release letter will be sent electronically with instructions to access responsive documents.***

3. "I would like to appeal that parts have been redacted which I don't believe which should have been redacted. I want to send in one comprehensive request. Items like complete email addresses, names, titles, the body of reports that speak to the internal investigate as it relates to my interview, witness statements and general facts of the investigation etc."

***The appeal language from the interim release letter states:***

*"We encourage you to speak with us if you have concerns as we continue to process this request. Although you have the ability to appeal at this time, we encourage you to focus the appeal/mediation/NOAA discussion, if needed, on exemptions applied to the documents thus far, but hold specific challenges about production until you have received and reviewed more of the voluminous records that the agency is still in the process of gathering and processing.*

*You have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the*



FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:  
Assistant General Counsel for Litigation, Employment, and Oversight  
U.S. Department of Commerce  
Office of General Counsel  
Room 5875  
14th and Constitution Avenue, N.W.  
Washington, D.C. 20230

An appeal may also be sent by e-mail to [FOIAAppeals@doc.gov](mailto:FOIAAppeals@doc.gov), by facsimile (fax) to [202-482-2552](tel:202-482-2552), or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.

For your appeal to be complete, it must include the following items:

- a copy of the original request,
- our response to your request,
- a statement explaining why the withheld records should be made available, and why the denial of the records was in error.
- “Freedom of Information Act Appeal” must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.

FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.

The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
Room 2510  
8601 Adelphi Road  
College Park, MD 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)

Phone: [301-837-1996](tel:301-837-1996)

Fax: [301-837-0348](tel:301-837-0348)

Toll-free: [1-877-684-6448](tel:1-877-684-6448)

**If you choose to submit a formal appeal, as noted in your email, all activity on your request will be stopped until the appeal is vetted and fully processed. This means all DOC documents will be on hold until the appeal is final.**

**Before you decide to submit a formal appeal, I can offer to schedule a telephone call with you to discuss your specific exemption concerns of the OLE documents. Prior to the call, I ask that you provide me with identifying information of the documents in question in order to avoid searching for specific documents during the call.**

4. “I have a time limit of 90 days on which to appeal (Started 8/3/16), which I would like to request be extended until the all the FOIA documents have been delivered. It is unfair to ask me to make my appeal decision without the totality of all the information. I have received less than 100 of the over 320 documents.

If this is not the proper way to request an extension of an appeal please let me know the method you require.”

***The interim release was uploaded and sent via FOIAonline on August 16, 2016. After our call, if you choose to submit a formal appeal, you will be within the 90 calendar days limit (November 14, 2016 by 5:00 p.m., Eastern Time). The correct procedure to submit a formal appeal is found in paragraph 3, above, and in the interim release letter sent on August 16, 2016.***

Please contact me if you would like to schedule a call to discuss your exemption concerns. I can be reached by email, Monday – Friday, at [lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov), or by phone on Tuesday, Thursday, and Friday, at [301-427-8244](tel:301-427-8244).

Kind regards,

**Ms. Lorna Martin-Gross**  
Records Manager  
Office of Law Enforcement  
NOAA Fisheries  
U.S. Department of Commerce  
1315 East-West Highway  
SSMC 3, Suite 3301  
Office: [301-427-8244](tel:301-427-8244)  
[lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)

**From:** FOIA Office - NOAA Service Account [mailto:[foia@noaa.gov](mailto:foia@noaa.gov)]  
**Sent:** Friday, October 14, 2016 2:20 PM  
**To:** Scott Doyle  
**Cc:** Lorna Martin-Gross - NOAA Federal  
**Subject:** Re: Fee Reimbursement Request

Good afternoon Mr. Doyle,

Thank you for your inquiry.

Lorna and Mark will address the FOIA request status and appeal questions. I can be your point of contact concerning the refund for your FOIA request.

I will follow-up with the NOAA finance office to check the status of your refund, and will have an update for you on Monday.

Please do not hesitate to contact me at the number below should you have additional questions concerning your refund.

Regards,

Lola Stith  
NOAA FOIA Office  
[703-298-8005](tel:703-298-8005)

Mark H. Graff  
FOIA Officer  
National Oceanic and Atmospheric Administration  
[\(301\)-628-5658](tel:(301)-628-5658)

On Fri, Oct 14, 2016 at 2:14 PM, Scott Doyle <[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)> wrote:  
Mr Graff, Ms. Martin,

Several items

1. I have not received my reimbursement as per the email below. That was well over a 2 months ago.
2. I have not received all the additional FOIA documents that were originally identified. Can you give me an idea when I will receive them and reason for the continued delay?
3. I would like to appeal that parts have been redacted which I don't believe which should have been redacted. I want to send in one comprehensive request. Items like complete email addresses, names, titles, the body of reports that speak to the internal investigate as it relates to my interview, witness statements and general facts of the investigation etc.
4. I have a time limit of 90 days on which to appeal (Started 8/3/16), which I would like to request be extended until the all the FOIA documents have been delivered. It is unfair to ask me to make my appeal decision without the totality of all the information. I have received less than 100 of the over 320 documents.

If this is not the proper way to request an extension of an appeal please let me know the method you require.

I appreciate your consideration on this matter and realize your office is not the reason for the delay.

Sincerely

Scott Doyle

-----Original Message-----

From: foia <[foia@noaa.gov](mailto:foia@noaa.gov)>

To: scottdoyle137 <[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)>

Sent: Thu, Sep 1, 2016 9:08 am

Subject: Fee Reimbursement Request

09/01/2016 09:03 AM

FOIA Request: DOC-NOAA-2016-001270

This is in response to your request for the reimbursement of the fees paid for the processing of your FOIA request. You have argued that the 2016 FOIA Improvement Act of 2016 mandates the return of fees paid to you. Although that act is not retroactive, it is correct that your request is past due, and unusual circumstances have not been cited as justifying billable processing with fees assessed in your request after the statutory time frame for responding to your request. As such, I have determined that your request is not billable, and that fees should be returned to you. A request for a refund of your fees paid will be submitted to the Office of the Chief Financial Officer.

Mark Graff

NOAA FOIA Officer

--

Ms. Lorna Martin-Gross

Records Manager

Office of Law Enforcement

NOAA Fisheries

U.S. Department of Commerce

Office: 301-427-8244

[lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)

---

**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Monday, February 27, 2017 9:24 AM  
**To:** Jackie Rolleri - NOAA Federal  
**Cc:** Aida Pettegrue  
**Subject:** Re: Attached is the Draft Ullom Fee Estimate Ltr. 2017-00000535  
**Attachments:** FOIA 2017-00535 Fee Estimate Ltr.J Ullom jr.docx

(b)(5)  
[Redacted]

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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On Fri, Feb 24, 2017 at 4:12 PM, Jackie Rolleri - NOAA Federal <[jackie.rolleri@noaa.gov](mailto:jackie.rolleri@noaa.gov)> wrote:  
Hi Aida-

(b)(5)  
[Redacted]

Thanks,  
Jackie

On Thu, Feb 23, 2017 at 3:09 PM, Aida Pettegrue <[aida.pettegrue@noaa.gov](mailto:aida.pettegrue@noaa.gov)> wrote:

--

Jackie Rolleri, Attorney-Advisor  
Oceans and Coasts Section  
Office of the General Counsel  
National Oceanic and Atmospheric Administration  
1305 East-West Highway  
SSMC4, Suite 6111  
Silver Spring, MD 20910  
[301-713-7387](tel:301-713-7387) (office)  
**(b)(6)** (cell)

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(b) (5)

(b) (5)

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**From:** Ann Madden - NOAA Federal <ann.madden@noaa.gov>  
**Sent:** Wednesday, February 8, 2017 11:09 AM  
**To:** Sarah Brabson; Jean Apedo - NOAA Federal; Mark Graff - NOAA Affiliate  
**Subject:** NOAA0200 PTA  
**Attachments:** NOAA0200 Privacy Threshold Analysis 08082016-DAP.pdf

Please see attached

Thanks  
Ann

--

-----  
**Ann E. Madden**  
Action Control Specialist  
Office of The Chief Information Officer &  
Director for High Performance Computing and Communications



U.S. Department of Commerce  
National Oceanic and Atmospheric Administration  
1315 East West Highway  
SSMC3 9634  
Silver Spring, MD 20910

301-713-9600 (main)  
301-628-5716 (direct)  
301-713-4040 (fax)P



(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Monday, February 27, 2017 5:20 PM  
**To:** Ann Madden - NOAA Federal  
**Cc:** Robert Swisher - NOAA Federal; Lola Stith - NOAA Affiliate; John Almeida - NOAA Federal; Dennis Morgan - NOAA Federal  
**Subject:** Judicial Watch FOIA Litigation Update (Hiatus paper)  
**Attachments:** Dkt. 21 - Opposition to Summary Judgment.pdf; Dkt. 22 - Cross Motion for Partial Summary Judgment.pdf

Hi Ann,

Zach had wanted to stay updated on this litigation, so as a follow-up (b)(5)

[REDACTED]

If you could please pass this on to Zach and ask if he would like a brief 15 minute summary meeting we can explain the developments in more detail. Thanks Ann--

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
	)	
<i>Plaintiff,</i>	)	
	)	Civ. No. 1:15-cv-2088 (CRC)
v.	)	
	)	
U.S. DEPARTMENT OF COMMERCE,	)	
	)	
<i>Defendant.</i>	)	
	)	

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**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S  
OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND IN  
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch (“Plaintiff” or “Judicial Watch”), by counsel, respectfully submits this memorandum in opposition to Defendant Department of Commerce’s (“Defendant” or “Commerce Department”) motion for summary judgment and to support Plaintiff’s cross-motion for summary judgment.

**INTRODUCTION**

Defendant has failed to provide all records in its possession, or at least the reasonably segregable, non-exempt portions of such records, and has, therefore, unreasonably withheld material responsive to Plaintiff’s FOIA request. Failing to meet its burden of proof, Defendant cannot justify the withholding of responsive documents as validly exempt under FOIA and should be ordered to disclose the improperly withheld records.

Defendant is improperly withholding information and records asserting Exemption 5 under FOIA. However, the information and documents Defendant is withholding do not validly fall within the parameters of Exemption 5 as part of the “deliberative process privilege” as intended by Congress. The “deliberative” nature of the records being withheld is factual,

investigative, scientific research related to a study published in a non-agency, peer-review journal, *Science*. The information reflects no policy or law of the agency. Therefore, the information and records being withheld are not validly exempt from disclosure under FOIA.<sup>1</sup>

### **BACKGROUND**

In June, 2015, the independent, scientific, peer-review journal *Science* published a scientific study by Thomas Karl and eight other scientists, entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* (“Karl Study”) See Defendant’s Statement of Material Facts (“Def’s SOF”) ¶6, ECF 16 (attached to Defendant’s Motion for Summary Judgment). The Karl Study specifically set out to investigate and formulate a conclusion regarding the “pause” or “slowdown” in global warming as reported the previous year (September 2013-November 2014) by the Intergovernmental Panel on Climate Change (“IPCC”). See Pl.’s SOF ¶ 1. The IPCC report concluded that the upward global surface temperature trend from 1998-2012 was lower than that from 1951-2012. See Def’s SOF ¶ 1. The Karl Study claimed that the ‘pause’ or ‘slowdown’ in global warming reported in the IPCC report never existed. See Plaintiff’s Statement of Material Facts (“Pl.’s SOF”) ¶ (attached herein).

Following publication of the Karl Study, Congressman Lamar Smith, Chairman of the House Committee on Science, Space, and Technology Committee, issued a subpoena requesting communications and documents related to the Karl Study. See Pl. SOF ¶ 11. NOAA officials did not comply with the subpoenas and refused to turn over internal discussions among the scientists who authored the Karl Study claiming confidentiality. *Id.*

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<sup>1</sup> Plaintiff initially challenged the adequacy of Defendant’s search for responsive records. Having reviewed the Declaration of Mark Graff submitted with Defendant’s motion for summary judgment, Plaintiff is no longer challenging the adequacy of the search. Plaintiff has no objection to Defendant withholding phone numbers of NOAA scientists pursuant to Exemption 6 under FOIA for privacy considerations. Plaintiff’s Opposition and Cross-Motion for Summary Judgment addresses only its challenges to Defendant’s B5 assertions.



On October 30, 2015, Plaintiff submitted a FOIA request to NOAA, *Seeking access to:*

1. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the methodology and utilization of Night Marine Air Temperatures to adjust ship and buoy temperature data.
2. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the use of other global temperature datasets for both NOAA's in-house dataset improvements and monthly press releases conveying information to the public about global temperatures.
3. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the utilization and consideration of satellite bulk atmospheric temperature readings for use in global temperature datasets.
4. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to a subpoena issued for the aforementioned information by Congressman Lamar smith on October 13, 2015.<sup>2</sup>

*See* Complaint ("Compl.") ¶5, ECF No. 1.

Plaintiff filed this FOIA lawsuit on December 2, 2015 after NOAA violated its obligations in 5 U.S.C. § 552, the Freedom of Information Act ("FOIA"). *See* Compl. ¶¶ 7-10. On February 4, 2016, counsel for NOAA contacted Plaintiff to discuss the request. *See* Pl.'s SOF 1. Plaintiff agreed to narrow its request and limit the agency's search parameters to the topics specifically identified in its request. *See* Def.'s SOF ¶ 22. On May 27, 2016, Plaintiff received 102 pages of records produced in full and 90 pages of records produced in part. *See* Fourth Joint Status Report, ECF No. 12 ¶ 2. NOAA informed Plaintiff it was withholding 8,013 pages of records in full as duplicative or exempt under FOIA. *See* Fourth Joint Status Report, ECF No. 12. Plaintiff requested NOAA provide a draft *Vaughn* index to review the specific

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<sup>2</sup> Plaintiff is not challenging Defendant's production of records related to this portion of the FOIA request.

exemptions and withholdings being asserted. *See* Fifth & Sixth Joint Status Reports, ECF Nos. 13 & 14. Following review of the draft *Vaughn* index, Plaintiff narrowed the issues and specific records it was challenging and informed Defendant it was challenging the documents withheld under Exemptions 5 and 6 and the adequacy of the search. *See* Pl.'s SOF ¶ 2 On September 16, 2016, Plaintiff received an additional 44 pages of responsive records previously withheld by Defendant. *See* Def's SOF ¶32. On December 15, 2016, Plaintiff received 62 additional records previously withheld. *See* Def's SOF ¶ 33.

On February 4, 2017, DailyMail.com, a British news blog website, reported that a high level whistleblower from NOAA, Dr. John J. Bates, former NOAA scientist had evidence that the Karl Study “was based on misleading, ‘unverified’ data.” *See* Pl.’s SOF 4. The article reports the Karl Study was never subject to NOAA’s “rigorous internal evaluation process.” *See* Pl.’s SOF 5. Dr. Bates accused Tom Karl of “insisting on decisions and scientific choices that maximized warming and minimized documentation...in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy.” *Id.* The article reports it learnt [*sic*] “that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming.” *Id.* “[t]he land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings ‘unstable.’”

### **LEGAL STANDARD**

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). In FOIA cases, agency decisions to “withhold or disclose information under FOIA are reviewed *de novo*.” *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 256 (D.D.C. 2004). In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the requester. *Weisberg v. U.S. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

Also in FOIA litigation, but unlike in most other federal litigation, the agency defending the action, not the plaintiff, must prove. 5 U.S.C. § 552(a)(4)(B) (“the burden is on the agency to sustain its action”); *accord Military Audit Project v. Casey*, 656 F.2d 724, 739 (D.C. Cir. 1981). “[T]he agency must demonstrate beyond material doubt that its search was ‘reasonably calculated to uncover all relevant documents.’” *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (*quoting Truitt v. U.S. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)).

FOIA requires complete disclosure of requested agency information unless the information falls into one of FOIA’s nine exemptions. 5 U.S.C. § 552(b); *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7-8 (2001); *See also Dep’t of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (discussing the history and purpose of FOIA and the structure of FOIA exemptions). “These limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Id.* Because of FOIA’s goal of promoting agency disclosure, the exemptions are to be construed narrowly. *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136, 150-151 (1989). “[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.” *U.S. Department of State v. Ray*, 502 U.S. 164, 173 (1991).

## ARGUMENT

### 1. Defendant Improperly Applies the Deliberative Process Privilege

Defendant is withholding information and records responsive to Plaintiff's FOIA request asserting the deliberative process privilege under Section 5 of FOIA. The withheld documents reflect communications among scientists related to factual data and conclusions of the scientific investigation reported in the Karl Study. *See Vaughn* index, Exhibit 1 to Declaration of Mark Graff ("Vaughn index"), ECF No. 16-2. The withheld records do not contain suggestions or recommendations on legal or policy matters. *See Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). Rather, any recommendations or opinions in the documents are of a scientific, factual, and investigatory nature. The information and records are related to a scientific research study published in a non-agency, peer review journal, *Science*. The communications and analysis do not reflect the "agency policy" envisioned by Congress as requiring protection from disclosure. *See Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1437 (D.C. Cir. 1992) (a "salient characteristic" of information eligible for protection under deliberative process privilege is its "association with a significant *policy* decision") (emphasis in original).

#### a. Scientific deliberations and decisions are not policy-related

Deliberative process covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated," *Sears, Roebuck & Co.*, 421 U.S. at 150 (internal quotation marks omitted). Congress did not intend to shield the public from the scientific discovery and research process. To withhold information under the deliberative process privilege, an agency must demonstrate that the information would "reveal 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *In*

*re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)). Further, the information must be “pre-decisional and it must be deliberative[,]” and the agency should “not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual.” *Id.* (citations omitted).

Scientific deliberations are not equivalent to policy deliberations. Scientific studies, such as this one, are objective, factual presentations of research and investigatory reports. The material is not part of the policy-making process and does not fall into the category of predecisional deliberative memoranda under Exemption 5. The deliberative process privilege is a limited privilege. In applying the deliberative process privilege, courts assess the substance of the records requested to determine if the information is purely factual or policy-related; (2) whether factual material is “reasonably segregable”, and (3) whether the material is both predecisional and deliberative. *See Nat’l Wildlife Fed’n*, 861 F.2d at 1118-20; *Senate of P.R. v. U.S. Dep’t of Justice*, 823 F.2d 574 (D.C. Cir. 1987).

To be part of the deliberative process, the document must be part of the decision-making process, or, as the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) has described, “[must] reflect[] the give-and-take of the consultative process.” *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). “[T]he agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process.” *Id.* at 868.

To determine whether the Defendant’s claim that the documents are validly being withheld, it is crucial to understand the function the documents serve within the agency. *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 858 (D.C. Cir. 1980); *NLRB v. Sears*,

*Roebuck & Co.*, 421 U.S. 132 (1975). Defendant asserts the drafts and information withheld contain opinions and recommendations of the authors and responses to peer review which qualify the material as “deliberations”. Defendant’s Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment (“Def.’s SJM”), ECF No. 16 at 10. However, such opinions, recommendations and peer responses are part of a *scientific deliberation* process and are not shielded from public disclosure under FOIA. Here, Defendant misconstrues the internal functioning of the scientific deliberative process. The withheld communications are not the documents Congress intended to be protected under the deliberative process privilege. *See Coastal States*, 617 F.2d at 867. They are not “suggestions or recommendations as to what agency policy should be.” *Id.*

Rather, the “deliberative” information and documents Defendant is attempting to withhold are more “resource opinion” relating to the applicability of existing and discovered - science to a certain set of existing and developing - data and methodology. Shielding such deliberations from the public is unnecessary and no protection from disclosure exists under FOIA.

Defendant provides the declaration of Dr. Richard W. Spinard who points to the “exchange and debate among peers as the mechanism that allows us to ensure that the scientific products we develop and release to the public are robustly developed and accurately tested. Such rigorous vetting is critical to developing and releasing scientific information of the highest possible quality to inform the public and decision-makers.” Spinrad Decl. ¶ 15.

Communications among the authors and their peers involve discussions about the tests, results, data, conclusions, etc., and analysis, theory, and presentation. Def.’s SJM at 10. Scientific answers and discoveries are realized through this open forum discussion and scientific progress

is advanced. However, Defendant argues that revealing the collaboration among scientists and disclosing these discussions will hinder the “robustness of the scientific progress.” Spinrad Decl. ¶ 24. However, the purpose of Exemption 5’s deliberative process protection specifically relates to agency policy-making. What purpose does Exemption 5 shield scientific deliberations that do not amount to agency policy? Scientific deliberations contemplate real, conclusive answers derived from concrete, measurable findings. Policy deliberations consider theoretical opinions and ideas molded into creating a rule or law. Congress’ intention to shield the theoretical “molding process” of policy deliberations cannot be concluded to similarly apply to the investigative research process of scientific deliberations.

Here, *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001) is instructive. There is no support for application of exemption 5 to scientific deliberations (as opposed to policy deliberations) in the statutory text, which the Supreme Court has “insisted be read strictly in order to serve FOIA’s mandate of broad disclosure”, which was expected and intended to affect Government operations (refusing to read an “Indian trust” exemption into the statute noting “as a general rule we are hesitant to construe statutes in light of legislative inaction” *citing Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983)).

Dr. Richard W. Spinrad asserts “these requests for input often lead to candid discussions and debates that can be thought of as a type of informal peer review that fulfills a valuable role in developing scientific thought and promoting scientific understanding.” Decl. ¶19. However, Candid discussions and informal peer review do not lead to the development of or advising on agency policy. Rather, these discussions among peers involve analysis and application of factual material and investigative techniques that “generate new ideas” in science. There is no advising

on agency policy. Rather, such deliberations are part of the scientific process in any research endeavor—the end result of which is not creation of policy, but factual, scientific discovery.

The D.C. Circuit has held that information is part of the deliberative process if disclosing such materials would expose the agency's decision-making process in such a way to discourage candid discussion within agency and undermine the agency's ability to perform its functions. *Dudman*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). Here, Defendant's Motion for Summary Judgment Memorandum and supporting declarations repeatedly state that disclosure of the withheld information and documents would inhibit candid internal discussions" and "chill the open and frank exchange of comments and opinions." Def.'s SJM at 10; Spinrad Decl. ¶¶ 22, 23, 27; Graff Decl. ¶ 64. However, the communications and deliberations related to the Karl Study at issue here do not reflect agency policy, there is no force of law. The purpose of these communications and deliberations was to adequately and accurately publish scientific findings in a peer-review journal, not to create agency policy. FOIA—and Congress in creating specific statutory exemptions—does not apply to the scientific method statutorily. Nor has it been held by courts it was the intention of Congress for exemption 5 to be so expansive as to encompass all intellectual or developmental discussions among peers. Exemption 5 relates to policy deliberations specifically. Even courts that have edged on judicial expansion of the meaning of deliberative process have cautioned and not done what Defendants *Seek* here.

In *Petroleum Information Corp. v. U.S. DOI*, 976 F.2d 1429, 1435 (D.C. Cir. 1992), the D.C. Cir. held that factual information should be shielded by the privilege, or not, according to "whether the agency has plausibly demonstrated the involvement of a policy judgment in the decisional process relevant to the requested documents." *See Mink*, 410 U.S. at 87 (privilege designed to promote "frank discussion of legal and policy matters") (quoting S.REP. No. 813,



89<sup>th</sup> Cong., 1<sup>st</sup> Sess. 9 (1965)); *id.* at 89 (“Exemption 5 requires different treatment for material reflecting deliberative or policy-making processes” and “purely factual, investigative matters”); *Coastal States*, 617 F.2d at 869 (resting conclusion that documents were not within Exemption 5 in part on ground that the documents did not “discuss the wisdom or merits of a particular agency policy, or recommend new agency policy”). “Conversely, when material could not reasonably be said to reveal an agency’s or official’s mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable.” *Petroleum Information Corp. v. DOI*, 976 F. 2d at 1435; *See Playboy Enterprises v. Department of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) (holding that fact report was not within privilege because compilers’ mission was simply “to investigate the facts,” and because report was not “intertwined with the policy-making process.”) Here, Defendant cannot point to any agency policy sought to be protected. Rather, Defendant asks the court to conclude a sufficient justification for applying Exemption 5 to scientific deliberations analogous to policy-making deliberations of an agency. The deliberations are comments among the authors and scientific community peers there is no agency policy decision. Defendant fails to point to any agency policy at issue that warrants Exemption 5 privilege protection. The results of research are factual, not deliberative, information and are not the discussions Congress intended to protect under the deliberative process privilege. *See Hennessey*, 1997 WL 537998 (“report does not bear on a policy-oriented judgment of the kind contemplated by Exemption 5” *citing Petroleum Info*, 976 F.2d at 1437); *Ethyl Corp. v. EPA*, 25 F.3d 1241 (4<sup>th</sup> Cir. 1994) (“privilege does not protect a document which is merely peripheral to actual policy formulation”); *Chi Tribune Co., v. HHS*, No. 95 C 3917, 1997 U.S. Dist. LEXIS 2308 (N.D. Ill. Feb. 26, 1997) (magistrate’s recommendation) (scientific judgments not protectable when they do not address agency policymaking.) Disclosure of the

scientific discussions within the withheld records will not “impinge[] on the policymaking decisional processes intended to be protected by this exemption.” *EPA v. Mink*, 410 U.S. 73, 92. The disclosure sought by Plaintiff will not reveal the deliberative process that Exemption 5 protects.

Disclosure of records under FOIA is required unless it squarely falls within one of the enumerated exemptions as written and specifically intended by Congress. Defendant argues this transparency requirement Congress placed on federal agencies will halt scientific progress by hampering scientists from discussing factual, scientific processes and findings. *See* Def’s SJM at 10, 20; Spinrad Decl. ¶¶ 21, 23, 24.

It cannot be possible that a scientist performing his duties would be less “frank” or “honest” if he or she knew the document might be made public. Here, withholding the communications serves no legitimate policy interest of the government. *See Coastal States*, 617 F.2d 854, 869.

Dr. Richard W. Spinard asserts “This would narrow the range of perspectives taken into account in generating our scientific products and therefore reduce the overall robustness of the scientific process.” Decl. ¶ 24. However, “robustness of the scientific process” is not statutorily protected under FOIA. Science is not Policy. While deliberations about judgments, opinions, and theories are part of the scientific research process, such exchanges among non-policy decision-makers are not protected from disclosure under FOIA. Such communications are necessary and play a major role in development of science and furthering research, but the substantive nature of scientific research is objective reporting of facts and findings, not subjective policy decisions.

## **2. The Evidence Revealed by Dr. John Bates Shows Misconduct Sufficient to Defeat Privilege**

In this Circuit, the government misconduct exception to the deliberative process privilege applies in two circumstances. First, the “deliberative process privilege disappears altogether when there is any reason to believe government misconduct occurred.” *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) (internal quotations omitted). And second, “where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve the public’s interest in honest, effective government.” *Id.* at 738 (internal quotations omitted). There is more than enough “reason to believe” government misconduct may have occurred here. Former top NOAA scientist recently revealed to DailyMail.com that the Karl Study is based on “unverified” data and was never subject to rigorous internal evaluation process. *See* Pl.’s SOF. Dr. Bates reports the Karl Study was never subject to NOAA’s “rigorous internal evaluation process.” *See* Pl.’s SOF. Dr. Bates accused Tom Karl of “insisting on decisions and scientific choices that maximized warming and minimized documentation...in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy.” *Id.* The article reports “that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming.” *Id.* “[t]he land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings ‘unstable.’” This is not mere speculation. Rather, Dr. Bates purports to have “irrefutable evidence”. *Id.*

This standard has been further elaborated by this Court. For instance, documents that constitute “circumstantial evidence” of wrongdoing should be released under the misconduct exception. *Alexander v. FBI*, 186 F.R.D. 154, 164 (D.D.C. 1999).

This Court has held that the government misconduct exception applies to documents withheld under FOIA. *Nat’l Whistleblower Ctr. v. HHS*, 903 F. Supp. 2d 59, 66 (D.D.C. 2012) (“With respect to Defendant’s legal argument, there is no authority supporting its contention that the government-misconduct exception cannot apply in FOIA cases.”).

In addition, a finding that the government misconduct exception applies does not require the Court to make a “determination as to the ultimate question of the lawfulness of Defendant’s actions,” but only requires a finding of sufficient “misconduct.” *Nat’l Whistleblower Ctr. v. HHS*, 903 F. Supp. 2d 59, 69 (D.D.C. 2012)

Even if the Court determined the communications are deliberative, NOAA must produce the records because the government misconduct exception applies here.

Government misconduct can be “nefarious” or “extreme” or a “serious breach of the responsibilities of representative government,” in which to apply the exception. *ICM Registry, LLC v. U.S. Dep’t of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008). Misleading the public about scientific data...is nefarious and extreme wrongdoing. Coupled with NOAA’s refusal to comply with Representative Smith’s congressional subpoena, there is ample evidence to *See* that government misconduct is an issue here.

The misconduct here is arguably more nefarious and extreme than the alleged misuse of the IRS at issue in *Tax Reform Research Grp. V. Internal Revenue Serv*, 419 F.Supp. 415, 426 (D.D.C. 1976), in which the exception was found to apply

### **3. Defendant Failed to Produce Reasonably Segregable Information**

The segregability analysis required by FOIA cannot be understated. In *Mead Data Central v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977), the Court held that “even where specific exemptions apply, the agency is required to conduct a segregability analysis and determine if any non-exempt portions of the record can be released.” This requirement is so essential that, “before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld ... [and] [i]f the district court approves withholding without such a finding, remand is required even if the requester did not raise the issue of segregability before the court.” *Sussman*, 494 F.3d at 1116 (internal citations omitted); *See also Soucie v. David*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971) (non-exempt material may be protected only if it is “inextricably intertwined” with exempt information).

Defendants’ declaration offers only the barest, conclusory statement that the withheld information is not segregable. *See* Def’s SJM at 22. This is inadequate to meet Defendant’s burden in FOIA litigation. Conclusory language in agency declarations that provides no specific basis for segregability findings by district courts may be found inadequate. *See Dorsett v. United States Dep’t of the Treasury*, 307 F. Supp. 2d 28, 41 (D.D.C. 2004) (denying summary judgment in part “[b]ecause of [agency’s] inadequate and conclusory segregability explanation,” and ordering renewed motion with affidavit solely addressing segregability); *Animal Legal Def. Fund v. Dept. of Air Force*, 44 F. Supp. 2d 295, 301 (D.C. Cir. 1999) (conclusory statement regarding segregability are “patently insufficient”); *Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep’t of State*, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992) (finding that “boilerplate” statement that “no segregation of nonexempt, meaningful information can be made for disclosure” is “entirely insufficient”); *See also Patterson v. IRS*, 56 F.3d 832, 839 (7th Cir. 1995) (“[B]ecause

the [agency declaration] lumps all of the withheld information together in justifying nondisclosure, the district court could not have independently evaluated whether exempt information alone was being withheld or deleted in each instance.”)

#### **4. *In Camera* Review is Warranted**

Courts have departed from routine reliance on agency affidavits where exemptions are not sufficiently proven, or where other good cause may exist to order release information under FOIA. The Court has “the option to conduct *in camera* review.” *Juarez v. DOJ*, 518 F.3d 54, 59-60 (D.C. Cir. 2008); *Allen v. CIA*, 636 F.2d 1287, 1298 (D.C. Cir. 1980) (“Where the agency fails to meet that burden, a not uncommon event, the court may employ a host of procedures that will provide it with sufficient information to make its *de novo* determination, including *in camera* inspection.”). Here, the court should undergo an *in camera* review to determine the appropriateness of Defendants’ asserted claims of deliberative process privilege.

Because the requested records are “few in number and of short length,” the Court may reasonably review the responsive records *in camera*. *Allen*, 636 F.2d at 1298. *In camera* review is “particularly appropriate” in cases like this one, where the “agency affidavits are insufficiently detailed to permit meaningful review of exemption claims.” *Quinon & Strafer v. Federal Bureau of Investigation*, 86 F.3d 1222, 1228 (D.C. Cir. 1996). In addition, as the D.C. Circuit Court has explained:

In cases that involve a strong public interest in disclosure there is also a greater call for *in camera* inspection... When citizens request information to ascertain whether a particular agency is properly serving its public function, the agency often deems it in its best interest to stifle or inhibit the probes. It is in these instances that the judiciary plays an important role in reviewing the agency’s withholding of information. But since it is in these instances that the representations of the agency are most likely to be protective and perhaps less than accurate, the need for *in camera* inspection is greater. *Allen*, 636 F.2d at 1299.

The public interest in disclosure, and the distinct possibility of the agency being “protective” of information given the circumstances, dictates such a review here.

**Conclusion**

For all of the foregoing reasons and the reasons, Plaintiff’s cross-motion for summary judgment should be granted and the material should be produced to Plaintiff.

Dated: February 21, 2017

Respectfully submitted,

/s/ Lauren M. Burke

Lauren M. Burke

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-2088 (CRC)
	)	
U.S. DEPARTMENT OF	)	
COMMERCE,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S RESPONSE TO DEFENDANT’S STATEMENT OF MATERIAL FACTS  
NOT IN DISPUTE AND PLAINTIFF’S STATEMENT OF MATERIAL FACTS IN  
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Local Civil Rule 7(h), respectfully submits this response to Defendant’s Statement of Material Facts Not in Dispute (ECF 25-5) and Plaintiff’s Statement of Material Facts in Support of Cross-Motion for Summary Judgment:

**I. Plaintiff’s Response to Defendants’ Statement of Material Facts Not in Dispute.**

General Objection

As an initial matter, Plaintiff objects that Defendant’s statement does not comply with Local Civil Rule 7(h)(1). The failure to comply with the requirement to file a proper statement of material facts in “making or opposing a motion for summary judgment may be fatal to the delinquent party’s position.” *Gardels v. Central Intelligence Agency*, 637 F.2d 770, 773 (D.C. Cir. 1980); *see also Adagio Investment Holding Ltd. v. Federal Deposit Insurance Corp.*, 338 F. Supp.2d 71, 75 (D.D.C. 2004); *Smith Property Holdings, 4411 Connecticut L.L.C. v. U.S.*, 311 F. Supp. 2d 69, 78 (D.D.C. 2004); *Robertson v. American Airlines*, 239 F. Supp.2d 5, 8-9 (D.D.C.



2002). Defendants' statement of material facts contains an improper mix of fact and legal conclusions and therefore fails to "assist the court in isolating the material facts, distinguishing disputed from undisputed facts, and identifying the pertinent parts of the record . . ." *Robertson*, 239 F. Supp. 2d at 9 (citations omitted).

Specific Objections

1. Not disputed.
2. Not disputed. as plaintiff lacks sufficient knowledge to confirm or deny whether Defendant directed its search efforts as described. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the asymmetrical distribution of knowledge between a FOIA requester and an agency in FOIA cases).
3. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.
4. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.
5. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.
6. Not disputed.
7. Disputed
8. Disputed
9. Disputed
10. Disputed
11. Disputed

12. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

13. Disputed

14. Disputed.

15. Disputed

16. Disputed

17. Disputed

18. Not disputed

19. Not disputed

20. Not disputed

21. Not disputed

22. Not disputed

23. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

24. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

25. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

26. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

27. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

28. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

29. Not disputed

30. Not disputed

31. Not disputed as to supplemental productions. Otherwise, disputed.

32. Not disputed

33. Not disputed

34. Not disputed as to NOAA's asserted exemption

35. Not disputed as to NOAA's asserted exemption

**II. Plaintiff's Statement of Material Facts Not in Dispute in Support of Cross-Motion for Summary Judgment.**

1. On February 4, 2016, counsel for NOAA contacted Plaintiff to discuss the request.

2. Following review of the draft *Vaughn* index, Plaintiff narrowed the issues and specific records it was challenging and informed Defendant it was challenging the documents withheld under Exemptions 5 and 6 and the adequacy of the search.

3. On February 4, 2017, David Rose from Britain's Mail on Sunday column on the DailyMail.com blog website published an article entitled: Exposed: How World Leaders Were Duped Into Investing Billions Over Manipulated Global Warming Data. The article can be found on the DailyMail.com website at:

<http://www.dailymail.co.uk/sciencetech/article-4192182/World-leaders-duped-manipulated-global-warming-data.html>

4. The article reported that a high level whistleblower from NOAA, Dr. John J. Bates, former NOAA scientist had evidence that the Karl Study "was based on misleading, 'unverified'

data.”

5. The article reports the Karl Study was never subject to NOAA’s “rigorous internal evaluation process.”

6. Dr. Bates accused Tom Karl of “insisting on decisions and scientific choices that maximized warming and minimized documentation...in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy.”

7. The article reports it learnt [sic] “that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming.”

8. Additionally, “The land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings ‘unstable.’”

9. The article reports that the Karl Study specifically set out to investigate and formulate a conclusion regarding the “pause” or “slowdown” in global warming as reported by the Intergovernmental Panel on Climate Change (“IPCC”).

10. The article reports that the Karl Study claimed that the ‘pause’ or ‘slowdown’ in global warming reported in the IPCC report never existed.

11. Following publication of the Karl Study, Congressman Lamar Smith, Chairman of the House Committee on Science, Space, and Technology Committee, issued a subpoena requesting communications and documents related to the Karl Study.

12. NOAA officials did not comply with the congressional subpoenas and refused to turn over internal discussions among the scientists who authored the Karl Study claiming confidentiality.

Dated: February 21, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ Lauren M. Burke

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*Attorneys for Plaintiff*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-2088 (CRC)
	)	
U.S. DEPARTMENT OF	)	
COMMERCE,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby cross-moves for summary judgment against Defendant U.S. Department of Commerce. As grounds therefor, Plaintiff respectfully refers the Court to the accompanying “Brief in Support of Plaintiff’s Cross-Motion for Summary Judgment and in Opposition to Defendants’ Motion for Summary Judgment,” and “Plaintiff’s Response to Defendants’ Statement of Material Facts Not in Dispute and Statement of Material Facts in Support of Cross-Motion for Partial Summary Judgment.”

Dated: February 21, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

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*Attorneys for Plaintiff*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
	)	
<i>Plaintiff,</i>	)	
	)	Civ. No. 1:15-cv-2088 (CRC)
v.	)	
	)	
U.S. DEPARTMENT OF COMMERCE,	)	
	)	
<i>Defendant.</i>	)	
_____	)	

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S  
OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND IN  
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch (“Plaintiff” or “Judicial Watch”), by counsel, respectfully submits this memorandum in opposition to Defendant Department of Commerce’s (“Defendant” or “Commerce Department”) motion for summary judgment and to support Plaintiff’s cross-motion for summary judgment.

**INTRODUCTION**

Defendant has failed to provide all records in its possession, or at least the reasonably segregable, non-exempt portions of such records, and has, therefore, unreasonably withheld material responsive to Plaintiff’s FOIA request. Failing to meet its burden of proof, Defendant cannot justify the withholding of responsive documents as validly exempt under FOIA and should be ordered to disclose the improperly withheld records.

Defendant is improperly withholding information and records asserting Exemption 5 under FOIA. However, the information and documents Defendant is withholding do not validly fall within the parameters of Exemption 5 as part of the “deliberative process privilege” as intended by Congress. The “deliberative” nature of the records being withheld is factual,

investigative, scientific research related to a study published in a non-agency, peer-review journal, *Science*. The information reflects no policy or law of the agency. Therefore, the information and records being withheld are not validly exempt from disclosure under FOIA.<sup>1</sup>

### **BACKGROUND**

In June, 2015, the independent, scientific, peer-review journal *Science* published a scientific study by Thomas Karl and eight other scientists, entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* (“Karl Study”) See Defendant’s Statement of Material Facts (“Def’s SOF”) ¶6, ECF 16 (attached to Defendant’s Motion for Summary Judgment). The Karl Study specifically set out to investigate and formulate a conclusion regarding the “pause” or “slowdown” in global warming as reported the previous year (September 2013-November 2014) by the Intergovernmental Panel on Climate Change (“IPCC”). See Pl.’s SOF ¶ 1. The IPCC report concluded that the upward global surface temperature trend from 1998-2012 was lower than that from 1951-2012. See Def’s SOF ¶ 1. The Karl Study claimed that the ‘pause’ or ‘slowdown’ in global warming reported in the IPCC report never existed. See Plaintiff’s Statement of Material Facts (“Pl.’s SOF”) ¶ (attached herein).

Following publication of the Karl Study, Congressman Lamar Smith, Chairman of the House Committee on Science, Space, and Technology Committee, issued a subpoena requesting communications and documents related to the Karl Study. See Pl. SOF ¶ 11. NOAA officials did not comply with the subpoenas and refused to turn over internal discussions among the scientists who authored the Karl Study claiming confidentiality. *Id.*

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<sup>1</sup> Plaintiff initially challenged the adequacy of Defendant’s search for responsive records. Having reviewed the Declaration of Mark Graff submitted with Defendant’s motion for summary judgment, Plaintiff is no longer challenging the adequacy of the search. Plaintiff has no objection to Defendant withholding phone numbers of NOAA scientists pursuant to Exemption 6 under FOIA for privacy considerations. Plaintiff’s Opposition and Cross-Motion for Summary Judgment addresses only its challenges to Defendant’s B5 assertions.



On October 30, 2015, Plaintiff submitted a FOIA request to NOAA, *Seeking access to:*

1. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the methodology and utilization of Night Marine Air Temperatures to adjust ship and buoy temperature data.
2. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the use of other global temperature datasets for both NOAA's in-house dataset improvements and monthly press releases conveying information to the public about global temperatures.
3. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the utilization and consideration of satellite bulk atmospheric temperature readings for use in global temperature datasets.
4. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to a subpoena issued for the aforementioned information by Congressman Lamar smith on October 13, 2015.<sup>2</sup>

*See* Complaint ("Compl.") ¶5, ECF No. 1.

Plaintiff filed this FOIA lawsuit on December 2, 2015 after NOAA violated its obligations in 5 U.S.C. § 552, the Freedom of Information Act ("FOIA"). *See* Compl. ¶¶ 7-10. On February 4, 2016, counsel for NOAA contacted Plaintiff to discuss the request. *See* Pl.'s SOF 1. Plaintiff agreed to narrow its request and limit the agency's search parameters to the topics specifically identified in its request. *See* Def.'s SOF ¶ 22. On May 27, 2016, Plaintiff received 102 pages of records produced in full and 90 pages of records produced in part. *See* Fourth Joint Status Report, ECF No. 12 ¶ 2. NOAA informed Plaintiff it was withholding 8,013 pages of records in full as duplicative or exempt under FOIA. *See* Fourth Joint Status Report, ECF No. 12. Plaintiff requested NOAA provide a draft *Vaughn* index to review the specific

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<sup>2</sup> Plaintiff is not challenging Defendant's production of records related to this portion of the FOIA request.

exemptions and withholdings being asserted. *See* Fifth & Sixth Joint Status Reports, ECF Nos. 13 & 14. Following review of the draft *Vaughn* index, Plaintiff narrowed the issues and specific records it was challenging and informed Defendant it was challenging the documents withheld under Exemptions 5 and 6 and the adequacy of the search. *See* Pl.'s SOF ¶ 2. On September 16, 2016, Plaintiff received an additional 44 pages of responsive records previously withheld by Defendant. *See* Def's SOF ¶32. On December 15, 2016, Plaintiff received 62 additional records previously withheld. *See* Def's SOF ¶ 33.

On February 4, 2017, DailyMail.com, a British news blog website, reported that a high level whistleblower from NOAA, Dr. John J. Bates, former NOAA scientist had evidence that the Karl Study “was based on misleading, ‘unverified’ data.” *See* Pl.’s SOF 4. The article reports the Karl Study was never subject to NOAA’s “rigorous internal evaluation process.” *See* Pl.’s SOF 5. Dr. Bates accused Tom Karl of “insisting on decisions and scientific choices that maximized warming and minimized documentation...in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy.” *Id.* The article reports it learnt [*sic*] “that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming.” *Id.* “[t]he land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings ‘unstable.’”

### **LEGAL STANDARD**

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). In FOIA cases, agency decisions to “withhold or disclose information under FOIA are reviewed *de novo*.” *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 256 (D.D.C. 2004). In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the requester. *Weisberg v. U.S. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

Also in FOIA litigation, but unlike in most other federal litigation, the agency defending the action, not the plaintiff, must prove. 5 U.S.C. § 552(a)(4)(B) (“the burden is on the agency to sustain its action”); *accord Military Audit Project v. Casey*, 656 F.2d 724, 739 (D.C. Cir. 1981). “[T]he agency must demonstrate beyond material doubt that its search was ‘reasonably calculated to uncover all relevant documents.’” *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (*quoting Truitt v. U.S. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)).

FOIA requires complete disclosure of requested agency information unless the information falls into one of FOIA’s nine exemptions. 5 U.S.C. § 552(b); *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7-8 (2001); *See also Dep’t of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (discussing the history and purpose of FOIA and the structure of FOIA exemptions). “These limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Id.* Because of FOIA’s goal of promoting agency disclosure, the exemptions are to be construed narrowly. *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136, 150-151 (1989). “[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.” *U.S. Department of State v. Ray*, 502 U.S. 164, 173 (1991).

## ARGUMENT

### 1. Defendant Improperly Applies the Deliberative Process Privilege

Defendant is withholding information and records responsive to Plaintiff's FOIA request asserting the deliberative process privilege under Section 5 of FOIA. The withheld documents reflect communications among scientists related to factual data and conclusions of the scientific investigation reported in the Karl Study. *See Vaughn* index, Exhibit 1 to Declaration of Mark Graff ("Vaughn index"), ECF No. 16-2. The withheld records do not contain suggestions or recommendations on legal or policy matters. *See Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). Rather, any recommendations or opinions in the documents are of a scientific, factual, and investigatory nature. The information and records are related to a scientific research study published in a non-agency, peer review journal, *Science*. The communications and analysis do not reflect the "agency policy" envisioned by Congress as requiring protection from disclosure. *See Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1437 (D.C. Cir. 1992) (a "salient characteristic" of information eligible for protection under deliberative process privilege is its "association with a significant *policy* decision") (emphasis in original).

#### a. Scientific deliberations and decisions are not policy-related

Deliberative process covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated," *Sears, Roebuck & Co.*, 421 U.S. at 150 (internal quotation marks omitted). Congress did not intend to shield the public from the scientific discovery and research process. To withhold information under the deliberative process privilege, an agency must demonstrate that the information would "reveal 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *In*

*re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)). Further, the information must be “pre-decisional and it must be deliberative[,]” and the agency should “not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual.” *Id.* (citations omitted).

Scientific deliberations are not equivalent to policy deliberations. Scientific studies, such as this one, are objective, factual presentations of research and investigatory reports. The material is not part of the policy-making process and does not fall into the category of predecisional deliberative memoranda under Exemption 5. The deliberative process privilege is a limited privilege. In applying the deliberative process privilege, courts assess the substance of the records requested to determine if the information is purely factual or policy-related; (2) whether factual material is “reasonably segregable”, and (3) whether the material is both predecisional and deliberative. *See Nat’l Wildlife Fed’n*, 861 F.2d at 1118-20; *Senate of P.R. v. U.S. Dep’t of Justice*, 823 F.2d 574 (D.C. Cir. 1987).

To be part of the deliberative process, the document must be part of the decision-making process, or, as the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) has described, “[must] reflect[] the give-and-take of the consultative process.” *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). “[T]he agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process.” *Id.* at 868.

To determine whether the Defendant’s claim that the documents are validly being withheld, it is crucial to understand the function the documents serve within the agency. *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 858 (D.C. Cir. 1980); *NLRB v. Sears*,

*Roebuck & Co.*, 421 U.S. 132 (1975). Defendant asserts the drafts and information withheld contain opinions and recommendations of the authors and responses to peer review which qualify the material as “deliberations”. Defendant’s Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment (“Def.’s SJM”), ECF No. 16 at 10. However, such opinions, recommendations and peer responses are part of a *scientific deliberation* process and are not shielded from public disclosure under FOIA. Here, Defendant misconstrues the internal functioning of the scientific deliberative process. The withheld communications are not the documents Congress intended to be protected under the deliberative process privilege. *See Coastal States*, 617 F.2d at 867. They are not “suggestions or recommendations as to what agency policy should be.” *Id.*

Rather, the “deliberative” information and documents Defendant is attempting to withhold are more “resource opinion” relating to the applicability of existing and discovered - science to a certain set of existing and developing - data and methodology. Shielding such deliberations from the public is unnecessary and no protection from disclosure exists under FOIA.

Defendant provides the declaration of Dr. Richard W. Spinard who points to the “exchange and debate among peers as the mechanism that allows us to ensure that the scientific products we develop and release to the public are robustly developed and accurately tested. Such rigorous vetting is critical to developing and releasing scientific information of the highest possible quality to inform the public and decision-makers.” Spinrad Decl. ¶ 15.

Communications among the authors and their peers involve discussions about the tests, results, data, conclusions, etc., and analysis, theory, and presentation. Def.’s SJM at 10. Scientific answers and discoveries are realized through this open forum discussion and scientific progress

is advanced. However, Defendant argues that revealing the collaboration among scientists and disclosing these discussions will hinder the “robustness of the scientific progress.” Spinrad Decl. ¶ 24. However, the purpose of Exemption 5’s deliberative process protection specifically relates to agency policy-making. What purpose does Exemption 5 shield scientific deliberations that do not amount to agency policy? Scientific deliberations contemplate real, conclusive answers derived from concrete, measurable findings. Policy deliberations consider theoretical opinions and ideas molded into creating a rule or law. Congress’ intention to shield the theoretical “molding process” of policy deliberations cannot be concluded to similarly apply to the investigative research process of scientific deliberations.

Here, *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001) is instructive. There is no support for application of exemption 5 to scientific deliberations (as opposed to policy deliberations) in the statutory text, which the Supreme Court has “insisted be read strictly in order to serve FOIA’s mandate of broad disclosure”, which was expected and intended to affect Government operations (refusing to read an “Indian trust” exemption into the statute noting “as a general rule we are hesitant to construe statutes in light of legislative inaction” *citing Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983)).

Dr. Richard W. Spinrad asserts “these requests for input often lead to candid discussions and debates that can be thought of as a type of informal peer review that fulfills a valuable role in developing scientific thought and promoting scientific understanding.” Decl. ¶19. However, Candid discussions and informal peer review do not lead to the development of or advising on agency policy. Rather, these discussions among peers involve analysis and application of factual material and investigative techniques that “generate new ideas” in science. There is no advising

on agency policy. Rather, such deliberations are part of the scientific process in any research endeavor—the end result of which is not creation of policy, but factual, scientific discovery.

The D.C. Circuit has held that information is part of the deliberative process if disclosing such materials would expose the agency’s decision-making process in such a way to discourage candid discussion within agency and undermine the agency’s ability to perform its functions. *Dudman*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). Here, Defendant’s Motion for Summary Judgment Memorandum and supporting declarations repeatedly state that disclosure of the withheld information and documents would inhibit candid internal discussions” and “chill the open and frank exchange of comments and opinions.” Def.’s SJM at 10; Spinrad Decl. ¶¶ 22, 23, 27; Graff Decl. ¶ 64. However, the communications and deliberations related to the Karl Study at issue here do not reflect agency policy, there is no force of law. The purpose of these communications and deliberations was to adequately and accurately publish scientific findings in a peer-review journal, not to create agency policy. FOIA—and Congress in creating specific statutory exemptions—does not apply to the scientific method statutorily. Nor has it been held by courts it was the intention of Congress for exemption 5 to be so expansive as to encompass all intellectual or developmental discussions among peers. Exemption 5 relates to policy deliberations specifically. Even courts that have edged on judicial expansion of the meaning of deliberative process have cautioned and not done what Defendants *Seek* here.

In *Petroleum Information Corp. v. U.S. DOI*, 976 F.2d 1429, 1435 (D.C. Cir. 1992), the D.C. Cir. held that factual information should be shielded by the privilege, or not, according to “whether the agency has plausibly demonstrated the involvement of a policy judgment in the decisional process relevant to the requested documents.” *See Mink*, 410 U.S. at 87 (privilege designed to promote “frank discussion of legal and policy matters”) (quoting S.REP. No. 813,



89<sup>th</sup> Cong., 1<sup>st</sup> Sess. 9 (1965)); *id.* at 89 (“Exemption 5 requires different treatment for material reflecting deliberative or policy-making processes” and “purely factual, investigative matters”); *Coastal States*, 617 F.2d at 869 (resting conclusion that documents were not within Exemption 5 in part on ground that the documents did not “discuss the wisdom or merits of a particular agency policy, or recommend new agency policy”). “Conversely, when material could not reasonably be said to reveal an agency’s or official’s mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable.” *Petroleum Information Corp. v. DOI*, 976 F. 2d at 1435; *See Playboy Enterprises v. Department of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) (holding that fact report was not within privilege because compilers’ mission was simply “to investigate the facts,” and because report was not “intertwined with the policy-making process.”) Here, Defendant cannot point to any agency policy sought to be protected. Rather, Defendant asks the court to conclude a sufficient justification for applying Exemption 5 to scientific deliberations analogous to policy-making deliberations of an agency. The deliberations are comments among the authors and scientific community peers there is no agency policy decision. Defendant fails to point to any agency policy at issue that warrants Exemption 5 privilege protection. The results of research are factual, not deliberative, information and are not the discussions Congress intended to protect under the deliberative process privilege. *See Hennessey*, 1997 WL 537998 (“report does not bear on a policy-oriented judgment of the kind contemplated by Exemption 5” *citing Petroleum Info*, 976 F.2d at 1437); *Ethyl Corp. v. EPA*, 25 F.3d 1241 (4<sup>th</sup> Cir. 1994) (“privilege does not protect a document which is merely peripheral to actual policy formulation”); *Chi Tribune Co., v. HHS*, No. 95 C 3917, 1997 U.S. Dist. LEXIS 2308 (N.D. Ill. Feb. 26, 1997) (magistrate’s recommendation) (scientific judgments not protectable when they do not address agency policymaking.) Disclosure of the

scientific discussions within the withheld records will not “impinge[] on the policymaking decisional processes intended to be protected by this exemption.” *EPA v. Mink*, 410 U.S. 73, 92. The disclosure sought by Plaintiff will not reveal the deliberative process that Exemption 5 protects.

Disclosure of records under FOIA is required unless it squarely falls within one of the enumerated exemptions as written and specifically intended by Congress. Defendant argues this transparency requirement Congress placed on federal agencies will halt scientific progress by hampering scientists from discussing factual, scientific processes and findings. *See* Def’s SJM at 10, 20; Spinrad Decl. ¶¶ 21, 23, 24.

It cannot be possible that a scientist performing his duties would be less “frank” or “honest” if he or she knew the document might be made public. Here, withholding the communications serves no legitimate policy interest of the government. *See Coastal States*, 617 F.2d 854, 869.

Dr. Richard W. Spinard asserts “This would narrow the range of perspectives taken into account in generating our scientific products and therefore reduce the overall robustness of the scientific process.” Decl. ¶ 24. However, “robustness of the scientific process” is not statutorily protected under FOIA. Science is not Policy. While deliberations about judgments, opinions, and theories are part of the scientific research process, such exchanges among non-policy decision-makers are not protected from disclosure under FOIA. Such communications are necessary and play a major role in development of science and furthering research, but the substantive nature of scientific research is objective reporting of facts and findings, not subjective policy decisions.

## **2. The Evidence Revealed by Dr. John Bates Shows Misconduct Sufficient to Defeat Privilege**

In this Circuit, the government misconduct exception to the deliberative process privilege applies in two circumstances. First, the “deliberative process privilege disappears altogether when there is any reason to believe government misconduct occurred.” *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) (internal quotations omitted). And second, “where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve the public’s interest in honest, effective government.” *Id.* at 738 (internal quotations omitted). There is more than enough “reason to believe” government misconduct may have occurred here. Former top NOAA scientist recently revealed to DailyMail.com that the Karl Study is based on “unverified” data and was never subject to rigorous internal evaluation process. *See* Pl.’s SOF. Dr. Bates reports the Karl Study was never subject to NOAA’s “rigorous internal evaluation process.” *See* Pl.’s SOF. Dr. Bates accused Tom Karl of “insisting on decisions and scientific choices that maximized warming and minimized documentation...in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy.” *Id.* The article reports “that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming.” *Id.* “[t]he land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings ‘unstable.’” This is not mere speculation. Rather, Dr. Bates purports to have “irrefutable evidence”. *Id.*

This standard has been further elaborated by this Court. For instance, documents that constitute “circumstantial evidence” of wrongdoing should be released under the misconduct exception. *Alexander v. FBI*, 186 F.R.D. 154, 164 (D.D.C. 1999).

This Court has held that the government misconduct exception applies to documents withheld under FOIA. *Nat’l Whistleblower Ctr. v. HHS*, 903 F. Supp. 2d 59, 66 (D.D.C. 2012) (“With respect to Defendant’s legal argument, there is no authority supporting its contention that the government-misconduct exception cannot apply in FOIA cases.”).

In addition, a finding that the government misconduct exception applies does not require the Court to make a “determination as to the ultimate question of the lawfulness of Defendant’s actions,” but only requires a finding of sufficient “misconduct.” *Nat’l Whistleblower Ctr. v. HHS*, 903 F. Supp. 2d 59, 69 (D.D.C. 2012)

Even if the Court determined the communications are deliberative, NOAA must produce the records because the government misconduct exception applies here.

Government misconduct can be “nefarious” or “extreme” or a “serious breach of the responsibilities of representative government,” in which to apply the exception. *ICM Registry, LLC v. U.S. Dep’t of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008). Misleading the public about scientific data...is nefarious and extreme wrongdoing. Coupled with NOAA’s refusal to comply with Representative Smith’s congressional subpoena, there is ample evidence to *See* that government misconduct is an issue here.

The misconduct here is arguably more nefarious and extreme than the alleged misuse of the IRS at issue in *Tax Reform Research Grp. V. Internal Revenue Serv*, 419 F.Supp. 415, 426 (D.D.C. 1976), in which the exception was found to apply

### **3. Defendant Failed to Produce Reasonably Segregable Information**

The segregability analysis required by FOIA cannot be understated. In *Mead Data Central v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977), the Court held that “even where specific exemptions apply, the agency is required to conduct a segregability analysis and determine if any non-exempt portions of the record can be released.” This requirement is so essential that, “before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld ... [and] [i]f the district court approves withholding without such a finding, remand is required even if the requester did not raise the issue of segregability before the court.” *Sussman*, 494 F.3d at 1116 (internal citations omitted); *See also Soucie v. David*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971) (non-exempt material may be protected only if it is “inextricably intertwined” with exempt information).

Defendants’ declaration offers only the barest, conclusory statement that the withheld information is not segregable. *See* Def’s SJM at 22. This is inadequate to meet Defendant’s burden in FOIA litigation. Conclusory language in agency declarations that provides no specific basis for segregability findings by district courts may be found inadequate. *See Dorsett v. United States Dep’t of the Treasury*, 307 F. Supp. 2d 28, 41 (D.D.C. 2004) (denying summary judgment in part “[b]ecause of [agency’s] inadequate and conclusory segregability explanation,” and ordering renewed motion with affidavit solely addressing segregability); *Animal Legal Def. Fund v. Dept. of Air Force*, 44 F. Supp. 2d 295, 301 (D.C. Cir. 1999) (conclusory statement regarding segregability are “patently insufficient”); *Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep’t of State*, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992) (finding that “boilerplate” statement that “no segregation of nonexempt, meaningful information can be made for disclosure” is “entirely insufficient”); *See also Patterson v. IRS*, 56 F.3d 832, 839 (7th Cir. 1995) (“[B]ecause

the [agency declaration] lumps all of the withheld information together in justifying nondisclosure, the district court could not have independently evaluated whether exempt information alone was being withheld or deleted in each instance.”)

#### **4. *In Camera* Review is Warranted**

Courts have departed from routine reliance on agency affidavits where exemptions are not sufficiently proven, or where other good cause may exist to order release information under FOIA. The Court has “the option to conduct *in camera* review.” *Juarez v. DOJ*, 518 F.3d 54, 59-60 (D.C. Cir. 2008); *Allen v. CIA*, 636 F.2d 1287, 1298 (D.C. Cir. 1980) (“Where the agency fails to meet that burden, a not uncommon event, the court may employ a host of procedures that will provide it with sufficient information to make its *de novo* determination, including *in camera* inspection.”). Here, the court should undergo an *in camera* review to determine the appropriateness of Defendants’ asserted claims of deliberative process privilege.

Because the requested records are “few in number and of short length,” the Court may reasonably review the responsive records *in camera*. *Allen*, 636 F.2d at 1298. *In camera* review is “particularly appropriate” in cases like this one, where the “agency affidavits are insufficiently detailed to permit meaningful review of exemption claims.” *Quinon & Strafer v. Federal Bureau of Investigation*, 86 F.3d 1222, 1228 (D.C. Cir. 1996). In addition, as the D.C. Circuit Court has explained:

In cases that involve a strong public interest in disclosure there is also a greater call for *in camera* inspection... When citizens request information to ascertain whether a particular agency is properly serving its public function, the agency often deems it in its best interest to stifle or inhibit the probes. It is in these instances that the judiciary plays an important role in reviewing the agency’s withholding of information. But since it is in these instances that the representations of the agency are most likely to be protective and perhaps less than accurate, the need for *in camera* inspection is greater. *Allen*, 636 F.2d at 1299.

The public interest in disclosure, and the distinct possibility of the agency being “protective” of information given the circumstances, dictates such a review here.

**Conclusion**

For all of the foregoing reasons and the reasons, Plaintiff’s cross-motion for summary judgment should be granted and the material should be produced to Plaintiff.

Dated: February 21, 2017

Respectfully submitted,

/s/ Lauren M. Burke

Lauren M. Burke

DC Bar No. 472919

JUDICIAL WATCH, INC.

425 Third Street SW, Suite 800

Washington, DC 20024

(202) 646-5172

*Counsel for Plaintiff*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-2088 (CRC)
	)	
U.S. DEPARTMENT OF	)	
COMMERCE,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S RESPONSE TO DEFENDANT’S STATEMENT OF MATERIAL FACTS  
NOT IN DISPUTE AND PLAINTIFF’S STATEMENT OF MATERIAL FACTS IN  
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Local Civil Rule 7(h), respectfully submits this response to Defendant’s Statement of Material Facts Not in Dispute (ECF 25-5) and Plaintiff’s Statement of Material Facts in Support of Cross-Motion for Summary Judgment:

**I. Plaintiff’s Response to Defendants’ Statement of Material Facts Not in Dispute.**

General Objection

As an initial matter, Plaintiff objects that Defendant’s statement does not comply with Local Civil Rule 7(h)(1). The failure to comply with the requirement to file a proper statement of material facts in “making or opposing a motion for summary judgment may be fatal to the delinquent party’s position.” *Gardels v. Central Intelligence Agency*, 637 F.2d 770, 773 (D.C. Cir. 1980); *see also Adagio Investment Holding Ltd. v. Federal Deposit Insurance Corp.*, 338 F. Supp.2d 71, 75 (D.D.C. 2004); *Smith Property Holdings, 4411 Connecticut L.L.C. v. U.S.*, 311 F. Supp. 2d 69, 78 (D.D.C. 2004); *Robertson v. American Airlines*, 239 F. Supp.2d 5, 8-9 (D.D.C.



2002). Defendants’ statement of material facts contains an improper mix of fact and legal conclusions and therefore fails to “assist the court in isolating the material facts, distinguishing disputed from undisputed facts, and identifying the pertinent parts of the record . . .” *Robertson*, 239 F. Supp. 2d at 9 (citations omitted).

Specific Objections

1. Not disputed.
2. Not disputed. as plaintiff lacks sufficient knowledge to confirm or deny whether Defendant directed its search efforts as described. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the asymmetrical distribution of knowledge between a FOIA requester and an agency in FOIA cases).
3. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.
4. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.
5. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.
6. Not disputed.
7. Disputed
8. Disputed
9. Disputed
10. Disputed
11. Disputed

12. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

13. Disputed

14. Disputed.

15. Disputed

16. Disputed

17. Disputed

18. Not disputed

19. Not disputed

20. Not disputed

21. Not disputed

22. Not disputed

23. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

24. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

25. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

26. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

27. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

28. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

29. Not disputed

30. Not disputed

31. Not disputed as to supplemental productions. Otherwise, disputed.

32. Not disputed

33. Not disputed

34. Not disputed as to NOAA's asserted exemption

35. Not disputed as to NOAA's asserted exemption

**II. Plaintiff's Statement of Material Facts Not in Dispute in Support of Cross-Motion for Summary Judgment.**

1. On February 4, 2016, counsel for NOAA contacted Plaintiff to discuss the request.

2. Following review of the draft *Vaughn* index, Plaintiff narrowed the issues and specific records it was challenging and informed Defendant it was challenging the documents withheld under Exemptions 5 and 6 and the adequacy of the search.

3. On February 4, 2017, David Rose from Britain's Mail on Sunday column on the DailyMail.com blog website published an article entitled: Exposed: How World Leaders Were Duped Into Investing Billions Over Manipulated Global Warming Data. The article can be found on the DailyMail.com website at:

<http://www.dailymail.co.uk/sciencetech/article-4192182/World-leaders-duped-manipulated-global-warming-data.html>

4. The article reported that a high level whistleblower from NOAA, Dr. John J. Bates, former NOAA scientist had evidence that the Karl Study "was based on misleading, 'unverified'

data.”

5. The article reports the Karl Study was never subject to NOAA’s “rigorous internal evaluation process.”

6. Dr. Bates accused Tom Karl of “insisting on decisions and scientific choices that maximized warming and minimized documentation...in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy.”

7. The article reports it learnt [sic] “that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming.”

8. Additionally, “The land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings ‘unstable.’”

9. The article reports that the Karl Study specifically set out to investigate and formulate a conclusion regarding the “pause” or “slowdown” in global warming as reported by the Intergovernmental Panel on Climate Change (“IPCC”).

10. The article reports that the Karl Study claimed that the ‘pause’ or ‘slowdown’ in global warming reported in the IPCC report never existed.

11. Following publication of the Karl Study, Congressman Lamar Smith, Chairman of the House Committee on Science, Space, and Technology Committee, issued a subpoena requesting communications and documents related to the Karl Study.

12. NOAA officials did not comply with the congressional subpoenas and refused to turn over internal discussions among the scientists who authored the Karl Study claiming confidentiality.

Dated: February 21, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ Lauren M. Burke

Lauren M. Burke

D.C. Bar No. 1028811

425 Third Street SW, Suite 800

Washington, DC 20024

Tel: (202) 646-5172

Fax: (202) 646-5199

Email: [lburke@judicialwatch.org](mailto:lburke@judicialwatch.org)

*Attorneys for Plaintiff*

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**From:** Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>  
**Sent:** Wednesday, February 8, 2017 4:40 PM  
**To:** Boyd, Harriette  
**Cc:** Mark Graff - NOAA Affiliate  
**Subject:** Fwd: FOIA Request regarding/relating to Transition  
**Attachments:** FOIA Listing 2017-02-02 (1).xls

Hi Harriette - Please find a list of the NOAA FOIA requests regarding Transition attached. Please let us know if you need anything else.

Lola

**Mark Graff - NOAA Federal** <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)>  
Date: Wed, Feb 8, 2017 at 4:32 PM  
Subject: Fwd: FOIA Request regarding/relating to Transition  
To: Lola Stith - NOAA Affiliate <[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)>

Hey Lola--

Can you forward a copy of those requests that were on your spreadsheet to Harriette?

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
[\(301\) 628-5658](tel:3016285658) (O)  
**(b)(6)** (C)

Confidentiality Notice: This e mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.

----- Forwarded message -----

**From:** **Boyd, Harriette (Federal)** <[hBoyd1@doc.gov](mailto:hBoyd1@doc.gov)>  
**Date:** Wed, Feb 8, 2017 at 4:31 PM  
**Subject:** FOIA Request regarding/relating to Transition  
**To:** "Toland, Michael (Federal)" <[MToland@doc.gov](mailto:MToland@doc.gov)>, "Parsons, Bobbie (Federal)" <[bParsons@doc.gov](mailto:bParsons@doc.gov)>, "Davis, James (Contractor)" <[jdavis@doc.gov](mailto:jdavis@doc.gov)>, "Staunton, Dondi" <[Dondi.Staunton@bea.gov](mailto:Dondi.Staunton@bea.gov)>, "Curry, Vernon E" <[vernon.e.curry@census.gov](mailto:vernon.e.curry@census.gov)>, "Moulder, Pamela (Federal)" <[pmoulder@doc.gov](mailto:pmoulder@doc.gov)>, "Kong, Stephen (Federal)" <[SKong@eda.gov](mailto:SKong@eda.gov)>, "Kuo, Jennifer" <[Jennifer.Kuo@bis.doc.gov](mailto:Jennifer.Kuo@bis.doc.gov)>, "Arnold, Josephine (Federal)" <[jarnold@mbda.gov](mailto:jarnold@mbda.gov)>, "Fletcher, Catherine" <[catherine.fletcher@nist.gov](mailto:catherine.fletcher@nist.gov)>, "Strickland, Wayne" <[WayneS@ntis.gov](mailto:WayneS@ntis.gov)>, "Cheney, Stacy" <[SCheney@ntia.doc.gov](mailto:SCheney@ntia.doc.gov)>, "Graff, Mark (Federal)" <[Mark.Graff@noaa.gov](mailto:Mark.Graff@noaa.gov)>, "Main, Laura" <[LMain@oig.doc.gov](mailto:LMain@oig.doc.gov)>, "Heaton, John" <[Ricou.Heaton@uspto.gov](mailto:Ricou.Heaton@uspto.gov)>, "Oliphant, Tashima (Federal)" <[TOLiphant@eda.gov](mailto:TOLiphant@eda.gov)>, "Piel, Jennifer" <[JPiel@oig.doc.gov](mailto:JPiel@oig.doc.gov)>, "So, Paris"

<[Paris.So@trade.gov](mailto:Paris.So@trade.gov)>, "Abello, Isabel (CONTR) ([Isabel.Abello@Hq.Doe.Gov](mailto:Isabel.Abello@Hq.Doe.Gov))" <[Isabel.Abello@hq.doe.gov](mailto:Isabel.Abello@hq.doe.gov)>

The Department is asking that any FOIA requests the Bureaus received regarding or related to the Transition including requests i.e., for information regarding directors, deputy directors, resignations or persons in “acting” roles be forward a copy to this Office. Please forward to me, [hboyd1@doc.gov](mailto:hboyd1@doc.gov). Thanks, Harriette

*Harriette Boyd*

*Freedom of Information Act Specialist*

*U.S. Department of Commerce*

*Office of Privacy and Open Government*

*Office: [\(202\) 482-1485](tel:(202)482-1485)*

*Email: [hboyd1@doc.gov](mailto:hboyd1@doc.gov)*

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Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)

BOU	Tracking Number	Type	Requester
	DOC-NOAA-2017-000331	Request	Adam J. Rappaport
	DOC-NOAA-2017-000346	Request	Anthony V. Schick
	DOC-NOAA-2017-000362	Request	Jaclyn Prange
	DOC-NOAA-2017-000497	Request	Rachel Clattenburg
	DOC-NOAA-2017-000351	Request	Yogin Kothari

**DOC REQUESTS - ASSIGNED TASKS TO NOAA**



	DOC-OS-2017-000267	TASK	Stephen S. Braun
	DOC-OS-2017-000308	TASK	Michael Best

Requester Organization	Submitted	Assigned To	Perfected	Due
Citizens for Responsibility and Ethics in Washington	12/16/2016	LA	YES	01/24/2017
Oregon Public Broadcasting	12/19/2016	Ana Liza Malabanan	YES	02/23/2017
	12/22/2016	USEC	YES	02/09/2017
Public Citizen	01/25/2017	USEC	YES	03/02/2017
UCS	12/20/2016	USEC	YES	

Associated Press	12/19/2016	NOAA/USEC	YES	01/11/2017
	01/26/2017	NOAA/USEC	YES	02/27/2017

Closed Dat	(b)(5)	Dispositions
TBD		TBD
TBD		TBD
TBD		TBD
TBD		TBD
TBD		TBD

**(b)(5)**

TBD

TBD

TBD

TBD

**Detail**

CREW requests copies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump's transition team, including representatives of Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect.

I request copies of any communications from regional staff in Oregon, Washington or Idaho since July 2016 involving both of the following keywords: 'Trump', 'President'. Scope modified to limit search by NMFS West Coast Region "Supervisory" staff located in Oregon, Washington or Idaho.

Please produce records in possession, custody, or control that are, include, or reflect communications between National Oceanic and Atmospheric Administration's (NOAA's) staff and any member of the transition team(s) of President-elect Donald Trump and/or Vice-President-elect Mike Pence. The term "transition team(s)" includes, but is not limited to, the staff members described in the Presidential Transition Act of 1963 and all amendments, 3 U.S.C. § 102 note. These members may include, but are not limited to, Wilbur Ross, Ray Washburne, David Bohigian, Joan Maginnis, George Sifakis, William Gaynor, A. Mark Neuman, and Tom Leppert.

On behalf of Public Citizen, Inc., and pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. s. 552, I request:

1. All records of communications from or on behalf of the Trump Administration and/or the Trump Transition Team to the National Oceanic and Atmospheric Administration (NOAA) providing guidance on which agency matters NOAA employees may or may not publicly discuss and/or regulating how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request. Background discussion of the concerns motivating this request is provided in the January 24, 2017, article in Politico by Andrew Restuccia, Alex Guill&eacute;n, and Nancy Cook, entitled Information lockdown hits Trump's federal agencies, available at <http://www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122>.
2. All records of communications disseminated internally to NOAA employees to provide guidance on which agency matters NOAA employees may or may not publicly discuss and/or to regulate how or whether NOAA employees may speak about any agency matter with individuals or organizations outside the agency, for the period from January 20, 2017, through the date of processing this request.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and on behalf of the Union of Concerned Scientists, I write to request access to and copies of all communications and attachments between National Oceanic and Atmospheric Administration staff and the following individuals from November 14, 2016 to present:

1. Anyone with the following email domain: @ptt.gov
2. Anyone with the following email domain: @donaldjtrump.com

copies of All emails sent to or sent from your agency employees in which the Internet domains "trump.com", "trumporg.com", "ptt.gov", "donaldjtrump.com" or "donaldtrump.com" are in email addresses in the To, From, CC,BCC, Subject or Body fields of the message. The time frame for this request is June 3, 2016 through December 5, 2016. for the following Officials: Secretary of Commerce Penny Pritzker Deputy Secretary Bruce H. Andrews Chief of Staff Jim Hock General Counsel Kelly R. Welsh Undersecretary for National Oceanic and Atmospheric Administration Dr Kathryn Sullivan Acting Undersecretary for International Trade Kenneth E. Hyatt Undersecretary for Industry and Security Eric L. Hirschhorn Director of the U.S. Census Bureau John Thompson Assistant Secretary for Economic Development Jay Williams

Under the Freedom of Information Act, I hereby request any emails produced or received by your agency to or from any member or part of the transition team, as well as any emails which include any or all of the following terms or phrases: • Trump • Transition • President-Elect • New administration • New boss

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**From:** Lorna Martin-Gross - NOAA Federal <lorna.martin-gross@noaa.gov>  
**Sent:** Friday, February 10, 2017 8:31 AM  
**To:** Lola Stith - NOAA Affiliate; Mark Graff - NOAA Federal  
**Subject:** Fwd: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

Is there a date projected to closeout 1270?

Thanks,

Lorna

----- Forwarded message -----

From: **Scott Doyle** <[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)>  
Date: Fri, Feb 10, 2017 at 8:20 AM  
Subject: Re: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)  
To: Lorna Martin-Gross - NOAA Federal <[lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)>

Isn't there some legal requirement to release them on in a certain time frame?

Do U have a date certain.

I realize it not your office but it's been at least 7 months.

Sent from my iPhone

On Feb 10, 2017, at 7:58 AM, Lorna Martin-Gross - NOAA Federal <[lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)> wrote:

Hello Mr. Doyle,

The final release of documents is awaiting NOAA FOIA Office approval. As soon as their process is complete, the remaining documents regarding FOIA DOC-NOAA-2016-001270 will be released to you and the request closed. Again, I appreciate your patience in this matter.

Kind regards,

On Tue, Feb 7, 2017 at 6:06 PM, Scott Doyle <[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)> wrote:

I have received only 119 documents. It is my understanding that there over 392 pages of Foia material. I have not received the all of the documents. Can you provide we with a date when I can expect the remaining ?

Sincerely  
Scott Doyle

-----Original Message-----

From: Lorna Martin-Gross - NOAA Federal <[lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)>



To: Scott Doyle <[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)>  
Cc: Lola Stith - NOAA Affiliate <[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)>  
Sent: Mon, Nov 21, 2016 1:13 pm  
Subject: RE: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

Hello Mr. Doyle,

The DOC OIG documents are pending approval for release from an office outside of OLE. As soon as approval is granted, the documents will be released to you via FOIAonline. This FOIA is still open for DOC OSY, they are processing a response. Ms. Stith is the POC for the reimbursement.

Kind regards,

**Ms. Lorna Martin-Gross**

*OLE Records Manager*

*Office: [301-427-8244](tel:301-427-8244)*

**From:** Scott Doyle [mailto:[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)]  
**Sent:** Friday, November 18, 2016 4:29 PM  
**To:** [lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov); [lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)  
**Subject:** Re: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

Nothing from OIG, today was the day it was estimated to upload its docs. OSY has now had close to 3 months and nothing from them.

Can you check and give me a update next week.

Also the reimbursement had not be paid.

Scott Doyle

-----Original Message-----

From: Lorna Martin-Gross - NOAA Federal <[lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)>  
To: lola.m.stith <[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)>  
Cc: scottdoyle137 <[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)>  
Sent: Wed, Nov 2, 2016 2:05 pm  
Subject: FW: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

Ms. Stith,

Please provide Mr. Doyle with an update of his fee reimbursement.

Thank you,

**Ms. Lorna Martin-Gross**

*OLE Records Manager*

*Office: [301-427-8244](tel:301-427-8244)*

**From:** Scott Doyle [mailto:[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)]  
**Sent:** Wednesday, November 02, 2016 1:51 PM  
**To:** [lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)  
**Subject:** Re: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

I have not received my reimbursement and update.?

-----Original Message-----

From: Lorna Martin-Gross - NOAA Federal <[lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)>

To: Scott Doyle <[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)>  
Sent: Tue, Oct 18, 2016 1:39 pm  
Subject: RE: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

Hello Mr. Doyle,

If you did not hear back from Ms. Stith yesterday, based on her email response to you on 10/14, I recommend you follow-up with her directly. The NOAA FOIA office handles all FOIA related funds and they will be the first to know the status.

Kind regards,

**Ms. Lorna Martin-Gross**

*OLE Records Manager*

*Office: [301-427-8244](tel:301-427-8244)*

**From:** Scott Doyle [mailto:[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)]  
**Sent:** Tuesday, October 18, 2016 1:15 PM  
**To:** [lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)  
**Subject:** Re: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

Thank you for the response.

Can you please let me know when the refund has been issued.

Scott

-----Original Message-----

From: Lorna Martin-Gross - NOAA Federal <[lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)>  
To: Scott Doyle <[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)>  
Cc: arlyn.penaranda <[arlyn.penaranda@noaa.gov](mailto:arlyn.penaranda@noaa.gov)>; foia <[foia@noaa.gov](mailto:foia@noaa.gov)>  
Sent: Tue, Oct 18, 2016 12:58 pm  
Subject: RE: Fee Reimbursement Request (FOIA DOC-NOAA-2016-001270)

Hello Mr. Doyle,

I understand your concern about not having received the remaining documents responsive to your FOIA request, DOC-NOAA-2016-001270. I will address each item of your email as it was written:

1. "I have not received my reimbursement as per the email below. That was well over a 2 months ago."

***The NOAA FOIA office is following up on the status of your refund.***

2. "I have not received all the additional FOIA documents that were originally identified. Can you give me an idea when I will receive them and reason for the continued delay?"

***The latest follow-up with the Department of Commerce was this morning. DOC's Office of Inspector General (OIG) estimates to have the documents uploaded into FOIAonline by November 18, 2016. DOC's Office of Security (OSY) has not provided an estimate, but we will continue to check the status. Once the OIG documents are uploaded into FOIAonline, you will be provided a second interim release letter with instructions to access responsive documents to your request. When the documents are provided by DOC OSY, a third interim release letter will be sent electronically with instructions to access responsive documents.***

3. "I would like to appeal that parts have been redacted which I don't believe which should have been redacted. I want to send in one comprehensive request. Items like complete email addresses, names, titles, the body of reports that speak to the internal investigate as it relates to my interview, witness statements and general facts of the investigation etc."

***The appeal language from the interim release letter states:***

*"We encourage you to speak with us if you have concerns as we continue to process this request. Although you have the ability to appeal at this time, we encourage you to focus the appeal/mediation/NOAA discussion, if needed, on exemptions applied to the documents thus far, but hold specific challenges about production until you have received and reviewed more of the voluminous records that the agency is still in the process of gathering and processing.*

*You have the right to file an administrative appeal if you are not satisfied with our response to your FOIA request. All appeals should include a statement of the reasons why you believe the FOIA response was not satisfactory. An appeal based on documents in this release must be received within 90 calendar days of the date of this response letter at the following address:*

*Assistant General Counsel for Litigation, Employment, and Oversight  
U.S. Department of Commerce  
Office of General Counsel  
Room 5875  
14th and Constitution Avenue, N.W.  
Washington, D.C. 20230*

*An appeal may also be sent by e-mail to [FOIAAppeals@doc.gov](mailto:FOIAAppeals@doc.gov), by facsimile (fax) to [202-482-2552](tel:202-482-2552), or by FOIAonline at <https://foiaonline.regulations.gov/foia/action/public/home#>.*

*For your appeal to be complete, it must include the following items:*

- *a copy of the original request,*
- *our response to your request,*
- *a statement explaining why the withheld records should be made available, and why the denial of the records was in error.*
- *"Freedom of Information Act Appeal" must appear on your appeal letter. It should also be written on your envelope, e-mail subject line, or your fax cover sheet.*

*FOIA appeals posted to the e-mail box, fax machine, FOIAonline, or Office after normal business hours will be deemed received on the next business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.*

*FOIA grants requesters the right to challenge an agency's final action in federal court. Before doing so, an adjudication of an administrative appeal is ordinarily required.*

*The Office of Government Information Services (OGIS), an office created within the National Archives and Records Administration, offers free mediation services to FOIA requesters. They may be contacted in any of the following ways:*

*Office of Government Information Services*

National Archives and Records Administration  
Room 2510  
8601 Adelphi Road  
College Park, MD 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)

Phone: [301-837-1996](tel:301-837-1996)  
Fax: [301-837-0348](tel:301-837-0348)  
Toll-free: [1-877-684-6448](tel:1-877-684-6448)

***If you choose to submit a formal appeal, as noted in your email, all activity on your request will be stopped until the appeal is vetted and fully processed. This means all DOC documents will be on hold until the appeal is final.***

***Before you decide to submit a formal appeal, I can offer to schedule a telephone call with you to discuss your specific exemption concerns of the OLE documents. Prior to the call, I ask that you provide me with identifying information of the documents in question in order to avoid searching for specific documents during the call.***

4. "I have a time limit of 90 days on which to appeal (Started 8/3/16), which I would like to request be extended until the all the FOIA documents have been delivered. It is unfair to ask me to make my appeal decision without the totality of all the information. I have received less than 100 of the over 320 documents.

If this is not the proper way to request an extension of an appeal please let me know the method you require."

***The interim release was uploaded and sent via FOIAonline on August 16, 2016. After our call, if you choose to submit a formal appeal, you will be within the 90 calendar days limit (November 14, 2016 by 5:00 p.m., Eastern Time). The correct procedure to submit a formal appeal is found in paragraph 3, above, and in the interim release letter sent on August 16, 2016.***

Please contact me if you would like to schedule a call to discuss your exemption concerns. I can be reached by email, Monday - Friday, at [lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov), or by phone on Tuesday, Thursday, and Friday, at [301-427-8244](tel:301-427-8244).

Kind regards,

**Ms. Lorna Martin-Gross**  
Records Manager  
Office of Law Enforcement  
NOAA Fisheries  
U.S. Department of Commerce  
1315 East-West Highway  
SSMC 3, Suite 3301  
Office: [301-427-8244](tel:301-427-8244)  
[lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)

**From:** FOIA Office - NOAA Service Account [mailto:[foia@noaa.gov](mailto:foia@noaa.gov)]  
**Sent:** Friday, October 14, 2016 2:20 PM  
**To:** Scott Doyle  
**Cc:** Lorna Martin-Gross - NOAA Federal  
**Subject:** Re: Fee Reimbursement Request

Good afternoon Mr. Doyle,

Thank you for your inquiry.

Lorna and Mark will address the FOIA request status and appeal questions. I can be your point of contact concerning the refund for your FOIA request.

I will follow-up with the NOAA finance office to check the status of your refund, and will have an update for you on Monday.

Please do not hesitate to contact me at the number below should you have additional questions concerning your refund.

Regards,

Lola Stith  
NOAA FOIA Office  
[703-298-8005](tel:703-298-8005)

Mark H. Graff  
FOIA Officer  
National Oceanic and Atmospheric Administration  
[\(301\)-628-5658](tel:301-628-5658)

On Fri, Oct 14, 2016 at 2:14 PM, Scott Doyle <[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)> wrote:  
Mr Graff, Ms. Martin,

Several items

1. I have not received my reimbursement as per the email below. That was well over a 2 months ago.
2. I have not received all the additional FOIA documents that were originally identified. Can you give me an idea when I will receive them and reason for the continued delay?
3. I would like to appeal that parts have been redacted which I don't believe which should have been redacted. I want to send in one comprehensive request. Items like complete email addresses, names, titles, the body of reports that speak to the internal investigate as it relates to my interview, witness statements and general facts of the investigation etc.
4. I have a time limit of 90 days on which to appeal (Started 8/3/16), which I would like to request be extended until the all the FOIA documents have been delivered. It is unfair to ask me to make my appeal decision without the totality of all the information. I have received less than 100 of the over 320 documents.

If this is not the proper way to request an extension of an appeal please let me know the method you require.

I appreciate your consideration on this matter and realize your office is not the reason for the delay.

Sincerely

Scott Doyle

-----Original Message-----  
From: foia <[foia@noaa.gov](mailto:foia@noaa.gov)>

To: scottdoyle137 <[scottdoyle137@aol.com](mailto:scottdoyle137@aol.com)>

Sent: Thu, Sep 1, 2016 9:08 am

Subject: Fee Reimbursement Request

09/01/2016 09:03 AM

FOIA Request: DOC-NOAA-2016-001270

This is in response to your request for the reimbursement of the fees paid for the processing of your FOIA request. You have argued that the 2016 FOIA Improvement Act of 2016 mandates the return of fees paid to you. Although that act is not retroactive, it is correct that your request is past due, and unusual circumstances have not been cited as justifying billable processing with fees assessed in your request after the statutory time frame for responding to your request. As such, I have determined that your request is not billable, and that fees should be returned to you. A request for a refund of your fees paid will be submitted to the Office of the Chief Financial Officer.

Mark Graff

NOAA FOIA Officer

--

Ms. Lorna Martin-Gross  
Records Manager  
Office of Law Enforcement  
NOAA Fisheries  
U.S. Department of Commerce  
Office: [301-427-8244](tel:301-427-8244)  
[lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)

--

Ms. Lorna Martin-Gross  
Records Manager  
Office of Law Enforcement  
NOAA Fisheries  
U.S. Department of Commerce  
Office: 301-427-8244  
[lorna.martin-gross@noaa.gov](mailto:lorna.martin-gross@noaa.gov)

---

**From:** Chung, Jennifer (Federal) <JChung@doc.gov>  
**Sent:** Tuesday, March 7, 2017 11:15 AM  
**To:** Graff, Mark (Federal)  
**Subject:** David Moser's Appeal of Fee Waiver Request Denial (DOC-NOAA-2017-000359)  
**Attachments:** FOIA Appeal DOC-NOAA-2017-000359.pdf

Hello, Mark,

I am the OGC attorney assigned to David Moser's appeal of his fee waiver request denial (FOIA Request No. DOC-NOAA-2017-000359). (b)(5) [REDACTED]

David Moser on December 21, 2016, submitted a FOIA request for the following: "For NOAA Fisheries, West Coast Region, California Coastal Office: All correspondence (including emails), reports, Biological Assessments, and all other documents related to the proposal by the California Department of Transportation (Caltrans) to replace or modify the Lagunitas Creek Bridge on Highway One (a.k.a. State Route One) in Point Reyes Station, California." (His request was perfected on January 11, 2017.) On January 4, 2017, you denied Mr. Moser's fee waiver request because the requester did not indicate having expertise in extracting, analyzing, and producing a unique work with the requested records and did not identify the segment of interested individuals who would receive a significant increased understanding through the dissemination of the records. On January 19, 2017, NOAA sent the requester a fee estimate (\$422.89) and included a notice of appeal rights.

(b)(5) [REDACTED]

[REDACTED]

Thank you very much for your consideration.

Best,  
Jennifer

Jennifer E. Chung, Esq.  
Senior Counsel, Information Law Division  
Office of General Counsel  
United States Department of Commerce  
1401 Constitution Ave., N.W.  
Washington, D.C. 20230  
Telephone: (202) 482-0387  
Facsimile: (202) 482-2552  
Email: JChung@doc.gov

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David E. Moser  
1069 Church Street  
San Francisco, CA 94114

January 19, 2017

[FOIAAppeals@doc.gov](mailto:FOIAAppeals@doc.gov)

Re: Appeal of FOIA Fee Waiver Denial  
FOIA Request No. DOC-NOAA-2017-000359

Dear Sir or Madam:

I filed a FOIA request with NOAA on December 21, 2016. A copy is enclosed. On January 4, 2017 I received via email a letter from NOAA denying my fee waiver request which was part of my December 21 submittal. I hereby appeal the fee waiver denial.

Your fee waiver denial cites the wrong Department of Commerce regulation. The denial cites 15 CFR 4.11(k), which is not relevant to fee waivers. The correct regulation is 40 CFR 4.11(l).

Section 4.11(l) states that to qualify for a fee waiver, the requester must demonstrate 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.

To determine whether the first of these fee waiver requirements is met, NOAA must “consider” several factors. Each of those factors, and its applicability to my request, is discussed below:

1. *The subject of the request* – My request concerns a proposal by the California Department of Transportation (Caltrans) to demolish and replace an existing bridge on U.S. Highway 1 over Lagunitas Creek in Point Reyes Station, California. Lagunitas Creek is used and occupied by coho salmon and steelhead, anadromous fish listed as threatened or endangered under the Endangered Species Act (ESA), and by marine mammals protected by the Marine Mammal Protection Act (MMPA). NOAA administers the ESA and MMPA. Caltrans is required to evaluate the potential impact of its project on these NOAA-protected resources, and to consult with and obtain certain approvals from NOAA, in order to implement the bridge project.

2. *The informative value of the information to be disclosed*: the requested records will meaningfully inform me and other concerned members of the public about the nature of Caltrans consultations with NOAA to date, ongoing and future consultations with NOAA, and the potential impacts of the Caltrans project on endangered species and marine mammal

resources subject to NOAA jurisdiction. The requested information is not already in the public domain.

3. *The contribution to an understanding of the subject by the public likely to result from disclosure* – I have been actively and publicly engaged in the evaluation of Caltrans' project for more than two years. I have testified orally at Caltrans public meetings on the project, I have worked with a local community group (the Point Reyes Village Association) on this project, I have submitted comments to Caltrans (which comments are available to the public) regarding this project, and I have had numerous letters to the editor published in the Point Reyes Light (a weekly newspaper) on the subject of this bridge project and its potential environmental and other impacts. I own and reside part-time in a home that is adjacent to the project site. I intend to utilize the requested records to continue informing the greater Point Reyes community about the project and its environmental impacts, and to submit public comments to Caltrans. Thus, disclosure of the requested records will contribute to the understanding of a reasonably broad audience of persons interested in the subject.


4. *The significance of the contribution to public understanding* – to date, despite several public meetings, and various written communications to the public from Caltrans, there has been virtually no information available about the potential impacts of the bridge project on NOAA-protected resources, or any interactions between Caltrans and NOAA or any input from NOAA to Caltrans regarding the project. Thus, the requested records would significantly enhance the public's understanding of these elements of the project evaluation and approval process.

To determine whether the second of these fee waiver requirements is met, NOAA must "consider" two factors. Each of those factors, and its applicability to my request, is discussed below:

1. *The existence and magnitude of a commercial interest* – As noted above, I own residential property and reside part-time at that property, which is located adjacent to the bridge project site. My property abuts a significant length of Lagunitas Creek, which contains the NOAA-protected resources noted above. I do not seek the requested information for a use or purpose that would further any commercial, trade, or profit interests. I seek the requested records in order to inform myself and my community about the potential environmental impacts of the Caltrans project on NOAA-protected resources, and to understand the required communications between Caltrans and NOAA regarding these resources.

2. *The primary interest in disclosure* – as explained above, my interest in purely non-commercial in nature. Accordingly, the public interest in disclosure is far greater than any commercial interest (which is zero).

I appreciate the opportunity to supplement the very limited fee waiver information I submitted with my original FOIA request, and I respectfully request approval of my fee waiver request.

Sincerely,  
  
David E. Moser  
dmoser@emslp.com

## David Moser

---

**From:** foia@noaa.gov  
**Sent:** Wednesday, December 21, 2016 11:28 AM  
**To:** David Moser  
**Subject:** FOIA Request DOC-NOAA-2017-000359 Submitted

This message is to confirm your request submission to the FOIAonline application: [View Request](#). Request information is as follows:

- Tracking Number: DOC-NOAA-2017-000359
- Requester Name: David Moser
- Date Submitted: 12/21/2016
- Request Status: Submitted
- Description: For NOAA Fisheries, West Coast Region, California Coastal Office: All correspondence (including emails), reports, Biological Assessments, and all other documents related to the proposal by the California Department of Transportation (Caltrans) to replace or modify the Lagunitas Creek Bridge on Highway One (a.k.a. State Route One) in Point Reyes Station, California.

---

This email has been scanned for spam and viruses by Proofpoint Essentials. Click [here](#) to report this email as spam.

Request Details

Tracking Number : DOC-NOAA-2017-000359

Submitted

Evaluation

Assignment

Processing

**Request Information**

Review	Full Name : Under	Closed	Date Submitted : 12/21/2016
	Agency		Estimated Date of Completion : February 9, 2017
Review	Organization : Under		Final Disposition :
	Agency	Undetermined	

**Description :**

For NOAA Fisheries, West Coast Region, California Coastal Office: All correspondence (including emails), reports, Biological Assessments, and all other documents related to the proposal by the California Department of Transportation (Caltrans) to replace or modify the Lagunitas Creek Bridge on Highway One (a.k.a. State Route One) in Point Reyes Station, California.

**Released Records**

No records have been released.





**U.S. DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
Office of the Chief Information Officer  
High Performance Computing and Communications

*Via FOIAonline*

January 19, 2017

Attn: David Moser  
1069 Church Street  
San Francisco, CA 94114

Re: FOIA Request No. DOC-NOAA-2017-000359

Dear Mr./Ms. Moser:

This letter responds to your Freedom of Information Act (FOIA) request entered into FOIAonline on December 21, 2016, in which you requested records as follows:

For NOAA Fisheries, West Coast Region, California Coastal Office: All correspondence (including emails), reports, Biological Assessments, and all other documents related to the proposal by the California Department of Transportation (Caltrans) to replace or modify the Lagunitas Creek Bridge on Highway One (a.k.a. State Route One) in Point Reyes Station, California.

Pursuant to procedures established in 15 CFR, Part 4.11(k), we rely on the following factors in determining whether the statutory standard for granting a fee waiver has been met:

1. The subject of the requested records must concern identifiable operations or activities of the Federal Government.
2. The disclosable portions of the requested records must be meaningfully informative about Government operations or activities in order to be "likely to contribute" to and increase public understanding of those operations or activities.
3. The disclosure of the requested information must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.
4. The disclosure of the requested information is likely to contribute "significantly" to the public's understanding of Government operations or activities.
5. Whether the requester has a commercial interest that would be furthered by the requester.
6. Whether any identified commercial interest of the requester is sufficiently great, in comparison with the public interest in disclosure, such that the disclosure is not primarily in the commercial interest of the requester.

Your fee waiver justification does not satisfy the 6 factors contemplated in 15 CFR 4.11. In this instance, you have only indicated that you are seeking the records for your own personal use. You have not indicated the expertise you as a requester have as in extracting, analyzing, and producing a unique work with the requested records. Additionally, you have not outlined the

---

**From:** Andre Sivels - NOAA Federal <andre.sivels@noaa.gov>  
**Sent:** Tuesday, March 7, 2017 11:32 AM  
**To:** Mark Graff - NOAA Federal  
**Cc:** Robert Swisher - NOAA Federal; Dennis Morgan - NOAA Federal; Lola Stith - NOAA Affiliate  
**Subject:** Re: Records Management Self Assessment w/FIOA questions

Mark

Thank you for your quick reply. I send you a final of the our submission as well.

Andre

On Tue, Mar 7, 2017 at 11:12 AM, Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)> wrote:

Hi Andre,

NOAA FOIA has completed its portion of NARA's compliance survey below in Red. Please see responses below, and if you could please copy me on the final response to the survey. Thanks Andre!

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
[\(301\) 628-5658](tel:(301)628-5658) (O)  
**(b)(6)** (C)

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On Mon, Mar 6, 2017 at 12:31 PM, Andre Sivels - NOAA Federal <[andre.sivels@noaa.gov](mailto:andre.sivels@noaa.gov)> wrote:

Hello Mark

Each year NARA requires all agencies to complete an annual self-assessment of their program This year our assessment has a few question related to the FOIA Program. Can you answer the following questions below and return to me by Monday, March 13th? Thanks

Andre

**The ability to find records is essential for a successful FOIA program. The following questions related to your agency's FOIA program may need consultation with your agency's FOIA Officer.**

(b) (5)

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)  
[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)

(b) (5)

(b) (5)



(b) (5)

(b) (5)

(b) (5)

(b) (5)

Andre Sivels  
NOAA Records Officer

U.S. Department of Commerce  
1305 East-West Highway- Rm 7439  
Silver Spring, MD 20910  
Phone: 301628-0946  
Fax: [301-713-1169](tel:301-713-1169)

--

Andre Sivels  
NOAA Records Officer  
U.S. Department of Commerce  
1305 East-West Highway- Rm 7439  
Silver Spring, MD 20910  
Phone: 301628-0946  
Fax: 301-713-1169

---

**From:** Kimberly Katzenbarger - NOAA Federal <kimberly.katzenbarger@noaa.gov>  
**Sent:** Tuesday, March 7, 2017 12:36 PM  
**To:** Mark Graff; John Almeida; Lola Stith - NOAA Affiliate  
**Subject:** Fwd: 2017-000320 Closing letter  
**Attachments:** Closing Letter 2017-000320 (2) kk.docx

Hi all (b)(5)

Lola, for my own edification, please send me the refund form.

Thanks, Kim

----- Forwarded message -----

**From:** Kimberly Katzenbarger - NOAA Federal <[kimberly.katzenbarger@noaa.gov](mailto:kimberly.katzenbarger@noaa.gov)>  
**Date:** Mon, Mar 6, 2017 at 3:55 PM  
**Subject:** Re: 2017-000320 Closing letter  
**To:** Jeri Dockett - NOAA Affiliate <[jeri.dockett@noaa.gov](mailto:jeri.dockett@noaa.gov)>, Nkolika Ndubisi - NOAA Federal <[nkolika.ndubisi@noaa.gov](mailto:nkolika.ndubisi@noaa.gov)>, Mark Graff <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)>

Jeri, I apologize for the delay in responding. (b)(5)

Please advise.

Thanks, Kim

On Mon, Mar 6, 2017 at 3:23 PM, Jeri Dockett - NOAA Affiliate <[jeri.dockett@noaa.gov](mailto:jeri.dockett@noaa.gov)> wrote:

Kim (b)(5)

Thanks,

Jeri

--

**Very respectfully,**

**Jeri Dockett**

**FOIA/Records Manager**

*National Oceanic Atmospheric Administration*

*Office of Response and Restoration*

*1305 East West Highway*

*SSMC4 RM 10124*

*Silver Spring, MD 20910*

*(O)240.533.0395*

--

Kimberly Katzenbarger, Attorney  
National Oceanic and Atmospheric Administration  
Office of General Counsel, Natural Resources Section  
1315 East West Hwy, Suite 15104  
Silver Spring, MD 20910 3282  
Desk: 301 713 7448  
Cell (b)(6)

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(b) (5)



(b) (5)

(b) (5)

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Tuesday, March 7, 2017 12:47 PM  
**To:** Lola Stith - NOAA Affiliate; Dennis Morgan - NOAA Federal  
**Subject:** Fwd: Records Management Self Assessment w/FIOA questions

Here is the underlying data call email for NOAA to chime in on its part to respond to the NARA assessment survey.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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----- Forwarded message -----

**From:** Andre Sivels - NOAA Federal <[andre.sivels@noaa.gov](mailto:andre.sivels@noaa.gov)>  
**Date:** Mon, Mar 6, 2017 at 12:31 PM  
**Subject:** Records Management Self Assessment w/FIOA questions  
**To:** Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)>

Hello Mark

Each year NARA requires all agencies to complete an annual self-assessment of their program. This year our assessment has a few questions related to the FOIA Program. Can you answer the following questions below and return to me by Monday, March 13th? Thanks

Andre

**The ability to find records is essential for a successful FOIA program. The following questions related to your agency's FOIA program may need consultation with your agency's FOIA Officer.**

26. The Agency Records Officer and the FOIA Officer:

Are the same person

Coordinate closely together

Know each other but do not work together

27. If the Agency Records Officer is not the FOIA Officer, please provide the FOIA Officer's name, position title, and contact information.

28. The FOIA Officer can find records needed to respond to a FOIA request.

*Select on the sliding scale a number between 1 and 5, with 1 being with difficulty and 5 being easily.*

29. Does your agency use software or other technology to process, track, de-duplicate responsive records, redact records, and respond to FOIA requests?

Yes

No

To some extent

Do not know

30. If Yes: Please list the software or other technology used by your agency to process, track, de-duplicate responsive records, redact records, and respond to FOIA requests.

31. Do FOIA programs throughout your agency have standard operating procedures for the *entire* FOIA process including intake/triage, fees, expedited processing, search, review, estimated dates of completion and response?

Yes

No

To some extent

Under development

Do not know

32. Have FOIA programs throughout your agency identified performance measures for FOIA activities?

\*Examples of performance measures for FOIA programs include but are not limited to:

- Number of pages processed
- Reduction in response times
- Reduction in backlog
- Increase in proactive disclosures

Yes

No

To some extent

Under development

Do not know

33. If No: Why not?

Do not know how to determine what performance measures are needed

My agency has performance measures but not specific to FOIA.

Do not understand the question

Other, please explain

34. Do FOIA programs throughout your agency alert requesters to the dispute resolution services offered by the Office of Government Information Services (OGIS)\*?

\*The Office of Government Information Services (OGIS) is a Freedom of Information Act (FOIA) resource for both the public and the government. Congress mandated OGIS with

reviewing agency compliance with FOIA, identifying policies and procedures for improving FOIA compliance, and providing mediation services to resolve FOIA disputes between Federal agencies and requestors.

Yes

No

Do not know

**The [FOIA Improvement Act of 2016](#) amends Section 3102 of the Federal Records Act, 44 U.S.C., to include a requirement that agencies establish "procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format."**

35. Are you familiar with the changes to this law?

Yes

To some extent

No

36. If Yes: Has your agency started to identify records that are of general interest or use to the public that are appropriate for public disclosure? (P.L. 114-185)

Yes

No

To some extent

Do not know

37. Please add any additional comments about your agency for Section II: Oversight and Compliance.  
(Optional)

--

Andre Sivels  
NOAA Records Officer  
U.S. Department of Commerce  
1305 East-West Highway- Rm 7439  
Silver Spring, MD 20910  
Phone: 301628-0946  
Fax: [301-713-1169](tel:301-713-1169)

---

**From:** Jeri Dockett - NOAA Affiliate <jeri.dockett@noaa.gov>  
**Sent:** Tuesday, March 7, 2017 2:15 PM  
**To:** Kimberly Katzenbarger - NOAA Federal  
**Cc:** Nkolika Ndubisi - NOAA Federal; Mark Graff  
**Subject:** Re: 2017-000320 Closing letter  
**Attachments:** Closing Letter 2017-000320 jd edits.docx

Kim,

I have attached the revised draft FAL. Please review and approve.

Thanks,  
Jeri

On Mon, Mar 6, 2017 at 3:55 PM, Kimberly Katzenbarger - NOAA Federal <[kimberly.katzenbarger@noaa.gov](mailto:kimberly.katzenbarger@noaa.gov)> wrote:

Jeri, I apologize for the delay in responding. I think that you sent me a draft closing letter a few days ago. Please find attached a revised version with a few suggested changes.

(b)(5) [Redacted]

[Redacted]

[Redacted] Please advise.

Thanks, Kim

On Mon, Mar 6, 2017 at 3:23 PM, Jeri Dockett - NOAA Affiliate <[jeri.dockett@noaa.gov](mailto:jeri.dockett@noaa.gov)> wrote:

Kim (b)(5) [Redacted]

Thanks,  
Jeri

--  
**Very respectfully,**  
**Jeri Dockett**



**FOIA/Records Manager**  
**National Oceanic Atmospheric Administration**  
**Office of Response and Restoration**  
**1305 East West Highway**  
**SSMC4 RM 10124**  
**Silver Spring, MD 20910**  
**(O)240.533.0395**

--

Kimberly Katzenbarger, Attorney  
National Oceanic and Atmospheric Administration  
Office of General Counsel, Natural Resources Section  
1315 East West Hwy, Suite 15104  
Silver Spring, MD 20910 3282  
Desk: [301 713 7448](tel:3017137448)  
Cell **(b)(6)**

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--

**Very respectfully,**  
**Jeri Dockett**  
**FOIA/Records Manager**  
**National Oceanic Atmospheric Administration**  
**Office of Response and Restoration**  
**1305 East West Highway**  
**SSMC4 RM 10124**  
**Silver Spring, MD 20910**  
**(O)240.533.0395**

(b) (5)

(b) (5)

(b) (5)

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Wednesday, March 8, 2017 11:15 AM  
**To:** Sarah Brabson - NOAA Federal  
**Subject:** NOAA5040 PTA  
**Attachments:** NOAA5040 SSP Appx G - Privacy Threshold Analysis FY17 2-8-17-1 signature copy ND  
(1) (1) mhg.pdf

Here you go--signed.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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**U.S. Department of Commerce (DOC)  
National Oceanic and Atmospheric Administration  
(NOAA)**



**Privacy Threshold Analysis (PTA)  
for the  
Comprehensive Large Array-data Stewardship System (CLASS)  
(NOAA5040)**

**U.S. Department of Commerce (DOC) Privacy Threshold Analysis (PTA)  
National Oceanic and Atmospheric Administration (NOAA)/Comprehensive  
Large Array-data Stewardship System (CLASS)**

**Unique Project Identifier: NOAA5040**

**Introduction:** This PTA is a questionnaire to assist with determining if a Privacy Impact Assessment (PIA) is necessary for this Information Technology (IT) system. This PTA is primarily based from the Office of Management and Budget (OMB) privacy guidance and the DOC IT security/privacy policy. If questions arise or further guidance is needed in order to complete this PTA, please contact your Bureau Chief Privacy Officer (BCPO).

**Description of the information system and its purpose:**

The E Government Act of 2002 defines "information system" by reference to the definition section of Title 44 of the United States Code. The following is a summary of the definition: "Information system" means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information. See: 44. U.S.C. § 3502(8).

CLASS is NOAA's enterprise-wide information technology system designed to support long-term, secure preservation, and standards-based access to environmental data collections and information. This system supports the ingest, quality control, and archival storage of and public access to data and science information. The system is modeled to support the NOAA-adopted Open Archival Information System Reference Model (OAIS-RM), which identifies high-level roles and responsibilities of various archival components and illustrates the connections between functional entities in order to fulfill archive requirements.

CLASS provides the NOAA National Data Centers with the capability of supporting ingest and archival of data from higher data-rate earth observation systems as well as the incorporation of existing NOAA data collections into the CLASS archive. The management of these increasing volumes of environmental data will require a rapid expansion in storage capacity, additional access methods, and improved automation of data ingest, archive, and quality control. Together, the NOAA National Data Centers, utilizing the IT infrastructure of CLASS, will provide the necessary ingredients to fulfill NOAA's data stewardship mission.

Currently, CLASS supports Suomi National Polar-orbiting Partnership (Suomi NPP), Polar Operational Environmental Satellite (POES), Defense Meteorological Satellite Program (DMSP), Geostationary Operational Environmental Satellite (GOES), Metop, Jason-2 data, and selected climate model data within the CLASS infrastructure. Future satellite-based collections planned for inclusion in the system include: Joint Polar Satellite Systems (JPSS) (formerly NPOESS), GOES-R, Jason-3, and planned Earth-based observing systems and Next Generation 2 Radar (NEXRAD) products. To ensure the preservation of these data, the distributed system replicates data and metadata holdings automatically to operational instances at the National Center for Environmental Information-North Carolina (NCEI-NC) in Asheville, North Carolina, and the NCEI-Colorado (NCEI-CO) in Boulder, Colorado.

**Questionnaire:**

1. What is the status of this information system?

- This is a new information system. *Continue to answer questions and complete certification.*  
 This is an existing information system with changes that create new privacy risks. *Complete chart below, continue to answer questions, and complete certification.*

Changes That Create New Privacy Risks (CTCNPR)					
a. Conversions		d. Significant Merging		g. New Interagency Uses	
b. Anonymous to Non-Anonymous		e. New Public Access		h. Internal Flow or Collection	
c. Significant System Management Changes		f. Commercial Sources		i. Alteration in Character of Data	
j. Other changes that create new privacy risks (specify):					

This is an existing information system in which changes do not create new privacy risks. *Skip questions and complete certification.*

2. Is the IT system or its information used to support any activity which may raise privacy concerns?

NIST Special Publication 800 53 Revision 4, Appendix J, states "Organizations may also engage in activities that do not involve the collection and use of PII, but may nevertheless raise privacy concerns and associated risk. The privacy controls are equally applicable to those activities and can be used to analyze the privacy risk and mitigate such risk when necessary." Examples include, but are not limited to, audio recordings, video surveillance, building entry readers, and electronic purchase transactions.

Yes. *Please describe the activities which may raise privacy concerns.*

No

3. Does the IT system collect, maintain, or disseminate business identifiable information (BII)?

As per DOC Privacy Policy: "For the purpose of this policy, business identifiable information consists of (a) information that is defined in the Freedom of Information Act (FOIA) as "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." (5 U.S.C.552(b)(4)). This information is exempt from automatic release under the (b)(4) FOIA exemption. "Commercial" is not confined to records that reveal basic commercial operations" but includes any records [or information] in which the submitter has a commercial interest" and can include information submitted by a nonprofit entity, or (b) commercial or other information that, although it may not be exempt from release under FOIA, is exempt from disclosure by law (e.g., 13 U.S.C.)"

Yes, the IT system collects, maintains, or disseminates BII about: *(Check all that apply.)*

- Companies
- Other business entities

No, this IT system does not collect any BII.



4. Personally Identifiable Information

4a. Does the IT system collect, maintain, or disseminate personally identifiable information (PII)?

As per OMB 07 16, Footnote 1: "The term 'personally identifiable information' refers to information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc... alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc..."

Yes, the IT system collects, maintains, or disseminates PII about: *(Check all that apply.)*

- DOC employees
- Contractors working on behalf of DOC
- Members of the public

No, this IT system does not collect any PII.

***If the answer is "yes" to question 4a, please respond to the following questions.***

4b. Does the IT system collect, maintain, or disseminate PII other than user ID?

Yes, the IT system collects, maintains, or disseminates PII other than user ID.

No, the user ID is the only PII collected, maintained, or disseminated by the IT system.

4c. Will the purpose for which the PII is collected, stored, used, processed, disclosed, or disseminated (context of use) cause the assignment of a higher PII confidentiality impact level?

Examples of context of use include, but are not limited to, law enforcement investigations, administration of benefits, contagious disease treatments, etc.

Yes, the context of use will cause the assignment of a higher PII confidentiality impact level.

No, the context of use will not cause the assignment of a higher PII confidentiality impact level.

***If any of the answers to questions 2, 3, 4b, and/or 4c are "Yes," a Privacy Impact Assessment (PIA) must be completed for the IT system. This PTA and the approved PIA must be a part of the IT system's Assessment and Authorization Package.***

### CERTIFICATION

X  I certify the criteria implied by one or more of the questions above **apply** to CLASS and as a consequence of this applicability, I will perform and document a PIA for this IT system.

I certify the criteria implied by the questions above **do not apply** to CLASS and as a consequence of this non-applicability, a PIA for this IT system is not necessary.

Name of Information System Security Officer (ISSO): Scott Koger

Signature of ISSO: KOGER.MILTON.S.1215745313  
5745313 Digitally signed by KOGER.MILTON.S.1215745313  
DN: c US, o U.S. Government, ou DoD, ou PKI,  
ou CONTRACTOR, cn KOGER.MILTON.S.1215745313  
Date: 2017.02.23 15:26:10 -05'00' Date: 2/23/2017

Name of Information Technology Security Officer (ITSO): Nancy DeFrancesco

Signature of ITSO: DEFRANCESCO.NANCY.A.1377370917  
Y.A.1377370917 Digitally signed by DEFRANCESCO.NANCY.A.1377370917  
DN: c US, o U.S. Government, ou DoD, ou PKI,  
ou OTHER, cn DEFRANCESCO.NANCY.A.1377370917  
Date: 2017.02.27 14:33:44 -05'00' Date: 02/27/2017

Name of Authorizing Official (AO): Vanessa Griffin

Signature of AO: GRIFFIN.VANESSA.L.1204308663  
8663 Digitally signed by GRIFFIN.VANESSA.L.1204308663  
DN: c US, o U.S. Government, ou DoD, ou PKI,  
ou OTHER, cn GRIFFIN.VANESSA.L.1204308663  
Date: 2017.03.08 09:25:14 -05'00' Date: 03/08/2017

Name of Bureau Chief Privacy Officer (BCPO): Mark Graff

Signature of BCPO: GRAFF.MARK.HYRU.1514447892  
M.1514447892 Digitally signed by GRAFF.MARK.HYRU.1514447892  
DN: c US, o U.S. Government, ou DoD, ou PKI,  
ou OTHER, cn GRAFF.MARK.HYRU.1514447892  
Date: 2017.03.08 11:11:15 -05'00' Date: \_\_\_\_\_

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Wednesday, March 8, 2017 3:35 PM  
**To:** Robert Swisher - NOAA Federal; Dennis Morgan - NOAA Federal; Lola Stith - NOAA Affiliate  
**Subject:** Draft Monthly FOIA Report  
**Attachments:** CREW - stip of dismissal.pdf; CREW FAL no Records Response mhg.pdf; CoA v NOAA - Dismissal.pdf; OCE v. NMFS Court Order re Fees.pdf; FOIA Monthly Status Report 02-28-2017.pdf; FOIA Monthly Status Report 02-28-2017.xlsx

If you guys could review and let me know if this is good to go:

(b) (5)

(b)(5)

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND )  
 ETHICS IN WASHINGTON, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 U.S. DEPARTMENT OF COMMERCE, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Civil No. 1:17-cv-00135 (APM)

**JOINT STIPULATION OF DISMISSAL**

IT IS HEREBY STIPULATED AND AGREED by and between the parties, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), that the above-captioned action shall be dismissed with prejudice, each party to bear its own attorney fees and costs.

March 8, 2017

Respectfully submitted,

/s/ Anne L. Weismann  
 (D.C. Bar No. 298190)  
 Stuart C. McPhail  
 (D.C. Bar No. 1032529)  
 Citizens for Responsibility and  
 Ethics in Washington  
 455 Massachusetts Ave., N.W.  
 6th Floor  
 Washington, D.C. 20001  
 Phone: (202) 408-5565  
 Fax: (202) 588-5020  
[aweismann@citizensforethics.org](mailto:aweismann@citizensforethics.org)

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MARCIA BERMAN  
 Assistant Director, Federal Programs Branch

/s/ Dena M. Roth  
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 Trial Attorney  
 United States Department of Justice  
 Civil Division, Federal Programs Branch  
 20 Massachusetts Ave., N.W., Room 7107  
 Phone: (202) 514-5108  
 Fax: (202) 616-8470  
 Email: [Dena.m.roth@usdoj.gov](mailto:Dena.m.roth@usdoj.gov)

Attorneys for Defendant



**U.S. DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
Office of the Chief Information Officer  
High Performance Computing and Communications

*Via FOIAonline*

March 6, 2017

Adam J. Rappaport  
Citizens for Responsibility and Ethics in Washington  
455 Massachusetts Ave., NW 6<sup>th</sup> Floor  
Washington, DC 20001

Re: FOIA Request DOC-NOAA-2017-000331

Dear Mr. Rappaport:

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on December 16, 2016, in which you requested:

(C)opies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump's transition team, including representatives of Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect..

On February 6, 2017, a search was conducted by the NOAA Acting Chief of Staff, who leads the NOAA Landing Team within the Office of the Undersecretary. The search included an electronic search of the email inbox and outbox of the Acting Chief of Staff using the connective search terms "Trump" & "Questionnaire" as well as "Transition" & "Questionnaire". This search did not locate any responsive records. This search was reasonably calculated to uncover relevant documents as any questionnaires submitted from President Trump's transition teams would have been received by the NOAA Acting Chief of Staff who leads the NOAA landing team.

Additionally, on February 6, 2017, a search was conducted by the undersigned NOAA FOIA Officer, within the Office of the Chief Information Officer. The search included an electronic search of the FOIA Officer's email inbox and outbox using the connective search terms "Trump" & "Questionnaire" as well as "Transition" & "Questionnaire". The search did not locate any responsive records. This search was reasonably calculated to uncover relevant documents as the NOAA FOIA Officer would have had oversight of any prior FOIA requests to NOAA where searches had located, or requesters had similarly sought, questionnaires submitted from President Trump's transition team.

Lastly, on Friday, February 10, 2017, a search was conducted by Diane Marston, who served as an administrative liaison between the Department of Commerce and members of the President-elect's transition team within the Office of the Deputy Assistant Secretary for Administration. The search included an electronic search of Ms. Marston's email inbox and outbox using the connective search terms "Trump" & "Questionnaire" as well as "Transition" & "Questionnaire". The search did not locate any responsive records. This search was reasonably calculated to uncover responsive records as any records submitted by the President-elect's transition team to the Department of Commerce would have been transmitted through, or been in the possession of, the Department administrative liaison for the transition team.

No additional locations exist where responsive records would be likely to be found that would not have been located by the searches already conducted.

If you have questions regarding this correspondence please contact Mark Graff at [mark.graff@noaa.gov](mailto:mark.graff@noaa.gov), or by phone at (301) 628-5658, or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

**GRAFF.MARK.HY  
RUM.1514447892**

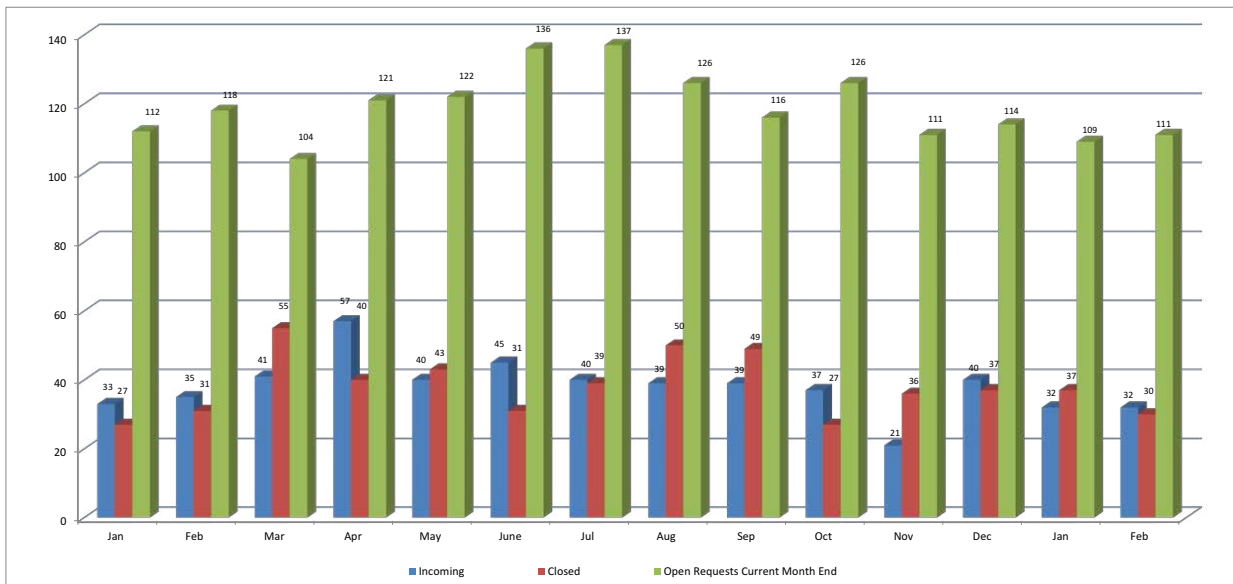
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Date: 2017.03.06 08:31:44 -05'00'

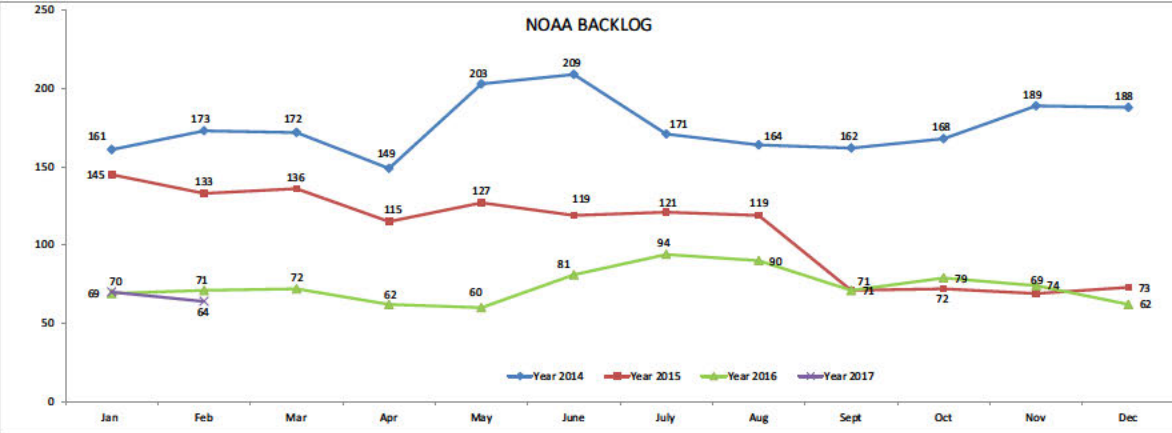
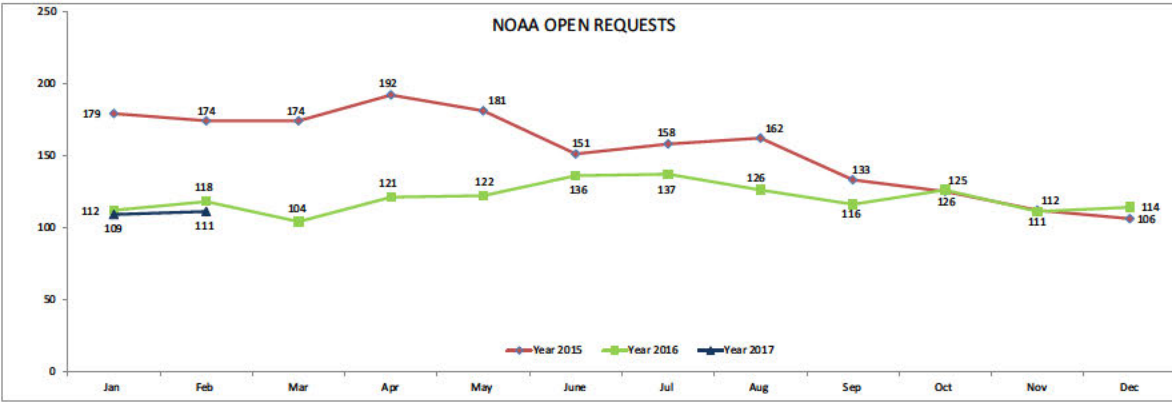
Mark H. Graff  
FOIA Officer  
National Oceanic and Atmospheric Administration



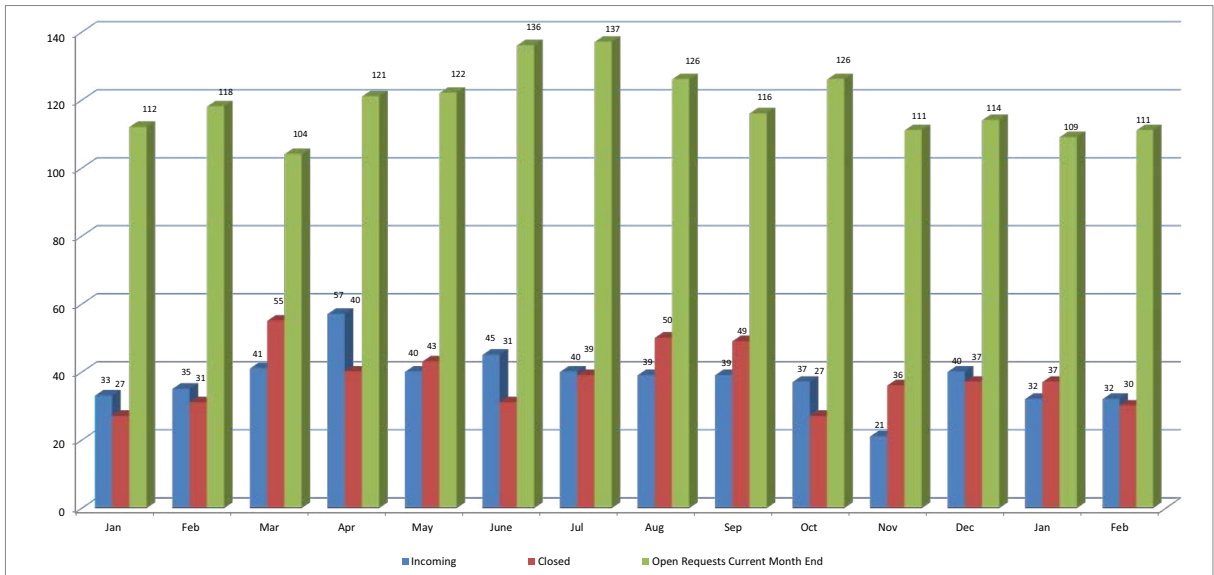
FOIA Monthly Status Report 02 28 2017

Organization	Open Requests Previous Month End	Incoming Requests	Closed Requests	Open Requests Current Month End	Backlog 21-120 days	Backlog 121-364 days	Backlog 365 or more days	Total Backlog
AGO	7	1	3	5	4	3	1	8
CAO	0	0	0	0	0	0	0	0
CFO	0	0	0	0	0	0	0	0
CIO	1	1	0	2	0	0	0	0
CIO/FOIA	24	3	0	27	5	0	0	5
GC	3	0	0	3	0	0	0	0
IA	0	0	0	0	0	0	0	0
LA	2	0	0	2	3	0	0	3
NESDIS	14	4	0	18	1	2	0	3
NMFS	16	12	20	8	11	13	2	26
NOS	21	6	5	22	8	1	1	10
NWS	10	3	1	12	4	1	0	5
OAR	3	0	0	3	1	0	0	1
OMAO	0	0	0	0	0	0	0	0
OC	0	0	0	0	0	0	0	0
PPI	0	0	0	0	0	0	0	0
USAO	2	1	0	3	1	0	0	1
WFMO	6	1	1	6	1	1	0	2
<b>NOAA Totals</b>	<b>109</b>	<b>32</b>	<b>30</b>	<b>111</b>	<b>39</b>	<b>21</b>	<b>4</b>	<b>64</b>

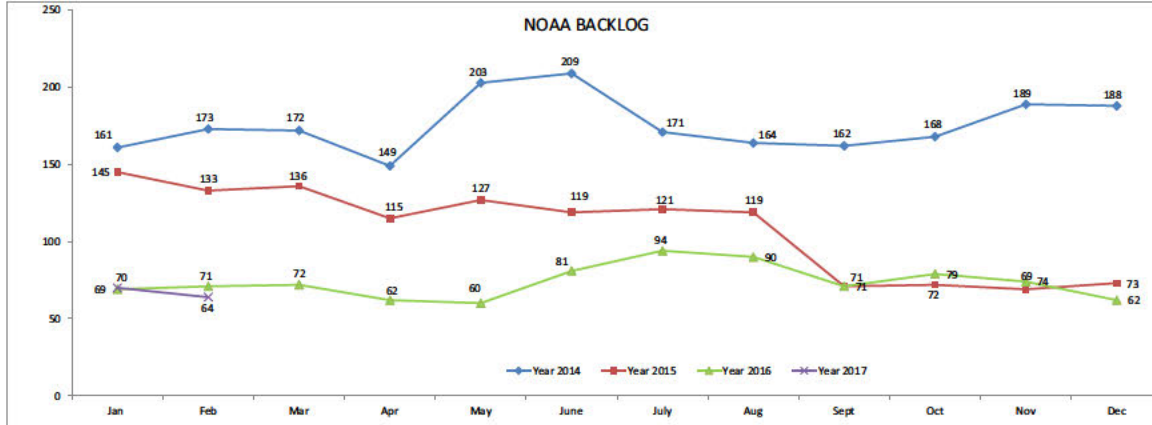
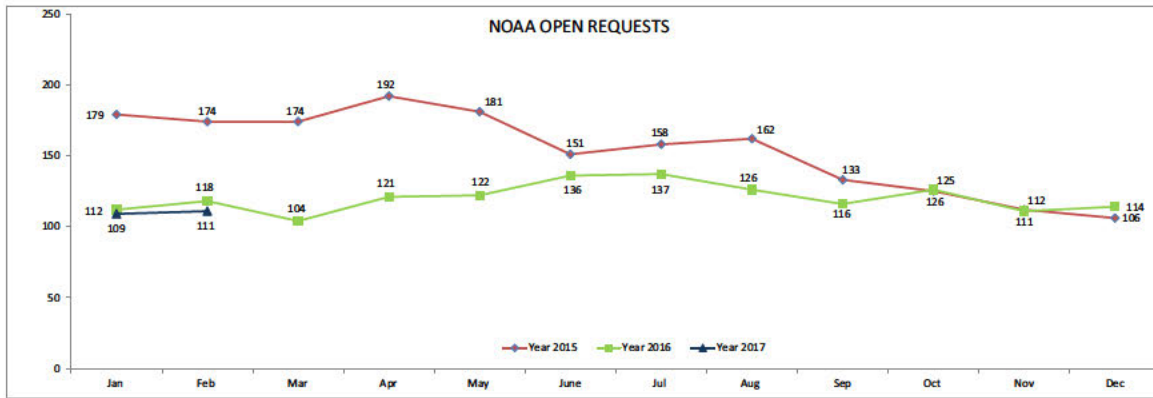




Organization	Open Requests Previous Month End	Incoming Requests	Closed Requests	Open Requests Current Month End	Backlog 21-120 days	Backlog 121-364 days	Backlog 365 or more days	Total Backlog
AGO	7	1	3	5	4	3	1	8
CAO	0	0	0	0	0	0	0	0
CFO	0	0	0	0	0	0	0	0
CIO	1	1	0	2	0	0	0	0
CIO/FOIA	24	3	0	27	5	0	0	5
GC	3	0	0	3	0	0	0	0
IA	0	0	0	0	0	0	0	0
LA	2	0	0	2	3	0	0	3
NESDIS	14	4	0	18	1	2	0	3
NMFS	16	12	20	8	11	13	2	26
NOS	21	6	5	22	8	1	1	10
NWS	10	3	1	12	4	1	0	5
OAR	3	0	0	3	1	0	0	1
OMAO	0	0	0	0	0	0	0	0
OC	0	0	0	0	0	0	0	0
PPI	0	0	0	0	0	0	0	0
USAO	2	1	0	3	1	0	0	1
WFMO	6	1	1	6	1	1	0	2
<b>NOAA Totals</b>	<b>109</b>	<b>32</b>	<b>30</b>	<b>111</b>	<b>39</b>	<b>21</b>	<b>4</b>	<b>64</b>



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United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OUR CHILDREN’S EARTH  
FOUNDATION, et al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES  
SERVICE, et al.,

Defendants.

Case No. [14-cv-01130-WHO](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION FOR  
ATTORNEY’S FEES**

Re: Dkt. No. 82

Plaintiffs seek an award of \$723,202.74 in attorney’s fees and \$3,190.39 in costs for succeeding in part on their consolidated lawsuits filed under the Freedom of Information Act (FOIA) against the federal agency defendants. Dkt. 94. I conclude that plaintiffs are eligible and entitled to an award of attorney’s fees, but at a significantly reduced amount in light of requested hourly rates that are not adequately supported and unnecessary or excessive time billed.

**BACKGROUND**

Plaintiffs Our Children’s Earth Foundation and Ecological Rights Foundation are Bay Area non-profits dedicated to protecting the environment.<sup>1</sup> Plaintiffs sent a series of nine FOIA requests to National Marine Fisheries Service (NMFS) starting in May 2013. The requests concerned NMFS’s oversight of activities by Stanford University and the impact of those activities on the Central California Coast steelhead. Plaintiffs were concerned with Stanford University’s operation of Searsville Lake and Dam, which were built in 1892, and other related water diversions and infrastructure that Stanford uses to provide non-potable water for its campus. Plaintiffs believe that “Lake Water System” adversely affects the steelhead by reducing water

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<sup>1</sup> See Declaration of Annaliese Beaman (Dkt. No. 83) ¶ 2. Plaintiffs are referred to collectively as OCE.

1 flows in San Francisquito Creek and its tributaries and cutting the steelhead off from access to  
 2 upstream spawning habitat. *See* Judge Conti’s March 30, 2015 Order [Dkt. No. 59] at 3-4.  
 3 Plaintiffs attempted to enjoin Stanford’s activities in a separate lawsuit, *Our Children’s Earth*  
 4 *Foundation v. Stanford Univ.*, No. 13-cv-00402-JSW (N.D. Cal.).<sup>2</sup>

5 In response to what OCE contends were deficient responses to its first four FOIA requests,  
 6 plaintiffs filed their first lawsuit (*OCE I*) in April 2014. In that lawsuit, OCE challenged whether  
 7 NMFS’s responses to plaintiffs’ FOIA requests were adequate, whether NMFS had a pattern and  
 8 practice of tardy and incomplete responses, and whether FWS failed to meet its internal deadline  
 9 to respond to NMFS.<sup>3</sup> Plaintiffs filed their second lawsuit (*OCE II*) in September 2014, based on  
 10 the tardy or otherwise deficient responses to their second set of FOIA Requests (FOIA requests 5 -  
 11 8). In *OCE II* plaintiffs alleged that NMFS failed to adequately respond to their additional FOIA  
 12 requests, and reiterated their argument that NMFS had a pattern and practice of tardy and  
 13 incomplete responses to FOIA requests.<sup>4</sup> The lawsuits were related by Judge Conti.<sup>5</sup>

14 In *OCE I*, the parties moved for summary judgment. Plaintiffs argued that: (1) NMFS  
 15 failed to adequately describe its searches or conducted an inadequate search and withheld  
 16 documents without sufficient justification; (ii) they were entitled to a declaratory judgment that  
 17 NMFS violated FOIA’s deadlines in responding to their four requests and in three related internal  
 18 appeals, and FWS violated FOIA’s deadlines in responding to a referral of documents from  
 19 NMFS; and (iii) the alleged violations of the FOIA are a part of a pattern and practice of non-

20 \_\_\_\_\_  
 21 <sup>2</sup> The government contends that plaintiffs’ first FOIA request was filed “as discovery” for the  
 22 Stanford lawsuit. *Oppo*. 6.

23 <sup>3</sup> A second defendant in *OCE I*, Fisheries and Wildlife Service (FWS) was alleged to have failed  
 24 to respond to NMFS’s request that FWS review and release under the FOIA portions of FWS’s  
 25 documents that NMFS had in its possession.

26 <sup>4</sup> The Army Corps of Engineers (Corps) was also named as a defendant in *OCE II*, as having failed  
 27 to appropriately respond to plaintiffs’ FOIA requests.

28 <sup>5</sup> Plaintiffs filed a third lawsuit (*OCE III*) in June 2015, which was also related to 14-1130. In  
*OCE III*, plaintiffs asserted that NMFS had failed to provide a timely final decision in response to  
 OCE’s ninth FOIA request (from April 2015) regarding more “up-to-date information” on the  
 same subject matter. Judge Conti, on plaintiffs’ request and without opposition from NMFS,  
 dismissed *OCE III* as “prudentially moot.” October 2015 SJ Order at 17-18. Plaintiffs are not  
 seeking fees or costs related to that lawsuit. *Mot.* 4, n.1.

1 compliance with the FOIA's mandates, so the Court should enjoin NMFS and order it to comply  
2 with its FOIA obligations. March 30, 2015 Order at 6-7. The government opposed those  
3 arguments.

4 In an Order dated March 30, 2015 [Dkt. No. 59, Case No. 14-1130], Judge Conti: (i) ruled  
5 that NMFS failed to conduct adequate searches in response to OCE's first and third FOIA  
6 requests;<sup>6</sup> (ii) held in abeyance the determination as to whether NMFS adequately invoked FOIA  
7 Exemption (b)(6) to withhold names and contact information from responsive documents pending  
8 further supplementation of the factual record by NMFS (concerning the privacy concerns that  
9 would be implicated by release of that information); (iii) affirmed in part the withholding of some  
10 attorney-client documents, but concluded that NMFS had not met its burden to explain why  
11 certain portions of documents did not contain segregable and releasable information or why one  
12 specific document was withheld as attorney-client privileged and, therefore, held in abeyance the  
13 determination as to NMFS's withholding of those documents was appropriate; and (iv) granted  
14 plaintiffs' request for a declaratory judgment that NMFS failed to comply with the statutorily  
15 mandated response and appeal deadlines with respect to the four FOIA requests at issue. *Id.* at 8-  
16 26.<sup>7</sup> Judge Conti denied plaintiffs' motion and granted defendants' motion regarding  
17 withholdings, redactions, and timeliness. *Id.* at 28.<sup>8</sup>

18 NMFS then provided additional information to the Court concerning its withholdings and  
19 redactions, and plaintiffs submitted responses regarding the same.<sup>9</sup> In an Order dated July 20,

20 \_\_\_\_\_  
21 <sup>6</sup> Judge Conti granted plaintiffs' motion on the adequacy of the search as to the first and third  
22 FOIA requests, and granted defendants' motion as to the adequacy of the searches in response to  
23 the second and fourth requests. *Id.* at 12.

24 <sup>7</sup> Judge Conti, however, expressly did not reach the question of whether plaintiffs had proven that  
25 NMFS had a pattern and practice of untimely responses, because "[t]he pattern and practice and  
26 cutoff date allegations are repeated, with a fuller evidentiary record, in cross-motions for  
27 summary judgment pending in" *OCE II*, and the Judge intended to address them in a subsequent  
28 order. *Id.* at 22.

<sup>8</sup> Plaintiffs point out that in preparing its cross-motion for summary judgment in *OCE I*, NMFS  
uncovered two additional responsive documents and disclosed them in full. *See* Declaration of  
Gary Stern [Dkt. No. 41, 14-1130] ¶ 17.

<sup>9</sup> As part of its supplemental briefing, NMFS decided to release two previously withheld in full  
documents and to release three redacted documents that had previously been withheld in full. It

1 2015, Judge Conti addressed the issues remaining from *OCE I*, as well as the cross-motions filed  
 2 in *OCE II*. Judge Conti characterized the remaining arguments made by plaintiffs as: (i) NMFS  
 3 failed to adequately search for records responsive to two of its requests; (ii) NMFS improperly  
 4 withheld or overly redacted responsive records under two FOIA exemptions; (iii) NMFS was  
 5 defying Department of Commerce (of which NMFS is a part) regulations by cutting off their  
 6 search for responsive records at the date the FOIA request is received rather than the date the  
 7 search begins; and (iv) the request for a declaratory judgment that NMFS's and the Corps'  
 8 responses to plaintiffs' requests were untimely, and grant declaratory and injunctive relief to  
 9 remedy NMFS's alleged pattern and practice of FOIA violations. July 20, 2015 Order [Dkt. No.  
 10 70, Case No. 14-1130] at 3-4. NMFS and the Corps cross-moved for summary judgment, arguing  
 11 that their responses were adequate and declaratory and injunctive relief were unwarranted. *Id.* at  
 12 4.<sup>10</sup>

13 As to the substance of the adequacy of NMFS's responses, Judge Conti found that: (i)  
 14 NMFS had failed to provide sufficient information for the court to determine whether NMFS  
 15 conducted an adequate search, ordered NMFS to supplement the factual record, and held in  
 16 abeyance the issue of summary judgment on NMFS's search; (ii) NMFS had properly withheld  
 17 draft biological opinions under FOIA Exemption (b)(5), but did not adequately justify its  
 18 withholding or non-redaction of an email under (b)(5), and as such NMFS was required to  
 19 supplement the factual record to justify its withholding and non-redaction, and the court held in  
 20 abeyance summary judgment on the withholding of that document; and (iii) granted summary  
 21 judgment to NMFS withholding under FOIA Exemption (b)(7) of names in a report. *Id.* 5-17.

22 As to the issue of untimely responses and pattern and practice of delay and improper cutoff  
 23 dates, Judge Conti: (i) granted plaintiffs' request for declaratory relief that NMFS violated its  
 24 statutory duties with respect to the timeliness of its responses and appeals, but declined to enter

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25  
 26 also stated it was conducting a supplemental search for documents responsive to OCE's first and  
 27 third FOIA requests. Dkt. No. 60 at 4-5; *see also* Dkt. No. 59 at 19, 21.

28 <sup>10</sup> In its cross-motion pleadings in *OCE II*, NMFS decided "upon additional review" to release an  
 additional eleven documents in part and one in full. Dkt. No. 19 (14-4365) ¶ 28; Dkt. No. 18-1  
 (14-4365) ¶ 5.



1 declaratory relief against the Corps; (ii) determined that further facts were needed to address  
2 plaintiffs' contention that NMFS was using an improper cutoff date when beginning its search for  
3 documents and ordered supplemental briefing; and (iii) ordered plaintiffs to submit supplemental  
4 briefing on the status of their pending FOIA requests as to the pattern and practice of delay claim.  
5 *Id.* at 17-25. Finally, as to plaintiffs' request for injunctive relief, the Judge ordered NMFS "to  
6 comply with FOIA and its deadlines, due to the Court's finding that the Fisheries Service has  
7 failed to do so previously and the potential that these offenses might continue. Yet the Court,  
8 having so ordered and having GRANTED declaratory relief, DENIES WITHOUT PREJUDICE  
9 further injunctive relief at this time," in part because of "the fact that Plaintiffs appear to be  
10 repeatedly making large requests in sufficiently rapid succession that the Fisheries Service is  
11 unable to complete its response to one request before receiving a second" and recognizing  
12 evidence of good faith and efforts on the part of NMFS to comply with its deadlines and  
13 significantly improve its future performance. *Id.* at 26-27. The Court held in abeyance the  
14 motions regarding NMFS's exemption claims, adequacy challenge, cutoff dates, and pattern and  
15 practice allegations pending the supplementation of the record. *Id.* at 29-30.<sup>11</sup>

16 Following that round of supplementation, in an October 21, 2015 Order, Judge Conti  
17 addressed the remaining issues and ruled that: (i) NMFS's declarants had addressed the concerns  
18 over the adequacy of the search and granted NMFS summary judgment on that issue; (ii)  
19 determined that one record had been appropriately withheld under (b)(5) based on a supplemental  
20 *Vaughn* index and granted NMFS summary judgment on its withholdings under (b)(5); (iii) found  
21 that NMFS cured its showing of non-segregability of withheld information based on its  
22 supplemental *Vaughn* index, except as to one document,<sup>12</sup> and granted NMFS summary judgment  
23 on segregability as to all documents except that one; and (iv) granted summary judgment to NMFS

24 \_\_\_\_\_  
25 <sup>11</sup> As part of its supplemental briefing, NMFS decided to release a redacted document that had  
26 been withheld in full. Dkt. No. 27 (14-4365) at 2. NMFS also explained its search cut-off policy  
27 (which OCE contends was "new"), requiring that if one or more subject-matter expert are required  
28 to search for documents, the date each expert starts his/her search establishes the cut-off date.  
Dkt. No. 27-4 (14-4365), ¶18(b).

<sup>12</sup> The Court ordered NMFS to produce the document at issue, or explain further why it should be  
withheld. October 21 2015 Order at 15. NMFS decided to produce the document.

1 based on additional information as to the cutoff dates used for searches. October 21, 2015 Order  
2 [Dkt. No 72, 14-1130] at 4-17.

3 As to the pattern and practice of delay claim, Judge Conti reviewed the evidence and found  
4 that NMFS was curing its processing and response problems and backlog, and therefore denied  
5 injunctive relief. However, in light of the “unmistakable history” of untimeliness and delay, Judge  
6 Conti granted declaratory relief to plaintiffs, concluding that: “(1) that the Fisheries Service has  
7 previously been engaged in a pattern-and-practice of failure to meet FOIA deadlines; (2) that the  
8 Fisheries Service has previously provided responses that were frequently and unreasonably  
9 delayed; (3) that due to these delays the Fisheries Service effectively provided no ability to FOIA  
10 requestors to anticipate when data might be provided; and (4) that due to these delays information  
11 was often provided after a long enough period of time that the data could be out-of-date,  
12 effectively negating its value and effectuating a complete denial of information.” *Id.* at 20-21. He  
13 also granted “limited” injunctive relief to plaintiffs, requiring NMFS to provide any outstanding  
14 production in response to certain of plaintiffs’ requests within 30 days. *Id.* at 21. Any further  
15 injunctive relief was denied without prejudice, but he required NMFS to show cause as to how it  
16 was curing its prior violations and intended to continue its response-time improvements going  
17 forward. *Id.* at 22.

18 After the case was reassigned to me in November 2015, I addressed whether any issues  
19 remained to be decided following Judge Conti’s October and November 2015 Orders as well as  
20 the supplemental briefing filed by the parties regarding NMFS’s efforts to cure its past timeliness  
21 violations and ensure those would not occur in the future. In an order dated January 20, 2016, I  
22 determined that Judge Conti had resolved all pending issues, and concluded that the evidence  
23 regarding NMFS’s substantial reduction of its FOIA-response backlog and the “technical,  
24 administrative, and staffing improvements” NMFS had implemented to ensure timely processing  
25 of FOIA requests on a forward-going basis meant that continuing injunctive relief was not  
26 warranted. January 20, 2016 Order [Dkt. No. 75]. A stipulated judgment was entered on February  
27 16, 2016. Plaintiffs now seek over \$700,000 in attorney’s fees for the hours they spent litigating  
28 *OCE I* and *OCE II*, as well as costs. Defendants oppose plaintiffs’ entitlement to any fees, and

1 challenge the reasonableness of the amount sought.

## 2 LEGAL STANDARD

3 FOIA authorizes courts to “assess against the United States reasonable attorney fees and  
4 other litigation costs reasonably incurred in any case under this section in which the complainant  
5 has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E). This provision “has as its fundamental  
6 purpose the facilitation of citizen access to the courts to vindicate the public’s statutory rights,” as  
7 the fees and costs of bringing suit could otherwise “present a virtually insurmountable barrier  
8 which [would] ba[r] the average person from forcing governmental compliance with the law.”  
9 *Exner v. F.B.I.*, 443 F. Supp. 1349, 1352 (S.D. Cal. 1978).

10 A court may grant an award of attorney’s fees under 5 U.S.C. § 552(a)(4)(E) where the  
11 plaintiff establishes that it is both eligible for and entitled to an award. *See Church of Scientology*  
12 *of California v. U.S. Postal Serv.*, 700 F.2d 486, 489 (9th Cir. 1983); *Rosenfeld v. U.S. Dep’t of*  
13 *Justice*, 903 F. Supp. 2d 859, 865 (N.D. Cal. 2012). To be eligible for an award, the plaintiff must  
14 show that “(1) the filing of the action could reasonably have been regarded as *necessary* to obtain  
15 the information; and (2) the filing of the action had a *substantial causative* effect on the delivery  
16 of the information.” *Church of Scientology*, 700 F.2d at 489 (emphasis in original).

17 If the court determines that the plaintiff is eligible for attorney’s fees, the court may then,  
18 “in the exercise of its discretion, determine that [it] is *entitled* to an award of attorney’s fees.” *Id.*  
19 at 492 (emphasis in original). In making this determination, courts consider “(1) the benefit to the  
20 public, if any, deriving from the case; (2) the commercial benefit to the complainant; (3) the nature  
21 of the complainant’s interest in the records sought; and (4) whether the government’s withholding  
22 of the records sought had a reasonable basis in law.” *Id.*; *accord Long v. U.S. I.R.S.*, 932 F.2d  
23 1309, 1313 (9th Cir. 1991). “These four criteria are not exhaustive, however, and the court may  
24 take into consideration whatever factors it deems relevant in determining whether an award of  
25 attorney’s fees is appropriate.” *Long*, 932 F.2d at 1313 (internal quotation marks omitted). Once  
26 eligibility is established, “[t]he decision to award attorney’s fees is left to the sound discretion of  
27 the trial court.” *Church of Scientology*, 700 F.2d at 492.

**DISCUSSION**

**I. WHETHER PLAINTIFFS SUBSTANTIALLY PREVAILED AND ARE ELIGIBLE FOR ATTORNEY'S FEES**

The government does not contest that plaintiffs substantially prevailed in *OCE I*, but argues that plaintiffs were not successful in *OCE II*, and therefore are not eligible for fees for that portion of the litigation. As noted above, in his July and October 2015 orders, Judge Conti addressed the claims asserted in *OCE II* (as well as issues asserted in *OCE I*). In the July Order, Judge Conti granted plaintiffs' request for a declaratory judgment that NMFS's responses to plaintiffs' FOIA requests 5-8 were untimely. July 2015 Order at 20-21. That by itself constitutes "success," albeit on a discrete issue. *See Hajro v. United States Citizenship & Immigration Servs.*, 900 F. Supp. 2d 1034, 1045 (N.D. Cal. 2012) (prevailing on summary judgment and obtaining injunctive relief on claim that defendant's responses were untimely constitutes substantial success), *reversed on other grounds by* 811 F.3d 1086, 1092 (9th Cir. 2016); *Or. Nat. Desert Ass'n v. Gutierrez*, 442 F. Supp. 2d 1096, 1098 (D. Or. 2006) (determination that agency failed to provide a timely response sufficient to create entitlement to fees), *aff'd in pertinent part, rev'd in part on other grounds by Or. Nat. Desert Ass'n v. Locke*, 572 F.3d 610 (9th Cir. 2009).

After initially finding that NMFS provided insufficient information in its declarations and *Vaughn* index to demonstrate the adequacy of some of its searches and withholdings, when NMFS provided supplemental briefing and declarations Judge Conti concluded that the searches were adequate and the withholdings justified (except as to one document under Exemption (b)(5), which NMFS decided to release). In addition, after receiving plaintiffs' summary judgment motion and while preparing its cross-motion pleadings in *OCE II*, NMFS decided "upon additional review" to release an additional eleven documents in part and one in full. Dkt. No. 19 (14-4365) ¶ 28; Dkt. No. 18-1 (14-4365) ¶ 5. Following the next round of supplemental briefing, NMFS decided to release in part yet another document that had been withheld. Dkt. No. 27 (14-4365) at 2. The evidentiary record supports plaintiffs' contention that these documents were produced as a result of *OCE II*.<sup>13</sup> Plaintiffs, therefore, prevailed, on another discrete portion of their litigation in

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<sup>13</sup> NMFS argues that its responses to Requests 5 through 8 were not produced as a result of the

1 securing these supplemental productions under a catalyst theory. *See, e.g., Dorsen v. United States*  
 2 *SEC*, 15 F. Supp. 3d 112, 120 (D.D.C. 2014) (plaintiff prevailed where FOIA suit prompted  
 3 additional or speedier release of documents); *Judicial Watch, Inc. v. United States DOJ*, 878 F.  
 4 Supp. 2d 225, 232 (D.D.C. 2012) (catalyst theory satisfied where after a final agency response and  
 5 commencement of lawsuit, additional documents were produced).

6 More importantly, in light of the “unmistakable history” of “unreasonable” untimeliness  
 7 and delay, Judge Conti granted plaintiffs’ request for a declaratory judgment that NMFS failed to  
 8 provide them with timely responses and had a past pattern and practice of untimely responses.  
 9 That judgment, along with the limited injunctive relief (requiring NMFS to respond to plaintiffs’  
 10 then-pending FOIA requests by a date certain), confers prevailing party status on plaintiffs as well.  
 11 The government in an attempt to avoid fees for *OCE II* argues that plaintiffs did not secure any  
 12 relief in *OCE II* beyond what they would have been entitled to given the claims asserted in *OCE I*.  
 13 *Oppo*. 7-8. However, Judge Conti specifically held the pattern and practice claim in abeyance in  
 14 *OCE I* to determine it on the more complete evidentiary record presented in *OCE II*. *OCE II*,  
 15 therefore, was a necessary part to the Court’s eventual determination.

16 Similarly, the fact that further, more wide-spread injunctive relief was not granted in  
 17 response to the allegations raised in both *OCE I* and *OCE II* in the October 2015 or January 2016  
 18 Orders was due to the strong showing NMFS made on the steps the agency had taken and was  
 19 continuing to take to extinguish its backlog and implement policies and practices to ensure timely  
 20 responses in the future. The government spends much time in its brief and declarations attempting  
 21 to show that the new policies and practices NMFS implemented in order to reduce the backlog  
 22 discussed by Judge Conti and myself in the October 2015 and January 2016 Orders were not  
 23 conceived in order to respond to, or spurred on by, plaintiffs’ litigation but were underway prior to  
 24 the filing of *OCE I* and *OCE II*. *See, e.g., Oppo*. 9-10. Plaintiffs counter that argument by citing  
 25 to notes and other documents produced by NMFS staff showing that efforts to reduce the backlog

26  
 27 litigation, and cites testimony showing that NMFS began work processing and responding to these  
 28 requests before the *OCE II* complaint was filed. *See Hornof Decl.* ¶ 7. NMFS also argues that the  
 three FOIA requests subject to Judge Conti’s limited order of injunctive relief, were also being  
 processed and responses “underway” before the October 21, 2015 Order. *Id.* ¶¶ 10-11.

1 were just being formulated in June 2015 and were implemented in part to avoid litigation, like the  
2 suits at issue which were the only ones pending at the relevant time. *See, e.g.*, Reply 3-4.

3 However, in order to determine that plaintiffs are eligible for an award of attorney's fees, I  
4 need not resolve this factual dispute. That plaintiffs secured additional documents from NMFS  
5 after *OCE II* was filed and after NMFS took a closer look at its searches and withholdings and,  
6 more importantly, secured another declaratory judgment recognizing that the agency failed to  
7 provide timely responses, had engaged in a pattern and practice of tardy responses, and secured  
8 limited injunctive relief as to then-pending but not sued upon FOIA requests, is success significant  
9 enough to establish plaintiffs' eligibility for fees.<sup>14</sup>

10 In sum, plaintiffs were the prevailing parties on significant portions of both *OCE I* and  
11 *OCE II* and are eligible for an award of attorney's fees and costs.<sup>15</sup> The next step is to determine  
12 if they are entitled to them.

## 13 **II. WHETHER PLAINTIFFS ARE ENTITLED TO ATTORNEY'S FEES**

14 The factors courts consider in determining whether a plaintiff is entitled to attorney's fees  
15 include "(1) the benefit to the public, if any, deriving from the case; (2) the commercial benefit to  
16 the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether  
17 the government's withholding of the records sought had a reasonable basis in law." *Church of*

18 \_\_\_\_\_  
19 <sup>14</sup> That said, the evidence on the whole indicates that NMFS took more concrete, specific, and  
20 immediate steps following Judge Conti's Orders to extinguish its backlog and commit additional  
21 resources to speeding up its response times than the agency might have taken but-for plaintiffs'  
22 suits.

23 <sup>15</sup> Plaintiffs repeatedly imply that they were successful on their improper cut-off date challenges,  
24 arguing that their lawsuits were the catalyst for NMFS's new cut-off date policy. Mot. at 8, 10.  
25 The improper cut-off date issue was raised but not decided by Judge Conti in his March 30 Order,  
26 because the issue was also raised but supported by a fuller factual record in the *OCE II* summary  
27 judgment briefing that was pending. In his July Order, Judge Conti determined that, at most, a  
28 factual dispute existed, and again held the issue in abeyance for supplemental responses. In his  
October Order, Judge Conti found that plaintiffs had not established that NMFS used improper  
cut-off dates, and instead granted summary judgment to NMFS on plaintiffs' improper search cut-  
off date claim as to plaintiffs' *own* FOIA requests. October Order at 17. Later in the October  
Order, Judge Conti recognized that the "NMFS West Coast Region appears to have an updated  
process in place, using modern software, additional personnel, and policy changes (e.g., how the  
cut-off date changes where there are multiple SMEs assigned) to speed up its process. *See* Supp.  
Malabanian Decl. ¶¶ 15-18." *Id.* at 18. Judge Conti, however, never reached the issue of whether  
these lawsuits were the catalyst for NMFS's new, updated, or clarified policy with respect to  
search cut-off dates.



1 *Scientology*, 700 F.2d at 489. I will discuss each in turn.

2 **A. Benefit to the Public**

3 In considering the public benefit factor, courts consider “the degree of dissemination and  
4 the likely public impact that might result from disclosure.” *Church of Scientology*, 700 F.2d at  
5 493. The factor generally weighs in favor of an award where the information is broadly  
6 disseminated to the public. *See, e.g., Electronic Frontier Foundation v. Office of Dir. of Nat.*  
7 *Intelligence*, No. 07-cv-05278-SI, 2008 WL 2331959, at \*3 (N.D. Cal. June 4, 2008) (finding that  
8 the public benefit factor was satisfied where the plaintiff “immediately posted the requested  
9 information on its website” and “created press releases for public access”). Even where the degree  
10 of dissemination is limited, or where the level of public interest in the requested information itself  
11 is minimal, the public benefit factor may still favor an award “as long as there is a public benefit  
12 from the fact of . . . disclosure.” *O’Neill, Lysaght & Sun v. D.E.A.*, 951 F. Supp. 1413, 1423 (C.D.  
13 Cal. 1996).

14 Courts in this circuit have found a public benefit favoring an award, despite an absence of  
15 broad dissemination or a significant level of public interest in the requested information, where (1)  
16 the case “establishe[d] that the government may not withhold certain information pursuant to a  
17 particular FOIA exemption,” *Church of Scientology*, 700 F.2d at 493; (2) the plaintiffs were  
18 environmental nonprofits whose purpose was “to oversee and enforce compliance with the [Clean  
19 Air Act]” and the requested information was “being used to inform [the plaintiffs’] ongoing  
20 oversight and enforcement efforts,” *The Sierra Club v. United States Env’tl. Prot. Agency*, 75 F.  
21 Supp. 3d 1125, 1143-44 (N.D. Cal. 2014); and (3) the requested documents revealed a “long  
22 history of abuse” by a paid DEA informant and “expos[ed] the implications of the government  
23 dealing with untrustworthy paid informants.” *O’Neill*, 951 F. Supp. at 1423-24.

24 Plaintiffs argue that just like the plaintiffs in *Sierra Club* they “utilized the documents  
25 to advance their efforts to promote compliance with environmental laws intended to broadly  
26 benefit the public interest environmental protection. Specifically, they utilized the documents to  
27 organize public support for measures designed to persuade Stanford and NMFS to do more to  
28 protect a threatened fish species and to develop ESA citizen suits claims aiming to help the

1 survival and recovery of this threatened species.” Beaman Decl. ¶¶ 6-8; Mot. 15. Plaintiffs also  
2 disseminated the information they secured to their members, the press, and the public through  
3 messages, website postings, press releases, and interviews. Beaman Decl. ¶¶ 6-8.

4 As NMFS points out, it is unclear what role in that public outreach (if any) the information  
5 actually secured by OCE as a direct result of the filing of these lawsuits or Judge Conti’s Orders  
6 played. Beaman’s declaration is not specific on that point. *See, e.g., Cotton v. Heyman*, 63 F.3d  
7 1115, 1120 (when evaluating the public benefit prong, the court must “evaluate the specific  
8 documents at issue in the case at hand”). NMFS does not argue (or show by declaration) that the  
9 information produced to OCE after the inception of the suits or Judge Conti’s Orders issued was  
10 so ministerial or obscure that it could not have supported plaintiffs’ public interest and public  
11 disclosure goals. The Beaman declaration, while not specifically focused on documents produced  
12 as a result of this litigation, persuasively explains how the documents OCE received through its  
13 FOIA requests and its litigation play a significant role in OCE’s mission to inform the public  
14 about the activities of Stanford and the Central California Coast steelhead. Dkt. Nos. 83, 96.

15 In addition, this lawsuit effectively and publicly disclosed NMFS’s history of untimely  
16 responses and significant backlog as well as the steps NMFS was undertaking to cure those  
17 issues. That shed important light about the agency’s non-compliance with its duty under FOIA, a  
18 situation Judge Conti repeatedly referred to as “clear, undisputed, and troubling.” March 30, 2015  
19 Order at 24; *see also* July 20, 2015 Order at 19 (“In short, even though the Fisheries Service does  
20 not take the FOIA’s deadlines seriously, ‘[t]here can be no doubt that Congress [did]’”). Finally,  
21 plaintiffs secured a significant, contested legal ruling from Judge Conti: that FOIA allows both  
22 declaratory judgment and injunctive relief as remedies for untimely responses. NMFS vigorously  
23 argued that the only available remedy for a violation under FOIA was an order requiring  
24 production of withheld documents; a position that was soundly rejected by Judge Conti. March  
25 30, 2015 Order at 24-26; July 20, 2015 Order at 19-21.

26 On this record, plaintiffs have shown that this litigation through the information released  
27 and the legal principles established conferred a significant benefit on the public.  
28



**B. Commercial Benefit to the Complainant/Nature of Plaintiffs' Interests**

The second and third factors are “the commercial benefit to the complainant” and “the nature of the complainant’s interest in the records sought.” *Church of Scientology*, 700 F.2d at 492. Courts regularly consider these factors together. *See, e.g., id.* at 494; *Am. Small Bus. League v. U.S. Small Bus. Admin.*, No. 08-cv-00829-MHP, 2009 WL 1011632, at \*3 (N.D. Cal. Apr. 15, 2009); *Electronic Frontier Foundation*, 2008 WL 2331959, at \*3.

As a general matter, if a “commercial benefit will inure to the plaintiff from the information,” or if the plaintiff “intends to protect a private interest” through the FOIA litigation, then “an award of attorney’s fees is not recoverable.” *Church of Scientology*, 700 F.2d at 494. On the other hand, where the plaintiff “is indigent or a nonprofit public interest group, an award of attorney’s fees furthers the FOIA policy of expanding access to government information.” *Id.* The Ninth Circuit has instructed that, pursuant to the second and third factors, a court “should generally award fees if the complainant’s interest in the information sought was scholarly or journalistic or public-oriented,” but should not do so “if his interest was of a frivolous or purely commercial nature.” *Long*, 932 F.2d at 1316.

Plaintiffs argue that their non-profit status combined with the lack of any private commercial interest in the information they secured, strongly favors an award under these factors. *See* Beaman Decl. ¶¶ 1, 6-8. The government counters that contrary to plaintiffs’ current assertion that their goal in *OCE I* and *OCE II* was to force NMFS to provide more timely and fulsome responses to their and others’ FOIA requests, the real purpose of these lawsuits was to force NMFS to produce documents that plaintiffs could and did use in their suit against Stanford University. Declaration of Robin M. Wall [Dkt. No. 92-1], Ex. L (“Stanford Summary Judgment Papers,” noting that some of the FOIA production was used on a motion to compel and on a motion for summary judgment in the Stanford case). That purpose, according to the government, is a private one that does not make plaintiffs entitled to fees. *Oppo*. 11-13.

The cases relied on by NMFS considered private litigants who used FOIA to secure evidence in support of their private lawsuits. *See Hersh & Hersh v. U.S. Dept. of Health and Human Services*, No. 06-04234-PJH, 2008 U.S. Dist. LEXIS 110977, at \*7 (N.D. Cal. July 9,

1 2008) (denying an award of attorney’s fees where “plaintiff undertook this FOIA request for  
 2 decidedly commercial purposes” when plaintiff was litigating private lawsuit against a defendant  
 3 regarding defective medical devices and plaintiff failed to secure disclosure of the “vast majority”  
 4 of documents it sought); *Ellis v. United States*, 941 F. Supp. 1068, 1078 (D. Utah 1996) (denying  
 5 fees where documents sought for assistance in private tort suit, because while documents produced  
 6 under FOIA created “some slight public benefit in bringing the government into compliance with  
 7 FOIA and providing information of general interest to the public, the disclosure of the records did  
 8 not add to the fund of information necessary to make important political choices”).<sup>16</sup> They do not  
 9 address the situation here, where non-profit environmental advocacy organizations bring suit  
 10 under FOIA as part of their ongoing efforts to shed light on how an agency is (or is not) protecting  
 11 the environment, albeit with respect to a specific project.

12 Moreover, while plaintiffs were undoubtedly motivated in some part to secure documents  
 13 from NMFS in order to assist their litigation against Stanford, there was a significant and separate  
 14 public benefit sought and secured by plaintiffs shedding light on the actions of NMFS (as  
 15 opposed to the actions of Stanford) in carrying out its agency duties and on its handling of  
 16 plaintiffs’ and others’ FOIA requests.<sup>17</sup>

17 These factors weigh in favor of plaintiffs’ entitlement to fees.  
 18

19 \_\_\_\_\_  
 20 <sup>16</sup> I recognize that the court in *Sierra Club v. United States EPA*, 75 F. Supp. 3d 1125, 1144 (N.D.  
 21 Cal. 2014) rejected an agency’s argument that a non-profit environmental group plaintiff had a  
 22 commercial interest in the FOIA litigation because they intended to bring environmental litigation,  
 in part because “Plaintiffs were not pursuing a separate private lawsuit against Luminant at the  
 time they initiated the FOIA request.” The court, therefore, did not directly reach the issue raised  
 here.

23 <sup>17</sup> NMFS’s other cases are inapposite, as they do not address whether use of documents secured  
 24 through FOIA in other litigation equals a “commercial” interest in the FOIA litigation, but stand  
 25 for the proposition that having a personal interest in the records sought does not increase the  
 26 access to those records under FOIA. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143  
 27 n.10 (1975) (“Sears’ rights under the Act are neither increased nor decreased by reason of the fact  
 28 that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the  
 average member of the public. The Act is fundamentally designed to inform the public about  
 agency action and not to benefit private litigants.”); *Shannahan v. IRS*, 672 F.3d 1142, 1151 (9th  
 Cir. 2012) (requestors’ interest in IRS documents about themselves to use in their civil tax suit  
 does not negate applicability of FOIA exemptions preventing disclosure).

**C. Reasonable Basis in Law**

The fourth factor is “whether the government’s withholding had a reasonable basis in law”; in other words, whether the government’s actions appeared to have “a colorable basis in law” or instead appeared to be carried out “merely to avoid embarrassment or to frustrate the requester.” *Church of Scientology*, 700 F.2d at 492, 492 n.6; *see also Rosenfeld*, 903 F. Supp. 2d at 870; *Am. Small Bus. League*, 2009 WL 1011632, at \*4. This factor “is not dispositive” and can be outweighed where the other relevant factors favor an award. *Rosenfeld*, 903 F. Supp. 2d at 870 (internal quotation marks omitted); *see also O’Neill*, 951 F. Supp. at 1425 (noting that the reasonable basis in law factor “in particular should not be considered dispositive”). The burden is on the government to demonstrate that its withholding was reasonable. *Sierra Club*, 75 F. Supp. 3d at 1145.

Here, Judge Conti repeatedly found in no uncertain terms that NMFS failed to provide timely responses under FOIA. *See, e.g.*, March 30, 2015 Order at 24 (with respect to NMFS’s violation of FOIA deadlines “the record is clear, undisputed, and troubling .... In short, even though the Fisheries Service does not take the FOIA’s deadlines seriously, ‘[t]here can be no doubt that Congress [did].’”); July 20, 2015 Order at 19 (“The records in both this and the related case show a clear and undisputed breach of this [FOIA response deadline] requirement.”); October 21, 2015 Order at 18-19 (“the Court has received showing [of] an unmistakable history that the Fisheries Service fails to meet its statutory deadlines under FOIA and causes Plaintiffs (and likely others similarly situated) to suffer unpredictable, unreasonable delays.”).<sup>18</sup>

Judge Conti also found that in litigating this case, NMFS repeatedly failed to explain with sufficient detail the adequacy of its searches and the reasons for its withholdings thereby necessitating additional rounds of briefing by the parties and orders by the court.<sup>19</sup> As such, I

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<sup>18</sup> Judge Conti’s repeated use of strong adjectives like “troubling” and “unreasonable” separates this case from those relied on by NMFS where fees were denied because delayed responses were caused by confusion or “bureaucratic difficulty” in handling requests. *Oppo*. at 14.

<sup>19</sup> I recognize that Judge Conti ultimately found that NMFS had conducted adequate searches and appropriately withheld all documents except one. But those conclusions were reached only after multiple rounds of briefing and decision, necessitated by NMFS’s initially deficient declarations and *Vaughn* indexes.

1 conclude that neither NMFS's general responses to the FOIA requests nor its litigation position  
2 before this Court had a reasonable basis in law.

3 In sum, plaintiffs are entitled to an award of attorney's fees. The next step is to determine  
4 the amount owed.

### 5 **III. REASONABLE AMOUNT OF ATTORNEY'S FEES AND COSTS**

6 "[O]nce the court has determined that the plaintiff is both eligible for and entitled to  
7 recover fees, the award must be given and the only room for discretion concerns the  
8 reasonableness of the amount requested." *Long*, 932 F.2d at 1314. In making this determination,  
9 the court must scrutinize the reasonableness of (i) the hourly rates and (ii) the number of hours  
10 claimed. *Id.* at 1313-14. "If these two figures are reasonable, then there is a strong presumption  
11 that their product, the lodestar figure, represents a reasonable award." *Id.* at 1314 (internal  
12 quotation marks omitted). Nevertheless, a court "may authorize an upward or downward  
13 adjustment from the lodestar figure if certain factors relating to the nature and difficulty of the  
14 case overcome this strong presumption and indicate that such an adjustment is necessary." *Id.*

#### 15 **A. Hourly Rate**

16 NMFS argues plaintiffs' hourly rates are excessively high, and that the Court should apply  
17 the hourly rates set forth in the *Laffey* matrix plus locality adjustments, which would result in a  
18 decrease of 22.9% in the requested lodestar. *Oppo.* at 20-22. As I recognized in  
19 *Public.Resource.org v. United States Internal Revenue Serv.*, No. 13-CV-02789-WHO, 2015 WL  
20 9987018, at \*6 (N.D. Cal. Nov. 20, 2015), "[a]bsent some showing that the rates stated in the  
21 matrix are in line with those prevailing in this community . . . I agree [that] that the matrix is not  
22 persuasive evidence of the reasonableness of its requested rates." As in *Public.Resource.org*, I  
23 will not bind plaintiffs to the *Laffey* matrix, especially as statutory fee awards from this District do  
24 not establish that the *Laffey* matrix rates are in line with prevailing rates for statutory fee cases in  
25 the Bay Area legal community. *See, e.g., Public.Resource.org* (awarding rates from \$205 for  
26 paralegals up to \$645 for senior/lead counsel); *Sierra Club*, 75 F. Supp. 3d at 1152-53 (approving  
27 hourly rates of \$350 to \$650 in FOIA action); *Rosenfeld*, 904 F. Supp. 2d at 1001, 1004  
28 (approving hourly rates of \$460, \$550, and \$700 in FOIA action); *Hajro v. U.S. Citizenship &*

1 *Immigration Servs.*, 900 F. Supp. 2d 1034, 1054 (N.D. Cal. 2012) (approving hourly rates of \$450  
2 to \$625 in FOIA action) *vacated and remanded on other grounds*, 2015 WL 6405473 (9th Cir.  
3 Oct. 23, 2015); *see also Hiken v. Dep't of Def.*, 836 F.3d 1037, 1039 (9th Cir. 2016) (reversing  
4 district court order awarding fees at matrix rate).

5 The rates sought by counsel in this case are, generally, higher than the rates approved in  
6 other recent FOIA cases in this District. They are also, more importantly, significantly higher than  
7 rates that were requested and approved by these *same* counsel in recent cases in this District for  
8 environmental litigation. *See, e.g., OCE v. EPA*, 13-cv-02857 (Dkt. Nos. 82, 99) (awarding fees  
9 from \$435 to \$655/hr for work through early 2015); *San Francisco Baykeeper v. West Bay*  
10 *Sanitary Dist.*, No. 09-5676, 2011 WL 6012936 (N.D. Cal. Dec. 1, 2011) (approving \$585/hr for  
11 Sproul). Plaintiffs argue this upward departure is warranted because in the past they have relied  
12 on the *Laffey* matrix with locality adjustments, but recent cases confirm those rates under-  
13 compensate them. *See, e.g., Declaration of Christopher Sproul* [Dkt. No. 88] ¶ 15; *Declaration of*  
14 *Patricia Weisselberg* [Dkt. No. 86] ¶ 9.

15 Plaintiffs undertook a “market rate” analysis and seek compensation for that research from  
16 *this* case. The analysis was performed primarily by billing attorney Christopher Hudak. Hudak  
17 reviewed fee awards in a number of different types of cases from the Northern District, including  
18 class action litigation (antitrust, wage and hour, consumer protection, and securities) as well as one  
19 anti-SLAPP case and one FOIA case. *See, e.g., Declaration of Christopher Hudak* [Dkt. No. 84]  
20 ¶¶ 11-32. The market rate analysis did not consider more than one FOIA case (despite there being  
21 a number of cases on point) nor did it directly consider cases awarding statutory fees for  
22 environmental litigation.<sup>20</sup>

23 Plaintiffs have not demonstrated that the rates they seek here are reasonable for FOIA  
24

25 \_\_\_\_\_  
26 <sup>20</sup> The OCE attorneys did rely for “data points” on the Declaration of Richard M. Pearl from a  
27 state court case, *Citizens Committee To Complete The Refuge, Inc. v. City of Newark*, Case No.  
28 RG10530015, (CA Superior Ct. County of Alameda). The Pearl declaration focused on attorney’s  
fees rates through 2014, and did review some statutory fee-shifting awards, as opposed to the class  
action attorney’s fee awards focused on by the plaintiffs here. *See, e.g., Weisselberg Decl.* ¶¶ 11-  
16; *Sproul Decl., Ex. 32; Hudak Decl.* ¶ 34.

1 litigation (or environmental fee-shifting litigation). They seek to downplay the fact that in cases  
 2 from 2014 and 2015 *these same attorneys* requested significantly lower attorney’s fee rates. I do  
 3 not believe the case law supports limiting plaintiffs to their prior requested rates, but I do believe  
 4 that any *significant* upward departure should be justified, for example, by declarations explaining  
 5 the increases in light of increased expenses from doing business and practicing in certain markets  
 6 or other factors. I also do not find plaintiffs’ focus as support for their requested hourly rates in  
 7 these cases on large scale, complex class action cases to be persuasive. That is not to say that  
 8 FOIA cases cannot be complex. But the high rates awarded for complex class action cases can be  
 9 explained in large part by the necessity in those cases for plaintiffs’ counsel to incur significant  
 10 cost outlays (for experts, document review systems, travel, depositions, etc.) as well as attorney  
 11 time (to review hundreds of thousands of documents, numerous depositions, etc.) which are not  
 12 typically required in FOIA cases and were not required in these cases.

13 Accordingly, I find that the hourly rates plaintiffs request here are not adequately  
 14 supported and are not reasonable. This conclusion is consistent with *Hiken v. Dep’t of Def.*, 836  
 15 F.3d 1037, 1044–46 (9th Cir. 2016), where the Ninth Circuit confirmed that a “reasonable rate” is  
 16 the rate prevailing “in the community” for “similar work” performed by attorneys of comparable  
 17 skill and experience and based on record evidence of prevailing historical rates. I do not find that  
 18 plaintiffs’ survey is based on the performance of “similar work” by attorneys of comparable skill  
 19 and experience.

20 Plaintiffs shall recalculate their lodestar based on hourly rates that are consistent with the  
 21 rates they requested in prior FOIA or environmental cases for the same time periods. For  
 22 example, time spent on these cases in 2015 should be sought at the same rate previously sought  
 23 and/or awarded by a court for time spent in 2015. For time in 2016 as to which plaintiffs may  
 24 have not had an hourly rate approved by another court plaintiffs are entitled to a 10% increase  
 25 over their 2015 approved-rates, absent specific justification supported by a declaration explaining  
 26 why a particular attorney or paralegal should be granted a higher percentage increase.<sup>21</sup>

27 \_\_\_\_\_  
 28 <sup>21</sup> For any biller in these cases who has not had a prior-court-submitted or approved billing rate, plaintiffs shall use a prior-court-approved billing rate for an attorney or paralegal of comparable



**B. Hours Expended**

NMFS also argues that the hours sought by plaintiffs cover time and tasks that were neither necessary nor reasonable for the prosecution of these suits and asks me to reduce the requested fee amount for the following:

- A \$188,381.47 reduction for plaintiffs' work on the claims they lost;
- A \$26,686.22 reduction for work on pleadings and other papers that were never filed;
- A \$89,442.20 reduction for work performed at the administrative stage and review of documents produced;
- A reduction for work unrelated to *OCE I* and *OCE II*; and
- A 30-50% reduction generally for excessive, redundant, and unnecessary work.<sup>22</sup>

**1. Claims Lost**

NMFS argues that plaintiffs are not entitled to \$188,381.47 in fees (calculated at the hourly rates that NMFS objects to) for "distinct" claims they lost: (i) claims against FWS and the Corps; (ii) claims regarding the adequacy of the searches in *OCE II* (based on a frivolous argument that NMFS's declarant's testimony was "hearsay"); (iii) unsuccessful challenges to NMFS's withholdings; (iv) claims regarding actual and pattern and practice search cut-off dates; and (v) plaintiffs' response to the October 21 2015 Order to Show Cause as to whether further injunctive relief was necessary.<sup>23</sup>

With respect to the \$3,506.18 incurred with *OCE III*, plaintiffs admit they do not seek to recover for that time. So there is no longer a dispute as to that time/amount. The only other unsuccessful legal theory/claim NMFS "breaks out" time for is the \$23,032.40 plaintiffs charge

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experience.

<sup>22</sup> Plaintiffs explain that before submitting their request, most billers took 10% of the time billed "off the top" to account for any potential inefficiencies or redundancies in their work. Sproul Decl. ¶¶ 92, 97; Weisselberg Decl. ¶ 41; Isaacs Decl. ¶¶ 6-7; Costa Decl. ¶ 6; Hudak Decl. ¶ 35 (worked over 100 hours, but seeking payment for approximately 30 hours).

<sup>23</sup> NMFS breaks down the \$188,381.47 (or more accurately \$188,381.48) as follows: \$23,032.40 for 37.1 hours spent on the opposition to NMFS's showing in response to Judge Conti's OSC; \$161,842.90 as a 50% reduction from the \$323,685.79 plaintiffs billed for pleadings, summary judgment, supplemental briefing and the joint submission; and \$3,506.18 incurred with *OCE III*.

1 for 37.1 hours spent responding to NMFS’s showing in response to Judge Conti’s Order to Show  
2 Cause. Oppo. 17. However, I find that that time was reasonable and necessary. Judge Conti’s  
3 OSC raised significant questions regarding the steps NMFS was taking to address its FOIA  
4 backlog, and NMFS filed a detailed response, supported by declarations. Plaintiffs filed a brief to  
5 contest some of the assertions made by NMFS, but that pleading was helpful and relied on by me  
6 in determining whether any live issues remained in the litigation, even though I denied plaintiffs’  
7 request for further injunctive relief as to the backlog.

8 NMFS does not break out the time spent on the other “unsuccessful” issues because  
9 plaintiffs’ billing records do not allow them to. NMFS instead argues the 595.6  
10 hours/\$323,685.79 plaintiffs billed to pleadings for the summary judgment, supplemental briefing,  
11 and the joint submission required by the October 2015 Order should be reduced by 50% to  
12 account for plaintiffs’ other losing claims/theories. Oppo. 17-18; Wall Decl., Ex. B (Summary  
13 Fee Analysis). I disagree.

14 As to claims against FWS and the Corps for their alleged part in causing repeated delays in  
15 NMFS’s FOIA responses, while plaintiffs were not ultimately successful in their claims against  
16 those entities, the claims made were part and parcel of the impermissible and excessive delay  
17 claims against NMFS. This time is compensable.

18 As to claims regarding the adequacy of the searches in *OCE II* (based in part on the  
19 argument that NMFS’s declarant’s testimony was hearsay), while plaintiffs eventually lost this  
20 claim, Judge Conti forced NMFS to submit supplemental briefing explaining the adequacy of its  
21 searches. NMFS’s initial explanations, therefore, were deficient and plaintiffs’ successfully  
22 argued that deficiency to Judge Conti in their initial and supplemental briefing. This time is  
23 compensable.

24 As to the unsuccessful challenges to NMFS’s withholdings, plaintiffs eventually lost all  
25 but one of these claims. But in the process of the initial and supplemental rounds of briefing,  
26 NMFS agreed to produce more documents and NMFS had to explain its actions in greater detail  
27 due to deficiencies in their initial briefing and declarations. This time is compensable.

28 And as to the eventually unsuccessful claim regarding NMFS’s pattern and practice of



1 applying improper search cut-off dates, while plaintiffs did not secure an order from Judge Conti  
2 finding that NMFS had an illegal pattern or practice, the record supports at least an inference that  
3 during this litigation NMFS implemented a new or clarified policy. Even assuming it was simply  
4 a clarified policy, that clarification produced a public benefit for future FOIA requestors. This  
5 time is compensable.

## 6 **2. Pleadings and Papers Never Filed**

7 NMFS argues that plaintiffs should not be compensated for 49.1 hours/\$26,686.22 for  
8 work on pleadings that were never filed, including draft amended complaints in *OCE I* and *OCE*  
9 *II*, a motion for reconsideration, and a motion for relief. Wall Decl., Ex. G (Unfiled Papers).

10 In reply, Sproul explains: (i) the work done on the unfiled SAC in May 2014 in *OCE I* was  
11 used on the motion for summary judgment in *OCE I* and is therefore compensable (Sproul Reply  
12 Decl. ¶ 5); (ii) the 3.16 hours billed in February 2015 for a “motion for relief” was in fact work  
13 done for the Notice Regarding Submitted Matter and Request For Ruling filed on March 2, 2015  
14 (*id.* ¶ 6); (iii) 13.19 hours of work in October 2014 was for a pleading filed in *OCE II*, Dkt. 58 (*id.*  
15 ¶ 7); (iv) 1.32 hours of time billed in May 2015, was cut from the request on plaintiffs’ Reply (and  
16 not currently sought); and (iv) the remaining hours that were spent on the unfiled motion for  
17 reconsideration in January 2016 are compensable because that unfiled motion was used as  
18 leverage to get NMFS to agree to a form of judgment and produce additional documents. *Id.* ¶ 8.  
19 Weisselberg also, on review, cut 0.56 of time from her entries challenged in Wall’s Ex. G, because  
20 those entries represented work on what was to become *OCE III*. Weisselberg. Reply Decl. ¶ 11.

21 Considering the declarations, I find that all of the challenged time except the time spent on  
22 the unfiled motion for reconsideration is compensable. Plaintiffs have adequately identified how  
23 the time identified by NMFS was spent or used for pleadings actually filed in this action.  
24 However, the time spent on the unfiled motion for reconsideration in January 2016 was created  
25 voluntarily by plaintiffs and used for “leverage” but was never necessary or useful for any  
26 contested decision made by me.

## 27 **3. Administrative Efforts**

28 NMFS wants a further reduction for 157.7 hours/\$89,442.20 that plaintiffs spent drafting

1 FOIA requests, working on the agency administrative appeals, and reviewing the documents  
 2 produced. Wall Decl., Ex. I. Generally, “work performed during the pre-litigation administrative  
 3 phase of a FOIA request is not recoverable under FOIA.” *Elec. Privacy Info. Ctr. v. United States*  
 4 *Dep't of Homeland Sec.*, 811 F. Supp. 2d 216, 237 (D.D.C. 2011); *but see Public.Resource.org*,  
 5 2015 WL 9987018, at \*8 (allowing recovery for two time entries on letters seeking agency  
 6 reconsideration “given the clear overlap in subject matter between the letter and this litigation, the  
 7 letter’s explicit contemplation of a lawsuit, and the proximity in time between the letter and the  
 8 filing of” the complaint).

9 In their Reply and supporting declarations, plaintiffs cut some of the contested time for  
 10 work on the FOIA requests and administrative appeals, but kept the time spent on two specific  
 11 FOIA requests in. As explained by lead counsel Sproul:

12 I and my co-counsel have been mindful that we are not entitled to  
 13 recover for drafting all our FOIA requests and reviewing all the  
 14 documents obtained for the purpose of learning the substantive  
 15 content of those documents for the Plaintiffs’ citizen suit litigation  
 16 against Stanford or larger public advocacy campaign related to  
 17 Stanford and the San Francisquito Creek watershed. However, we  
 18 have concluded that we may recover for time spent drafting FOIA  
 19 requests specifically intended to garner information for use in this  
 20 litigation and reviewing documents for such litigation purposes. I  
 21 and my co-counsel have carefully segregated the time spent drafting  
 22 FOIA requests reviewing documents such that we are seeking  
 23 recovery only for the latter time. With respect to drafting FOIA  
 24 requests, we are seeking to recover for time spent drafting (or  
 25 appealing responses concerning) only two of the multiple FOIA  
 26 requests at issue in this proceeding that Plaintiffs specifically used to  
 27 gather information used as evidence against NMFS in this case:  
 28 FOIA requests sent on April 3, 2014 and November 24, 2015. (the  
 latter is Exhibit M to the Wall Declaration, (OCE I, Dkt. 92-1). The  
 April 3, 2014 FOIA sought documents concerning the searches done  
 by NMFS and the responses provided by NMFS to Plaintiffs in  
 response to their FOIA requests with the aim of developing evidence  
 that NMFS’s searches have not complied with FOIA. Plaintiffs’  
 November 24, 2015 FOIA request sought documents with the  
 specific intent of trying to garner evidence that Plaintiffs’ litigation  
 had catalyzed NMFS to respond more promptly to Plaintiffs’ FOIA  
 requests. The aim was to develop evidence in support of catalyst  
 theory arguments for purposes of attorney fees recovery in  
 settlement and, if necessary, a fees motion. Plaintiffs’ November 24,  
 2015 FOIA Request sought documents related to NMFS’s assertions  
 that it had instituted several FOIA reforms also with the specific  
 intent of trying to garner evidence that Plaintiffs’ litigation had  
 catalyzed NMFS to institute these reforms. Again, our aim was to  
 develop evidence in support of catalyst theory arguments for

1 purposes of attorney fees recovery in settlement and, if necessary, a  
 2 fees motion. As discussed in the Reply Declaration of Patricia  
 3 Weisselberg, Plaintiffs have in fact used documents obtained in  
 4 response to their FOIA requests as exhibits supporting the catalyst  
 theory arguments they are advancing in their Fees Motion and  
 plaintiffs agree to reduce some of their time spent on drafting the  
 FOIA requests and the administrative appeals.

5 Sproul Reply Decl. ¶ 10.

6 Accordingly, Michael Costa cut 11.91 hours/\$6,148.98 for drafting FOIA requests and  
 7 appeals, except for the work he did on the April 3, 2014 and November 24, 2015 FOIA requests  
 8 that were aimed at gathering information for this lawsuit. Costa Reply Decl. ¶ 3. Jodene Isaacs  
 9 cut 11.21 hours/\$5,599.40 for drafting FOIA requests and appeals. Isaacs Reply Decl. ¶ 2.  
 10 Weisselberg cut 8.74 hours spent on FOIA appeals, included in Wall's Ex. I. Weisselberg Reply  
 Decl. ¶ 13.

11 The bulk of the remaining time appears to be for document review conducted primarily by  
 12 Costa and Isaacs. NMFS argues that document review is simply not compensable. *See, e.g.,*  
 13 *Sierra Club v. United States EPA*, 75 F. Supp. 3d 1125, 1149 (N.D. Cal. 2014) ("As Plaintiffs  
 14 received, at least in part, the relief they sought when the EPA produced the documents, the time  
 15 they expended reviewing the documents was is properly characterized as post-relief activity,  
 16 separate from the litigation."); *Citizens for Responsibility & Ethics v. United States DOJ*, 825 F.  
 17 Supp. 2d 226, 231 (D.D.C. 2011) ("Plaintiff would have had to expend this time had DOJ timely  
 18 produced the documents without litigation; the cost of reviewing documents produced in response  
 19 to a FOIA request is simply the price of making such a request.").

20 Plaintiffs respond that in this case, where the adequacy of NMFS's searches and  
 21 withholdings were central claims, plaintiffs needed to spend significant amounts of time reviewing  
 22 the documents to support those claims in litigation. That might be true but plaintiffs'  
 23 withholding claims were almost totally rejected (except for one document) and plaintiffs'  
 24 inadequate search claims were likewise mostly unsuccessful (except for two narrow wins in *OCE*  
 25 *I*). Plaintiffs also do not cite any case law allowing for recovery of time spent reviewing document  
 26 productions where that review is necessary for a plaintiff to be able to challenge the adequacy of  
 27 an agency's search or the propriety of withholdings.  
 28

1 Based on the declarations, I find that the Costa time spent on the two identified FOIA  
 2 requests is compensable, given the overlap in subject matter between requests and this litigation as  
 3 well as the proximity in time between those requests and the filing of pleadings in this case. The  
 4 time spent reviewing the documents produced is not compensable.

5 **4. Work Unrelated to *OCE I* and *OCE II***

6 NMFS argues that plaintiffs should not be compensated for 8.9 hours/\$4,461.23 billed by  
 7 Sproul, Weisselberg, Isaacs, and Costa that it contends is unrelated to *OCE I* and *OCE II*,  
 8 including litigation with Stanford and entries related to FWS and the Corps. Wall Decl., Ex. H  
 9 (Unrelated Matters). In Reply, Weisselberg explains the relevance of her entries listed on Exhibit  
 10 H to *OCE I* and *OCE II*. Weisselberg Reply Decl. ¶ 12. Sproul also addresses the 8.9 hours listed  
 11 in Exhibit H, and other than two mistakes accounting for 0.35/hours (which were cut in the Reply)  
 12 adequately explains that those hours billed were necessary for *OCE I* and *OCE II*. Sproul Reply  
 13 Decl. ¶ 9; *see also* Costa Reply Decl. ¶ 16. This time is compensable.

14 NMFS also argues that plaintiffs have (perhaps inadvertently) claimed time for work on  
 15 *OCE III*, despite their claim that they are not seeking that time. In its Opposition and supporting  
 16 declaration, NMFS identified 5.9 hours/\$3,506.18 it contends was incurred on *OCE III*. *See* Wall  
 17 Decl., Ex. D. As noted above, this time is not compensable.

18 **5. Reduction for Excessive or Redundant Work**

19 NMFS asks the Court to reduce by 30-50% any fee award to account for excessive,  
 20 cumulative, and inefficient billing. *Oppo.* at 24. NMFS specifically challenges: (i) the 158 hours  
 21 spent on the opening attorney's fees motion and declarations; (ii) 249 hours on summary judgment  
 22 and supplemental briefing in *OCE I*; (iii) 263.8 hours on summary judgment and supplemental  
 23 briefing in *OCE II*; (iv) 157.7 hours on the "administrative phase" including record review; and (v)  
 24 the fact that five attorneys worked on the case, which NMFS contends is excessive given the  
 25 nature of these cases and is demonstrated by the 173.7 hours/\$107,885.73 billed for telephone  
 26 calls and email correspondence between counsel for "coordination" purposes. Wall Decl., Ex. F  
 27 (Coordination Activities).

28 In their Reply declarations, two of the billing attorneys exercised "more" billing judgment

1 to cut hours in light of potential redundancy. *See* Costa Reply Decl. ¶ 4 (cutting 4.05  
2 hours/\$2,136.38); Isaacs Reply Decl. ¶ 3 (cutting just over 14 hours/\$7,087.91). No other  
3 reductions for excessive or redundant work appear to have been made, other than the 10%  
4 “off the top” that each of the billing attorneys took off their time initially.

5 The time spent on the opening attorney’s fees motion and declarations is excessive and  
6 unreasonable. In particular, plaintiffs should not be compensated for the time Hudak spent  
7 (unsuccessfully as addressed above) surveying cases in order to determine what billing rates  
8 should be used for plaintiffs in this fee motion. Moreover, the time spent in drafting the fee  
9 motion which itself does not raise any unique issues or issues of first impression is excessive.  
10 Plaintiffs purport to be experienced FOIA and environmental litigators; submission of fee petitions  
11 is a regular part of that work. I recognize that reviewing the time records, exercising billing  
12 judgment, and creating supporting declarations will take significant time in each case no matter  
13 how experienced counsel is. But the time spent on the *brief* appears to be excessive in and of  
14 itself. A 25% reduction in the time spent on the opening attorney’s fees motion is appropriate, as  
15 is elimination of the time Hudak spent on his inapposite attorney’s fees survey.

16 As to time spent on the Reply brief and declarations (which NMFS did not have the  
17 opportunity to attack), I conclude that the time spent on the brief itself is reasonable, but not the  
18 time spent reviewing the time slips and submitting supplemental declarations, because much of  
19 *that* time was spent accounting for errors pointed out by NMFS and then making additional  
20 reductions for improper or otherwise redundant billing. Only 50% of the time spent on the  
21 declarations in support of the Reply is compensable.

22 As to the 249 hours spent on summary judgment and supplemental briefing in *OCE I* as  
23 well as the 263.8 hours spent on summary judgment and supplemental briefing in *OCE II*, I find  
24 that the time is reasonable and compensable. The summary judgment briefing was extensive,  
25 detailed and addressed a number of issues where there was little precedent. In these circumstances  
26 I cannot say the time spent was unreasonable.

27 As to the 157.7 hours on the “administrative phase” including record review, as noted  
28 above, plaintiffs have voluntarily cut all time on drafting the FOIA requests, except for time Costa

1 spent on two, and I have already found that time spent reviewing the documents produced is not  
2 compensable.

3 Finally, as to the time spent on coordination between counsel, I find that 173.7 hours is  
4 excessive. While this case was complex in the sense that there were a large number of FOIA  
5 requests at issue, at least three lawsuits filed, and multiple rounds of summary judgment and  
6 additional briefing required, the sheer number of attorneys involved many of whom it appears  
7 were involved in part because of the Stanford litigation meant that there was an excessive  
8 amount of “coordination.” A 25% reduction in the amount of time spent on coordination is  
9 appropriate.

10 **C. Costs**

11 Plaintiffs seek \$3,190.39 in costs. Dkt. No. 94. NMFS does not oppose the amount of  
12 costs, but argues instead that in light of the limited nature of plaintiffs’ success and the agency’s  
13 good faith, costs are not warranted. Oppo. at 24-25. Having concluded that plaintiffs are  
14 substantially prevailing and that the agency’s defenses were without a reasonable basis in law, an  
15 award of costs is appropriate. Plaintiffs are awarded \$3,190.39 in costs.

16 **CONCLUSION**

17 For the foregoing reasons, plaintiffs will be awarded attorney’s fees, but at a significantly  
18 reduced amount, and are awarded \$3,190.39 in costs.

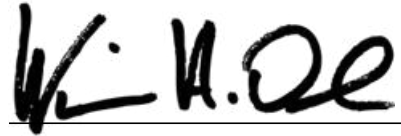
19 Within twenty days of the date of this Order, plaintiffs shall, after meeting and conferring  
20 with defense counsel, submit a *joint* supplemental brief and proposed judgment containing a  
21 revised request for attorney’s fees that excludes all of the time I have identified above as not being  
22 compensable. The parties shall make all reasonable efforts to reach agreement on the time to be  
23 included in light of the time that has been excluded by this Order. If the parties cannot agree, any  
24 remaining disputes shall be explained in no more than two pages.

25 Plaintiffs must also recalculate their lodestar, using hourly rates that were approved for  
26 them in past years and using a rate for 2016 that is no more than 10% above their 2015 rates,  
27 unless otherwise justified. At the time the joint supplemental brief and proposed judgment is filed,  
28 plaintiffs shall submit a declaration explaining and identifying: (i) the rates for each biller for each

1 year billed; (ii) the case(s) for which each biller's rates have been requested and approved; (iii) the  
2 basis for the 2016 hourly rates sought; and (iv) the basis for any hourly rate sought for a biller who  
3 has not had her or his time approved by a prior court order.

4 **IT IS SO ORDERED.**

5 Dated: March 1, 2017

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8 William H. Orrick  
9 United States District Judge  
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United States District Court  
Northern District of California

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**From:** Stacey Nathanson - NOAA Federal <stacey.nathanson@noaa.gov>  
**Sent:** Thursday, March 9, 2017 12:57 PM  
**To:** Mark Graff - NOAA Federal  
**Subject:** Fwd: FOIA exemption 4  
**Attachments:** Blue Harvest Ingrande letter September 29.pdf

Hi Mark,

I have what will hopefully be a quick question for you (b)(5)

[Redacted]

A couple of thoughts on my end --

- (b)(5) [Redacted]
- [Redacted]
- [Redacted]

Thoughts? Thanks!

*Stacey*  
Stacey Nathanson  
Attorney-Advisor  
NOAA Office of the General Counsel



Fisheries and Protected Resources Section

Phone: 301-713-9673

Email: [Stacey.Nathanson@noaa.gov](mailto:Stacey.Nathanson@noaa.gov)

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From: **Megan Walline - NOAA Federal** <[megan.walline@noaa.gov](mailto:megan.walline@noaa.gov)>

Date: Wed, Mar 8, 2017 at 5:07 PM

Subject: Re: FOIA exemption 4

To: Keith Hagg <[keith.hagg@noaa.gov](mailto:keith.hagg@noaa.gov)>, Stacey Nathanson <[stacey.nathanson@noaa.gov](mailto:stacey.nathanson@noaa.gov)>

Cc: Caroline Park <[caroline.park@noaa.gov](mailto:caroline.park@noaa.gov)>

Here is the letter that I mentioned.

Also cc'ing Caroline to keep her in the loop. :)

On Wed, Mar 8, 2017 at 5:03 PM, Megan Walline - NOAA Federal <[megan.walline@noaa.gov](mailto:megan.walline@noaa.gov)> wrote:

Hi Keith and Stacey!

(b)(5)  
[Redacted content]

Thanks in advance for your help!

Megan

(b)(5)  
[Redacted content]

(b)(5)

--

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September 29, 2016

**VIA EMAIL**

margo.schulze-haugen@noaa.gov

brad.mchale@noaa.gov

Margo Schulze-Haugen  
Chief  
Highly Migratory Species Management  
Division  
Office of Sustainable Fisheries  
National Marine Fisheries Service  
Silver Spring, MD 20910

Bradley S. McHale  
Northeast Branch Chief  
Highly Migratory Species Management  
Division  
National Marine Fisheries Service  
55 Great Republic Dr.  
Gloucester, MA 01930

RE: Atlantic Tunas Purse Seine Permits – Request for Confirmation and Confidential Treatment under the Freedom of Information Act<sup>1</sup>

Dear Ms. Schulze-Haugen and Mr. McHale:

Thank you for taking the time to talk with us over the summer regarding the Atlantic Tunas Purse Seine category permits (“Purse Seine Permits” or “Permits”) issued to Diane Marie Fishery Inc., Katherine Ann Fishing Inc., and North Queen Fishing Inc. (the “Companies”). We are writing to request confirmation of our understanding regarding the status of the Permits and the Companies as set out below.

**1. Background Facts**

The Companies are historical participants in the Atlantic Tunas purse seine category. Until March 18, 2016, each of the Companies and their respective vessels (the “Vessels”) and permits were as follows:

- Diane Marie Fishery Inc. – *F/V Diane Marie* (O.N. 1041740) (permit 10060799)
- Katherine Ann Fishing Inc. – *F/V Kathy Ann* (O.N. 590065) (permit 10020271)
- North Queen Fishing Inc. – *F/V North Queen* (O.N. 693499) (permit 10002296)

The Companies, and related entities, have participated in the Atlantic bluefin tuna fishery in the purse seine category annually for decades, with one or more of the Vessels harvesting the respective bluefin tuna allocations for each. During this period the stock ownership of each of the Companies has changed from time to time.

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<sup>1</sup> The information contained in this letter is considered to be confidential commercial, financial, and proprietary business information exempt from Freedom of Information Act (FOIA) disclosure pursuant to 5 U.S.C. §552(b)(4). We therefore respectfully request that this letter be withheld from disclosure, should you receive inquiries under FOIA or otherwise. We further request that you notify us in the event you receive any such inquiry.



On March 18, 2016, all three Vessels were sold to the following companies and the Vessels were renamed as indicated:

- *F/V Diane Marie* to BHF Blue South, LLC and renamed *Blue South*
- *F/V Kathy Ann* to BHF Blue Pacific, LLC and renamed *Blue Pacific*
- *F/V North Queen* to BHF Blue Delta, LLC and renamed *Blue Delta*

All three of these companies that acquired the Vessels are wholly-owned subsidiaries of Blue Harvest Fisheries, LLC. Following the sale of the Vessels to the Blue Harvest Fisheries entities the 2016 Atlantic Tunas purse seine category permits were canceled because they were no longer associated with vessels owned by a permit holder.<sup>2</sup>

## 2. Regulatory Framework

In the promulgation of the current regulations governing Atlantic Tunas permits the National Marine Fisheries Service (“NMFS”) continued to recognize the historical participation by the five participants in the purse seine category. These include Diane Marie Fishery Inc., Katherine Ann Fishing Inc., and North Queen Fishing Inc., each of which is a Delaware corporation, and the two companies that previously owned the purse seine fishing vessels *White Dove* and the *Ruth & Pat* respectively. NMFS effectively grandfathered the number of historical participants in the purse seine category as of 1982.<sup>3</sup>

Under current NMFS regulations, the baseline annual purse seine category quota is 184.3 metric tons, subject to in-season and/or annual adjustments.<sup>4</sup> Each year that baseline quota is allocated equally among the five historical participants in the purse seine category (i.e., 36.9 metric tons each),<sup>5</sup> subject to a potential reduction of 25 to 75 percent based upon the amount of bluefin tuna caught by a participant in the prior fishing year.<sup>6</sup> These historical participants may lease their annual bluefin quota allocations to an eligible Individual Bluefin Quota (“IBQ”) participant, or

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<sup>2</sup> Letter dated June 8, 2016 from Margo Schulze-Haugen, the Chief of the Highly Migratory Species Management Division in the Office of Sustainable Fisheries of the National Marine Fisheries, to Christopher Ingrande, President of each of the Companies.

<sup>3</sup> See 48 Fed. Reg. 27745, 27752 (June 17, 1983) (“The purse seine fishery has been one of the traditional fisheries for harvesting Atlantic bluefin tuna in the western Atlantic Ocean. NOAA does not believe that because the number of participants are small compared to the handgear and recreational fisheries, the purse seine fishery should be eliminated or severely restricted.”); *id.* at 27753 (“Historical participants and new entrants in this [purse seine] fishery are not similarly situated. The historical participants have been dependent on this fishery for a number of years. They have borne the burden of Federal regulation of the fishery in order to enhance the abundance of the resource upon which their livelihood depends. NOAA believes, therefore, they must be afforded some preference in terms of reaping the harvest of their forbearance.”).

<sup>4</sup> See 50 C.F.R. § 635.27(a); *id.* § 635.27(a)(4)(i).

<sup>5</sup> See 50 C.F.R. § 635.27(a)(4)(ii).

<sup>6</sup> See 50 C.F.R. § 635.27(a)(4)(v)(A).



may land their individual quota allocations (plus any additional quota acquired through lease) if the participant possesses a valid purse seine category permit issued to a purse seine vessel owned by the participant.<sup>7</sup> NMFS will issue “no more than 5 Atlantic Tunas purse seine category permits,”<sup>8</sup> corresponding to the number of historical participants in the purse seine category.

As we discussed, NMFS has consistently tracked the eligibility of the historical participants in the purse seine category to receive an annual allocation of bluefin quota, and to receive a permit to harvest bluefin tuna with purse seine gear provided the participant owns a purse seine vessel. Historically each year NMFS issued a corresponding purse seine category permit or, in the absence of a vessel, a letter of authorization to the company. Since adoption of Amendment 7 to the Highly Migratory Species (“HMS”) Fishery Management Plan (“FMP”) last year, the record of eligibility for each company to receive an annual quota allocation and a permit has been kept electronically by the agency rather than by issuing such a letter.

With the sale of the Vessels owned by the Companies, the Companies have no vessels that are *currently* permitted to fish for Atlantic bluefin tuna with purse seine gear.<sup>9</sup> Nonetheless, it is our understanding based on our discussion with you that should any of the Companies acquire a fishing vessel with purse seine gear in the future, then that company would again be eligible to receive a valid purse seine category fishing permit upon application to NMFS.

The relevant regulation contemplates that the owner of a vessel with an Atlantic Tunas permit in the purse seine category can transfer the permit “to another purse seine vessel that he or she owns” provided a written request for transfer is submitted to NMFS.<sup>10</sup> Since its promulgation the regulation has been applied to corporate entities and has not been limited to individual persons as permit holders (as the use of the “he or she” terminology in the regulations might otherwise suggest). Nor have changes in the composition of the shareholders over the years affected the ability of a corporate entity to receive or hold the permit.<sup>11</sup>

Reading the regulation to allow for a change in shareholders without affecting eligibility to receive an annual allocation of bluefin quota or to receive a purse seine category fishing permit is consistent with well-established principles of corporate law, and Delaware law in particular. A corporation is an artificial person or legal entity, with a personality and existence distinct from its several members or shareholders and is vested with the capacity of continuous succession,

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<sup>7</sup> See 50 C.F.R. § 635.27(a)(4)(v)(B).

<sup>8</sup> See 50 C.F.R. § 635.4(d)(5).

<sup>9</sup> See Letter from Margo Schulze-Haugen, Chief, Highly Migratory Species Management Division, Office of Sustainable Fisheries, National Marine Fisheries Service, to Mr. Christopher Ingrande, dated July 7, 2016.

<sup>10</sup> *Id.* (citing 50 C.F.R. § 635.4(d)(5)).

<sup>11</sup> For example, in 2002 the two original stockholders in both North Queen Fishing, Inc. and Kathryn Ann Fishing, Inc. transferred all of their stock to five new stockholders.



irrespective of changes in its shareholders or membership, either in perpetuity or for a limited term of years.<sup>12</sup>

Because a corporation is a separate legal entity that exists in perpetuity, a change in some or all of its shareholders does not change its status as a separate legal entity. Hence in this case the grandfathered company remains grandfathered regardless of who owns the stock.

Where a different result is intended the regulatory language is explicit, unlike the language of the purse seine category regulations. For example, when Congress intends a change in shareholders to affect the qualification of a grandfathered vessel, Congress has said so directly as it did in the American Fisheries Act (“AFA”). The AFA increased the U.S. citizen ownership requirement for fishing industry vessels from a majority of stock to the current 75% stock ownership requirement. At the time of enactment of the AFA, Congress grandfathered certain vessels that did not meet the higher standard. Those particular vessels were allowed to continue to operate under their then current ownership structure, until such time after the effective date of the AFA “as more than 50 percent of the interest owned and controlled in the vessel changes....”<sup>13</sup> In the years since enactment of the AFA, stock ownership changes in those companies have in fact resulted in a loss of their grandfathered status.

There is no similar indication of regulatory intent to phase out the historical participation in the purse seine category of the Atlantic bluefin tuna fishery based on stock ownership changes of the historical participants. To the contrary, in 1983 NMFS stated it did not believe that “the purse seine fishery should be eliminated or severely restricted.”<sup>14</sup> Nor has NMFS previously treated a change in stockholders of the historical participants as having any effect on eligibility of those participants to receive an annual allocation of bluefin quota or to obtain a purse seine category fishing permit.

Finally, we understand from our prior discussions that each of the Companies could revise their structure from a Delaware corporation to a Delaware limited liability company (“LLC”) and still retain their grandfathered status and their eligibility to receive an annual allocation of bluefin quota and receive a purse seine category permit, provided that the LLC retains the same Federal Income Tax ID number as the current corporation.

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<sup>12</sup> See *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 37 (Del. Ch. 2013) (“A Delaware corporation, by default, has a perpetual existence.”); *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096, 1109 (Del. Ch. 2008) (“a fundamental tenet of corporate law [is] a corporation has a continuity of existence regardless of its component members.”) see also 8 Del. C. §§ 102(b)(5), 106, 122(1).

<sup>13</sup> Section 203(g) of the American Fisheries Act, Public Law 105-277 (Division C, Title II, Subtitle I)(October 21, 1998); 46 C.F.R. 356.51(a) (“The following vessels are exempt from the requirements of 46 U.S.C. 12102(c) as amended by the AFA until such time after October 1, 2001, as 50% of the interest owned and controlled in the vessel changes...”) (emphasis added).

<sup>14</sup> See 48 Fed. Reg. 27745, 27752 (June 17, 1983).



### 3. Request for Confirmation

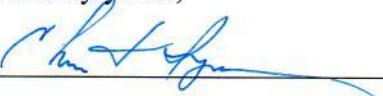
Based on the above discussion we are writing to request your confirmation of our understanding of the following:

- (a) That Diane Marie Fishery Inc., Katherine Ann Fishing Inc., and North Queen Fishing Inc. remain eligible to receive the historic allocation of bluefin quota for each company pursuant to 50 C.F.R. § 635.27(a)(4), notwithstanding the recent sale of the Vessels owned by each company;
- (b) That each of the three Companies are and will remain eligible to receive a valid purse seine category fishing permit upon the acquisition of a purse seine vessel and application for such permit to NMFS;
- (c) That the transfer of some or all of the stock of the three Companies to Blue Harvest Fisheries LLC, or any other stockholder, would not affect the eligibility of those Companies to receive their historic allocation of bluefin quota pursuant to 50 C.F.R. § 635.27(a)(4), or to receive a valid purse seine category fishing permit upon acquisition of a purse seine vessel and application for such permit to NMFS; and
- (d) That converting the three Companies from Delaware corporations to Delaware limited liability companies would not result in a loss of their grandfathered status as participants in the purse seine category or any change in their status that they currently enjoy as Delaware corporations under NMFS's HMS regulations as long as the LLC retains the same Federal Income Tax ID number as the corporation.

If you have questions or need additional information, please do not hesitate to contact either one of us directly, or Tim Hobbs (tim.hobbs@klgates.com) or Bill Myhre (bill.myhre@klgates.com), the counsel who participated in our recent discussions with you.

If, for any reason, you are unable to provide the requested confirmation, we also ask for the opportunity to talk with you again to discuss your concerns before issuing your written determination.

Sincerely yours,



---

Christopher Ingrande  
Diane Marie Fishery Inc.  
84 Front Street  
New Bedford, MA 02740  
chingrand@yahoo.com



---

Jeffrey W. Davis  
Blue Harvest Fisheries, LLC  
1152 Goodlette Road North  
Naples, FL 34102  
jeff.davis@BHFisheries.com

cc: Megan.Walline@noaa.gov  
Sarah.McLaughlin@noaa.gov

---

**From:** Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>  
**Sent:** Thursday, March 9, 2017 4:13 PM  
**To:** Mark Graff - NOAA Federal  
**Subject:** Re: OMB Litigation Consult  
**Attachments:** Generic tasker consultation.docx

Hi Mark - We also received the consult through FO. Please complete the attached tasker, so I can upload it to the FO request file.

Thanks!

Lola

On Thu, Mar 9, 2017 at 4:00 PM, Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)> wrote:

I had the same question, actually--(b)(5)

[REDACTED]

[REDACTED] Thanks John.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
[\(301\) 628-5658](tel:3016285658) (O)  
(b)(6) (C)

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On Thu, Mar 9, 2017 at 3:56 PM, John Almeida - NOAA Federal <[john.almeida@noaa.gov](mailto:john.almeida@noaa.gov)> wrote:

(b)(5)  
[REDACTED] ?

On Thu, Mar 9, 2017 at 3:42 PM, Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)> wrote:

Hi John/Rob,

(b)(5)  
[REDACTED]



(b)(5)

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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--

Lola Stith  
Contractor - The Ambit Group, LLC  
NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6)  
[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)



**U.S. DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
Office of the Chief Information Officer  
High Performance Computing and Communications

March 9, 2017

Ch

MEMORANDUM FOR: Mark Graff – NOAA FOIA Officer C  
FROM: Lola Stith  
NOAA FOIA Office  
SUBJECT: FOIA Request No. DOC-NOAA-2017-000758

In processing a Freedom of Information Act (FOIA) request responsive records were located which is either of interest to the National Oceanic and Atmospheric Administration or originated here. Please review the document(s) and provide your disclosure determination, redacting the information to be withheld on one set of the document with the exemption noted and uploading the un-redacted document and redacted versions into FOIAonline.

**THIS RESPONSE MUST BE SIGNED BY A SENIOR OFFICIAL IN YOUR OFFICE.**

Please sign this sheet of paper and check **all** of the appropriate boxes.

- My office reviewed the subject document(s) and agree with the suggested withholding(s).
- My office reviewed the subject document(s) and it/they can be released in entirety.
- My office noted the exemption(s) and we have found reason to partially withhold.
- My office noted the exemption(s) and we have found reason to withhold entirely.
- A foreseeable harm review and analysis was not applicable.
- A foreseeable harm review and analysis has been completed for all withheld documents and portions of documents and it has been determined that disclosure of the withheld materials would result in harm to an interest protected by the asserted exemption or that disclosure is prohibited by law. If Foreseeable Harm checklist is not provided in FOIAonline, provide the name of the person who completed the foreseeable harm review and analysis

Check **all** exemptions that apply:

- (b)(2) Agency Personnel Rules/Practices
- (b)(3) Federal Law Prohibits Disclosure
- (b)(4) Business Trade and Financial Information
- (b)(5) Attorney Work Product/Attorney-Client Privilege/Deliberative Process
- (b)(6) Personal Privacy Protection
- (b)(7) Law Enforcement Purposes

Final response

Signature (Senior Official)

3/9/17  
Date



---

**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Thursday, March 9, 2017 4:28 PM  
**To:** Lola Stith - NOAA Affiliate  
**Subject:** Re: OMB Litigation Consult  
**Attachments:** Generic tasker consultation mhg.pdf

Done--here it is filled in and signed.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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On Thu, Mar 9, 2017 at 4:13 PM, Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov> wrote:  
Hi Mark - We also received the consult through FO. Please complete the attached tasker, so I can upload it to the FO request file.

Thanks!

Lola

On Thu, Mar 9, 2017 at 4:00 PM, Mark Graff - NOAA Federal <mark.graff@noaa.gov> wrote:

(b)(5)  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

[Redacted] Thanks John.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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On Thu, Mar 9, 2017 at 3:56 PM, John Almeida - NOAA Federal <[john.almeida@noaa.gov](mailto:john.almeida@noaa.gov)> wrote:

(b)(5) [Redacted]  
[Redacted] ?

On Thu, Mar 9, 2017 at 3:42 PM, Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)> wrote:

Hi John/Rob,

(b)(5) [Redacted]  
[Redacted]

[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

[Redacted]  
[Redacted]  
[Redacted]

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
[\(301\) 628-5658](tel:3016285658) (O)  
(b)(6) [Redacted] (C)

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--  
Lola Stith  
Contractor - The Ambit Group, LLC  
NOAA Office of the Chief Information Officer (OCIO)  
(c (b)(6) [Redacted])  
[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)



**U.S. DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
Office of the Chief Information Officer  
High Performance Computing and Communications

March 9, 2017

MEMORANDUM FOR: Mark Graff – NOAA FOIA Officer  
FROM: Lola Stith  
NOAA FOIA Office  
SUBJECT: FOIA Request No. DOC-NOAA-2017-000758

In processing a Freedom of Information Act (FOIA) request responsive records were located which is either of interest to the National Oceanic and Atmospheric Administration or originated here. Please review the document(s) and provide your disclosure determination, redacting the information to be withheld on one set of the document with the exemption noted and uploading the un-redacted document and redacted versions into FOIAonline.

THIS RESPONSE MUST BE SIGNED BY A SENIOR OFFICIAL IN YOUR OFFICE.

Please sign this sheet of paper and check **all** of the appropriate boxes.

- My office reviewed the subject document(s) and agree with the suggested withholding(s).  
 My office reviewed the subject document(s) and it/they can be released in entirety.  
 My office noted the exemption(s) and we have found reason to partially withhold.  
 My office noted the exemption(s) and we have found reason to withhold entirely.  
 A foreseeable harm review and analysis was not applicable.  
 A foreseeable harm review and analysis has been completed for all withheld documents and portions of documents and it has been determined that disclosure of the withheld materials would result in harm to an interest protected by the asserted exemption or that disclosure is prohibited by law. If Foreseeable Harm checklist is not provided in FOIAonline, provide the name of the person who completed the foreseeable harm review and analysis

Check **all** exemptions that apply:

- (b)(2) Agency Personnel Rules/Practices  
 (b)(3) Federal Law Prohibits Disclosure  
 (b)(4) Business Trade and Financial Information  
 (b)(5) Attorney Work Product/Attorney-Client Privilege/Deliberative Process  
 (b)(6) Personal Privacy Protection  
 (b)(7) Law Enforcement Purposes

Final response

**GRAFF.MARK.HY**  
**RUM.1514447892**  
Digitally signed by  
GRAFF.MARK.HYRUM.1514447892  
DN: c US, o U.S. Government,  
ou DoD, ou PKI, ou OTHER,  
cn GRAFF.MARK.HYRUM.1514447892  
Date: 2017.03.09 16:21:44 -05'00'

Signature (Senior Official)

3/9/17  
Date

---

**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Thursday, March 9, 2017 4:50 PM  
**To:** Lola Stith - NOAA Affiliate  
**Subject:** Fwd: FW: DOC-OS-2017-000578  
**Attachments:** 2017-000578 Input Memo HR Bureaus mhg.pdf

Hey Lola--

Here is the signed Dep't tasker on this one as well, since I know this one would be next.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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**From:** Karen Robin - NOAA Federal <[karen.robin@noaa.gov](mailto:karen.robin@noaa.gov)>  
**Date:** Thu, Mar 9, 2017 at 4:04 PM  
**Subject:** RE: FW: DOC-OS-2017-000578  
**To:** Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)>, Lola Stith - NOAA Affiliate <[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)>

WFMO has no responsive records.

—

**Karen Robin, writer-editor**  
NOAA Workforce Management Office  
Silver Spring, MD • [\(301\) 713-6361](tel:3017136361)

**From:** Mark Graff - NOAA Federal [mailto:[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)]  
**Sent:** Thursday, March 09, 2017 8:01 AM  
**To:** Karen Robin - NOAA Federal; Lola Stith - NOAA Affiliate  
**Subject:** Fwd: FW: DOC-OS-2017-000578

Hi Guys--

Where are we at on this one? Any idea on the date of estimated completion?

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:3016285658) (O)

(b)(6) (C)

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From: **Boyd, Harriette (Federal)** <[hBoyd1@doc.gov](mailto:hBoyd1@doc.gov)>

Date: Thu, Mar 9, 2017 at 7:54 AM

Subject: FW: DOC-OS-2017-000578

To: "Graff, Mark (Federal)" <[Mark.Graff@noaa.gov](mailto:Mark.Graff@noaa.gov)>

Cc: "Stith, Lola (Contractor)" <[Lola.M.Stith@noaa.gov](mailto:Lola.M.Stith@noaa.gov)>, "Toland, Michael (Federal)" <[MToland@doc.gov](mailto:MToland@doc.gov)>

Dear Mark,

Please submit the requested documents or provide a tentative completion date for this assigned task - DOC-OS-2017-000578. Thank-you.

*Harriette Boyd*

*Freedom of Information Act Specialist*

*U.S. Department of Commerce*

*Office of Privacy and Open Government*



Office: [\(202\) 482-1485](tel:(202)482-1485)

Email: [hboyd1@doc.gov](mailto:hboyd1@doc.gov)

---

**From:** Boyd, Harriette (Federal)  
**Sent:** Wednesday, March 08, 2017 7:38 AM  
**To:** Graff, Mark (Federal) ([Mark.Graff@noaa.gov](mailto:Mark.Graff@noaa.gov)) <[Mark.Graff@noaa.gov](mailto:Mark.Graff@noaa.gov)>; Robinson, Anesia (Federal) <[ARobinson@doc.gov](mailto:ARobinson@doc.gov)>  
**Cc:** Toland, Michael (Federal) <[MToland@doc.gov](mailto:MToland@doc.gov)>  
**Subject:** DOC-OS-2017-000578

Good Morning, the requester has requested a status report of their FOIA request. The Department sent tasks on 2/22/17 for responsive documents, the due date is March 8, 2017. Please submit the requested responsive documents, or a tentative completion date for this assigned task.

Thank-you. Harriette

*Harriette Boyd*

*Freedom of Information Act Specialist*

*U.S. Department of Commerce*

*Office of Privacy and Open Government*

Office: [\(202\) 482-1485](tel:(202)482-1485)

Email: [hboyd1@doc.gov](mailto:hboyd1@doc.gov)



**UNITED STATES DEPARTMENT OF COMMERCE**  
**Chief Financial Officer and**  
**Assistant Secretary for Administration**  
Washington, D.C. 20230

February 17, 2017

MEMORANDUM FOR:      Vernon Curry, Census              Catherine Fletcher, NIST  
                                 Mark Graff, NOAA              Lauren Main, OIG  
                                 Ricou Heaton, PTO              Jennifer Piel, OIG  
                                 Anesia Robinson, OS/OHRM

FROM:                      Michael Toland, Ph.D  
                                 Acting, Departmental FOIA Officer  
                                 Office of Privacy and Open Government

SUBJECT:                      FOIA Request from Derek Kravitz    DOC-OS-2017-000578

I am forwarding a copy of the attached FOIA request for your immediate attention. Please conduct a search for responsive records.

**In order to be responsive to this request in a timely manner, we need all responsive documents by C.O.B. March 8, 2017. Separate the Tasker from the responsive documents when uploading to FOIAonline. Taskers should be uploaded in Case File/Correspondence/Other. Only the tasker signed by the FOIA Officer/Senior Official from the Bureau should be uploaded. Please do not upload Sub-Agency Taskers.**

Please identify whether you believe the document, or any portion of it, should be withheld from disclosure. You must include the FOIA exemption next to any information you identify as protected from disclosure. Link - List of Exemptions: <http://www.osec.doc.gov/omo/FOIA/exemptions.htm>.

- A clean copy and redacted copy shall be uploaded on FOIAonline.
- The Clean Copy will be uploaded with an UU (Unredacted    Unreleaseable) Publish Option.
- Redacted copy of responsive documents are to be uploaded in Case/Records and grouped by exemptions applied, i.e., RR (Redacted- Releasable) - (b)6, (b)5 (please include the privilege used).
- The format to be used for "Title" of uploaded documents: **ITA - 24 documents, RR, (b)4, (b)6.** (Bureau -not sub agency - number of documents - Publish Options    exemptions).
- For documents that are completely withheld UU-Unredacted    Unreleasable; and RU-Redacted- Unredacted, you must apply an Exemption in the Action Column.

- For referred documents use the following format for “Title:” **15 documents refer to NTIA.**

**The cut of date for the search is for the period January 20, 2017 and Present. You must begin the search immediately on this date. Documents created after this date are not responsive to the request. If the search is delayed for any reason, please notify me immediately, but no later than 24 hours from the date listed.**

THIS RESPONSE MUST BE SIGNED BY A SENIOR OFFICIAL IN YOUR OFFICE.

Please contact me if you have any questions about the scope of this request or the FOIA exemptions, 02-482-3842.

Please sign this sheet of paper and check all of the appropriate boxes

Uploaded in FOIAonline are all documents in the possession of my office which are responsive and can be released in entirety.

Uploaded in FOIAonline are all documents within the possession of my office which are responsive and we have found reason to partially withhold. **One clean copy and one redacted copy have been uploaded.**

Uploaded in FOIAonline are all documents within the possession of my office which are responsive and we have found reason to withhold entirely, each document to be withheld entirely has been noted.

Uploaded in FOIAonline are all documents within the possession of my office which are responsive and must be referred to the originating office, bureau, or federal agency for disclosure determinations.

My office has found no responsive documents.

All disclosure determinations have been made by the Commerce Office that originated or has control of the documents

A foreseeable harm review and analysis has been completed for all withheld documents and portions of documents and it has been determined that disclosure of the withheld material would result in harm to an interest protected by the asserted exemption or that disclosure is prohibited by law. Name of person most knowledgeable with the issue of foreseeable harm: \_\_\_\_\_ .

Interim response

Final response

**GRAFF.MARK.HYRUM.1514447892**  
Digitally signed by  
 GRAFF.MARK.HYRUM.1514447892  
 DN: c US, o U.S. Government, ou DoD,  
 ou PKI, ou OTHER,  
 cn GRAFF.MARK.HYRUM.1514447892  
 Date: 2017.03.09 16:46:32 -05'00'

**Signature (Senior Official) Bureau**

\_\_\_\_\_  
**Date**

---

**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Thursday, March 9, 2017 5:20 PM  
**To:** Annie Thomson - NOAA Federal; Trenika Tapscott; Stephen Lipps - NOAA Federal; John Almeida - NOAA Federal; Holmes, Colin; Robert Moller - NOAA Federal; Scott Smullen - NOAA Federal; Jeff Dillen - NOAA Federal; Kristen Gustafson - NOAA Federal; Stephanie Altman - NOAA Federal; Jackie Rolleri - NOAA Federal; Kimberly Katzenbarger - NOAA FEDERAL; Mike Devany - NOAA Federal; Kelly Quickle - NOAA Federal; Kelly Turner - NOAA Federal; Zachary Goldstein - NOAA Federal; Althea Lee - NOAA Federal; Denise Hamilton - NOAA Federal; Elizabeth McLanahan - NOAA Federal; Gerard Fox - NOAA Federal; Jerome McNamara - NOAA Federal; Karen Robin - NOAA Federal; Lesa Jeanpierre - NOAA Federal; Nkolika Ndubisi - NOAA Federal; NMFS FOIA1 - NOAA Service Account; OMAO FOIA; Tejuana Michael - NOAA Federal; James Crocker - NOAA Federal; Beverly Hernandez - NOAA Affiliate; Mary Ann Whitmeyer - NOAA Federal; Louise Milkman - NOAA Federal; Shem Yusuf - NOAA Federal; NOAA Assistant CIOs; Gregory Raymond - NOAA Federal; Kathryn Kempton - NOAA Federal; James LeDuc - NOAA Federal; Velna Bullock - NOAA Federal; Lanetta Gray - NOAA Federal; Corinne Brown - NOAA Federal; Lisa Love - NOAA Federal; Karla Burch-White - NOAA Affiliate; Maria Williams - NOAA Federal; Douglas Perry - NOAA Federal; Bruce Gibbs - NOAA Federal; Roxie Allison-Holman - NOAA Federal; Lindsey Averill - NOAA Affiliate; Steven Goodman - NOAA Federal; Benjamin Friedman - NOAA Federal; Cc: OCIO/OPPA  
**Cc:** Mark Graff - NOAA Federal; Dennis Morgan - NOAA Federal; Robert Swisher - NOAA Federal; Lola Stith - NOAA Affiliate; Rodney Vieira - NOAA Federal; Jolie Harrison - NOAA Federal; Bogomolny, Michael (Federal)  
**Subject:** February 2017 Monthly FOIA Report  
**Attachments:** CoA v NOAA - Dismissal.pdf; CREW - stip of dismissal.pdf; CREW FAL no Records Response mhg.pdf; FOIA Monthly Status Report 02-28-2017.pdf; FOIA Monthly Status Report 02-28-2017.xlsx; OCE v. NMFS Court Order re Fees.pdf

Good Afternoon,

The February 2017 Monthly FOIA Report is attached.

A few highlights from the report include:

- Year over year metrics show a clear processing shift toward consistent increased productivity and steady-state program metrics. As an example, in February 2017, NOAA brought its backlog down to just 64 requests, compared with 71 in February 2016, 133 in February 2015, and 173 in February 2014. What is more, the backlog has stayed within 30 requests of this current low figure of 64 for over 18 months now. However, we are concerned in the shift in the subject matter and complexity of non-NMFS FOIA requests. Several other Line Offices, such as NESDIS and NOS, are experiencing difficulty in processing the broad, complex FOIA requests covering topics such as climate change and PCBs in the Hudson River respectively. If this trend persists, the backlog will increase significantly, as FOIA staffing and processing tools are not concentrated in those historically low-FOIA Line Offices.
- NMFS has been largely influential in the reduction of the overall NOAA FOIA backlog, despite NMFS still currently receiving more than double the FOIA requests of any other Line Office. By comparison, at the beginning of September, 2015, NMFS had 82 open FOIA requests. At the

beginning of February, that figure was only 16, representing an 80% reduction. NMFS has set the standard in processing consistency and closure times, and has been at the forefront of many recent NOAA accomplishments reported in the draft DOC Chief FOIA Officer's Report which will be submitted to the Attorney General.

Yesterday in the *CREW v. DOC* litigation, the Plaintiff filed a joint Stipulated Dismissal of their FOIA lawsuit (attached). Their original request sought questionnaires sent from the President Trump Transition Team. On Monday, NOAA FOIA outlined in a letter the parameters of our adequate search, which nonetheless failed to yield any responsive records (attached). The Plaintiff indicated to the Attorney for DOJ/Federal Programs the day after our letter that they were willing to dismiss the case. We appreciate the tremendous support from NOAA/GC, as well as DOC/GC. Michael Bogomolny at DOC/GC in particular was a significant advocate for NOAA in marshaling this case to conclusion through DOJ.

In the *Cause of Action v. NOAA* FOIA litigation, following NOAA's response to the Plaintiff's informal challenge to our search adequacy, the Plaintiff agreed to dismiss their case with prejudice, without fees, and the lawsuit was dismissed on February 22, 2017 (attached). That original request sought records about the appointment of New England Fishery Management Council members.

In the *Our Children's Earth v. NMFS* FOIA litigation, the Court granted the Plaintiff's request for Attorneys' fees in part (attached). However, the Court rejected the Plaintiff's valuation of their fees, which was over \$700,000, and asked the parties to submit a Joint Supplemental Brief and Proposed Order on the amount of fees owed to the Plaintiff. The original request in that case sought records regarding NMFS' regulatory oversight of Stanford University's activities' impact on steelhead trout.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____ )	
CAUSE OF ACTION INSTITUTE, )	
)	
Plaintiff, )	
)	
v. )	Civil Action No. 16-cv-2178 (EGS)
)	
NATIONAL OCEANIC AND ATMOSPHERIC )	
ADMINISTRATION, )	
)	
Defendant. )	
_____ )	

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), Plaintiff Cause of Action Institute and Defendant National Oceanic and Atmospheric Administration stipulate and agree to dismissal of this action, which pertains to FOIA request DOC-NOAA-2016-001453, with prejudice. Each party will bear its own costs, attorney fees, and expenses.

Date: February 22, 2017

Respectfully submitted,

/s/ Ryan P. Mulvey

Ryan P. Mulvey  
D.C. Bar No. 1024362  
Eric R. Bolinder  
D.C. Bar No. 1028335

CHANNING D. PHILLIPS  
D.C. Bar # 415793  
U.S. Attorney for the District of Columbia

DANIEL VAN HORN  
D.C. Bar # 924092  
Chief, Civil Division

CAUSE OF ACTION INSTITUTE  
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Washington, D.C. 20006  
Telephone: (202) 499-4232  
Facsimile: (202) 330-5842  
ryan.mulvey@causeofaction.org  
eric.bolinder@causeofaction.org

/s/ Wyneva Johnson

WYNEVA JOHNSON  
D.C. Bar # 278515  
Assistant United States Attorney  
555 4th Street, N.W.  
Washington, D.C. 20530  
Telephone: (202) 252-2518  
E-mail: Wyneva.Johnson@usdoj.gov

*Counsel for Plaintiff*

*Counsel for Defendant*

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND	)
ETHICS IN WASHINGTON,	)
	)
Plaintiff,	)
	)
v.	)
	)
U.S. DEPARTMENT OF COMMERCE,	)
	)
Defendant.	)
	)

Civil No. 1:17-cv-00135 (APM)

**JOINT STIPULATION OF DISMISSAL**

IT IS HEREBY STIPULATED AND AGREED by and between the parties, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), that the above-captioned action shall be dismissed with prejudice, each party to bear its own attorney fees and costs.

March 8, 2017

Respectfully submitted,

/s/ Anne L. Weismann  
(D.C. Bar No. 298190)  
Stuart C. McPhail  
(D.C. Bar No. 1032529)  
Citizens for Responsibility and  
Ethics in Washington  
455 Massachusetts Ave., N.W.  
6th Floor  
Washington, D.C. 20001  
Phone: (202) 408-5565  
Fax: (202) 588-5020  
[aweismann@citizensforethics.org](mailto:aweismann@citizensforethics.org)

Attorneys for Plaintiff

CHAD A. READLER  
Acting Assistant Attorney General, Civil Division

MARCIA BERMAN  
Assistant Director, Federal Programs Branch

/s/ Dena M. Roth  
Dena M. Roth (D.C Bar No. 1001184)  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave., N.W., Room 7107  
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Fax: (202) 616-8470  
Email: [Dena.m.roth@usdoj.gov](mailto:Dena.m.roth@usdoj.gov)

Attorneys for Defendant



**U.S. DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
Office of the Chief Information Officer  
High Performance Computing and Communications

*Via FOIAonline*

March 6, 2017

Adam J. Rappaport  
Citizens for Responsibility and Ethics in Washington  
455 Massachusetts Ave., NW 6<sup>th</sup> Floor  
Washington, DC 20001

Re: FOIA Request DOC-NOAA-2017-000331

Dear Mr. Rappaport:

This letter is in response to your Freedom of Information Act (FOIA) request which was received by our office on December 16, 2016, in which you requested:

(C)opies of any questionnaires submitted to NOAA by any representative of President-elect Donald Trump's transition team, including representatives of Trump for America, Inc., and the Office of the President-Elect and the Office of the Vice President-Elect..

On February 6, 2017, a search was conducted by the NOAA Acting Chief of Staff, who leads the NOAA Landing Team within the Office of the Undersecretary. The search included an electronic search of the email inbox and outbox of the Acting Chief of Staff using the connective search terms "Trump" & "Questionnaire" as well as "Transition" & "Questionnaire". This search did not locate any responsive records. This search was reasonably calculated to uncover relevant documents as any questionnaires submitted from President Trump's transition teams would have been received by the NOAA Acting Chief of Staff who leads the NOAA landing team.

Additionally, on February 6, 2017, a search was conducted by the undersigned NOAA FOIA Officer, within the Office of the Chief Information Officer. The search included an electronic search of the FOIA Officer's email inbox and outbox using the connective search terms "Trump" & "Questionnaire" as well as "Transition" & "Questionnaire". The search did not locate any responsive records. This search was reasonably calculated to uncover relevant documents as the NOAA FOIA Officer would have had oversight of any prior FOIA requests to NOAA where searches had located, or requesters had similarly sought, questionnaires submitted from President Trump's transition team.



Lastly, on Friday, February 10, 2017, a search was conducted by Diane Marston, who served as an administrative liaison between the Department of Commerce and members of the President-elect's transition team within the Office of the Deputy Assistant Secretary for Administration. The search included an electronic search of Ms. Marston's email inbox and outbox using the connective search terms "Trump" & "Questionnaire" as well as "Transition" & "Questionnaire". The search did not locate any responsive records. This search was reasonably calculated to uncover responsive records as any records submitted by the President-elect's transition team to the Department of Commerce would have been transmitted through, or been in the possession of, the Department administrative liaison for the transition team.

No additional locations exist where responsive records would be likely to be found that would not have been located by the searches already conducted.

If you have questions regarding this correspondence please contact Mark Graff at [mark.graff@noaa.gov](mailto:mark.graff@noaa.gov), or by phone at (301) 628-5658, or the NOAA FOIA Public Liaison Robert Swisher at (301) 628-5755.

Sincerely,

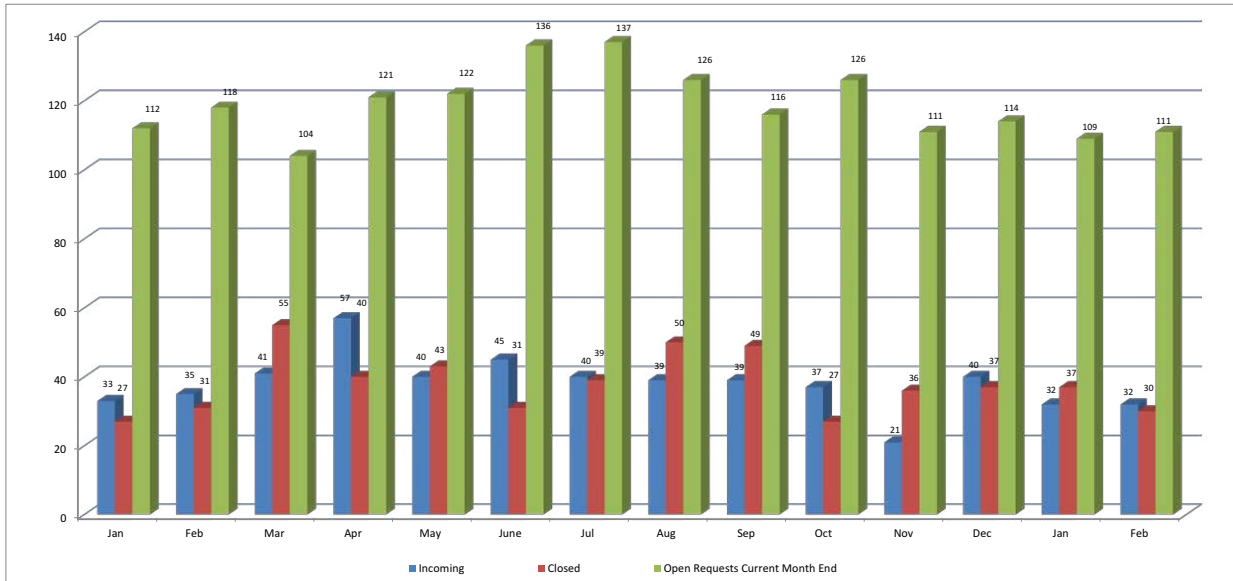
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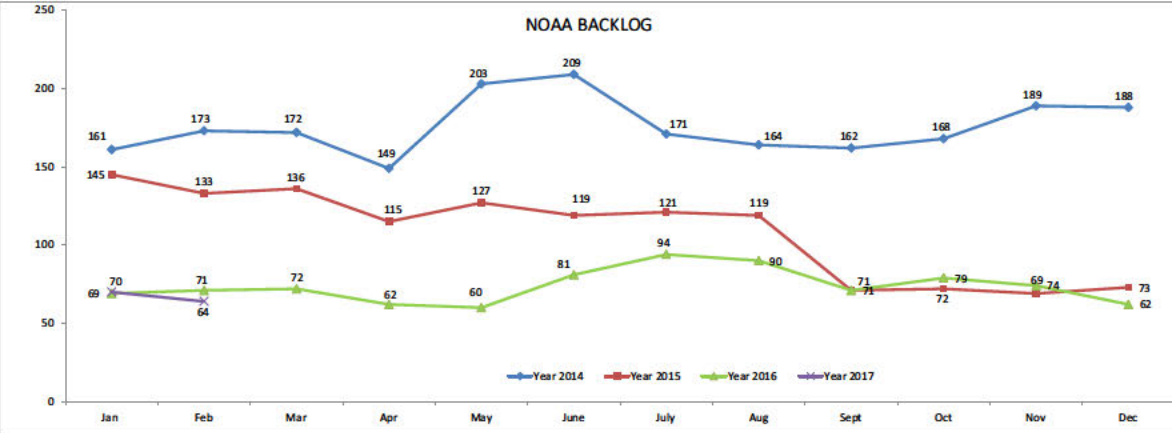
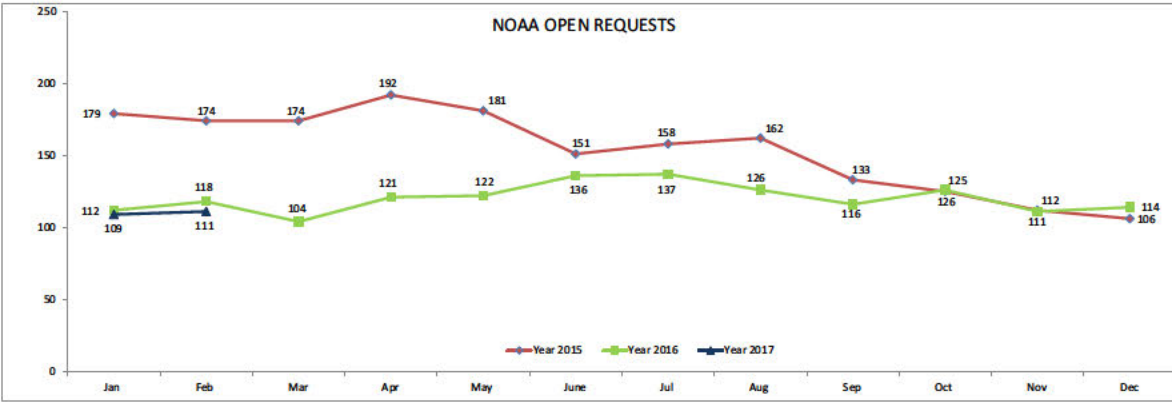
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Mark H. Graff  
FOIA Officer  
National Oceanic and Atmospheric Administration

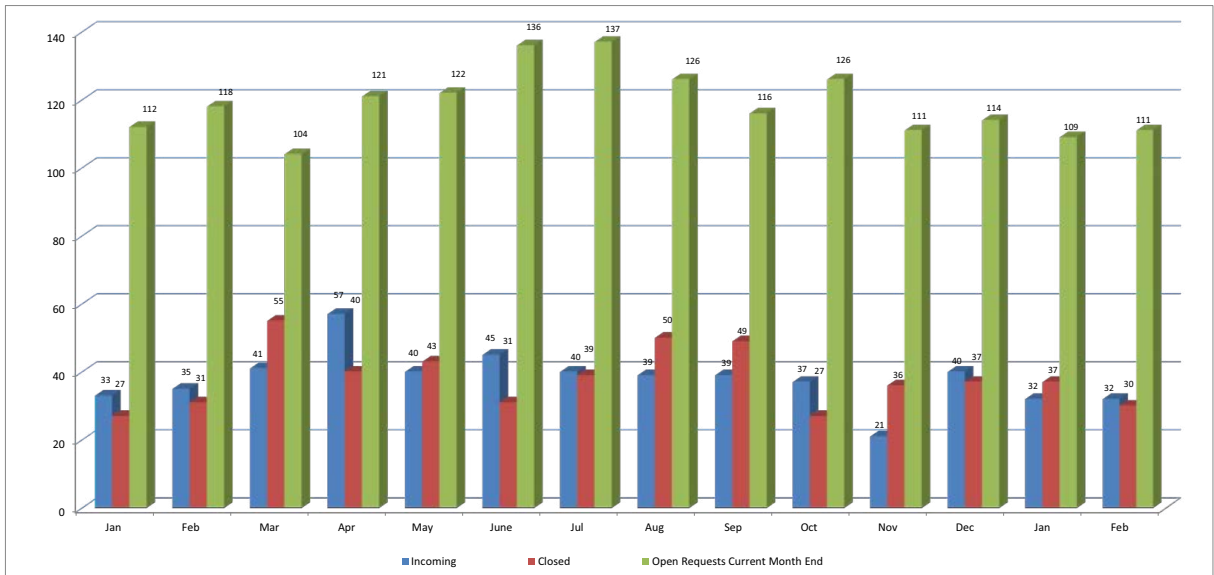
FOIA Monthly Status Report 02 28 2017

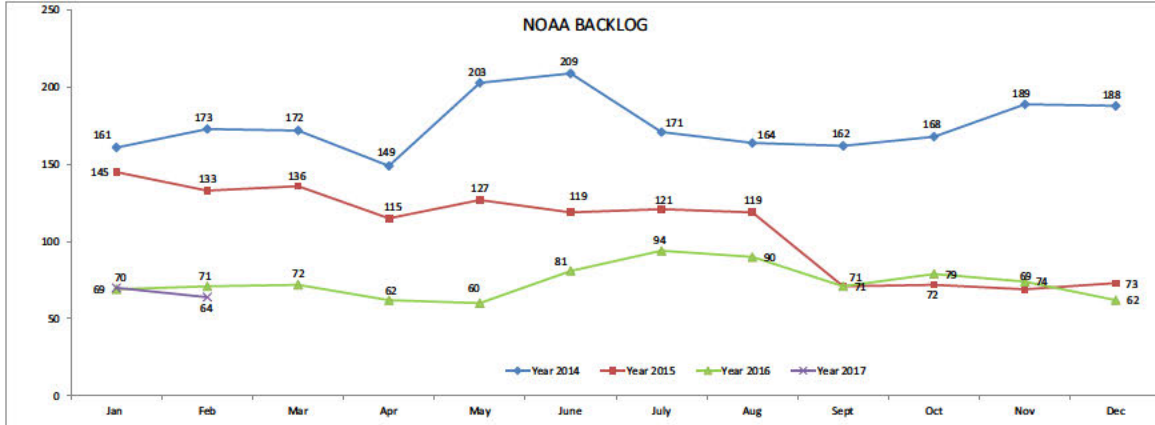
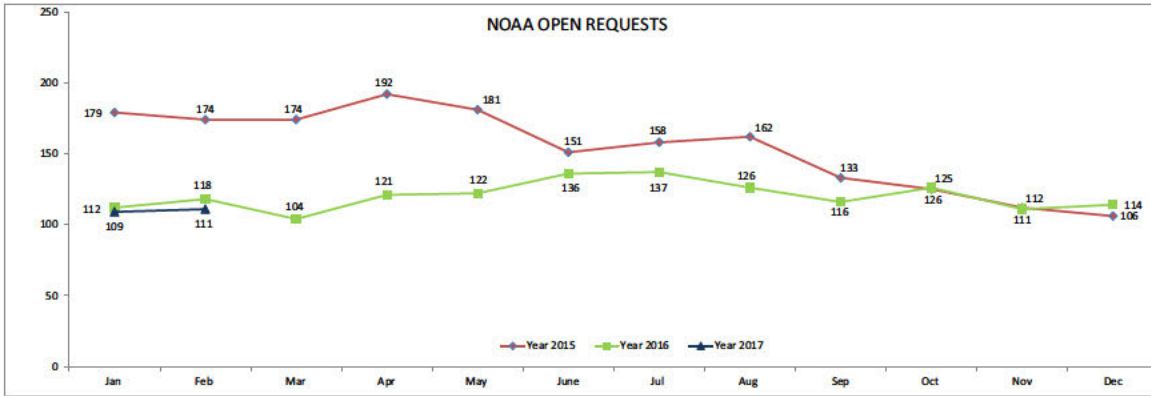
Organization	Open Requests Previous Month End	Incoming Requests	Closed Requests	Open Requests Current Month End	Backlog 21-120 days	Backlog 121-364 days	Backlog 365 or more days	Total Backlog
AGO	7	1	3	5	4	3	1	8
CAO	0	0	0	0	0	0	0	0
CFO	0	0	0	0	0	0	0	0
CIO	1	1	0	2	0	0	0	0
CIO/FOIA	24	3	0	27	5	0	0	5
GC	3	0	0	3	0	0	0	0
IA	0	0	0	0	0	0	0	0
LA	2	0	0	2	3	0	0	3
NESDIS	14	4	0	18	1	2	0	3
NMFS	16	12	20	8	11	13	2	26
NOS	21	6	5	22	8	1	1	10
NWS	10	3	1	12	4	1	0	5
OAR	3	0	0	3	1	0	0	1
OMAO	0	0	0	0	0	0	0	0
OC	0	0	0	0	0	0	0	0
PPI	0	0	0	0	0	0	0	0
USAO	2	1	0	3	1	0	0	1
WFMO	6	1	1	6	1	1	0	2
<b>NOAA Totals</b>	<b>109</b>	<b>32</b>	<b>30</b>	<b>111</b>	<b>39</b>	<b>21</b>	<b>4</b>	<b>64</b>





Organization	Open Requests Previous Month End	Incoming Requests	Closed Requests	Open Requests Current Month End	Backlog 21-120 days	Backlog 121-364 days	Backlog 365 or more days	Total Backlog
AGO	7	1	3	5	4	3	1	8
CAO	0	0	0	0	0	0	0	0
CFO	0	0	0	0	0	0	0	0
CIO	1	1	0	2	0	0	0	0
CIO/FOIA	24	3	0	27	5	0	0	5
GC	3	0	0	3	0	0	0	0
IA	0	0	0	0	0	0	0	0
LA	2	0	0	2	3	0	0	3
NESDIS	14	4	0	18	1	2	0	3
NMFS	16	12	20	8	11	13	2	26
NOS	21	6	5	22	8	1	1	10
NWS	10	3	1	12	4	1	0	5
OAR	3	0	0	3	1	0	0	1
OMAO	0	0	0	0	0	0	0	0
OC	0	0	0	0	0	0	0	0
PPI	0	0	0	0	0	0	0	0
USAO	2	1	0	3	1	0	0	1
WFMO	6	1	1	6	1	1	0	2
<b>NOAA Totals</b>	<b>109</b>	<b>32</b>	<b>30</b>	<b>111</b>	<b>39</b>	<b>21</b>	<b>4</b>	<b>64</b>





United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OUR CHILDREN’S EARTH  
FOUNDATION, et al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES  
SERVICE, et al.,

Defendants.

Case No. [14-cv-01130-WHO](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION FOR  
ATTORNEY’S FEES**

Re: Dkt. No. 82

Plaintiffs seek an award of \$723,202.74 in attorney’s fees and \$3,190.39 in costs for succeeding in part on their consolidated lawsuits filed under the Freedom of Information Act (FOIA) against the federal agency defendants. Dkt. 94. I conclude that plaintiffs are eligible and entitled to an award of attorney’s fees, but at a significantly reduced amount in light of requested hourly rates that are not adequately supported and unnecessary or excessive time billed.

**BACKGROUND**

Plaintiffs Our Children’s Earth Foundation and Ecological Rights Foundation are Bay Area non-profits dedicated to protecting the environment.<sup>1</sup> Plaintiffs sent a series of nine FOIA requests to National Marine Fisheries Service (NMFS) starting in May 2013. The requests concerned NMFS’s oversight of activities by Stanford University and the impact of those activities on the Central California Coast steelhead. Plaintiffs were concerned with Stanford University’s operation of Searsville Lake and Dam, which were built in 1892, and other related water diversions and infrastructure that Stanford uses to provide non-potable water for its campus. Plaintiffs believe that “Lake Water System” adversely affects the steelhead by reducing water

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<sup>1</sup> See Declaration of Annaliese Beaman (Dkt. No. 83) ¶ 2. Plaintiffs are referred to collectively as OCE.

1 flows in San Francisquito Creek and its tributaries and cutting the steelhead off from access to  
 2 upstream spawning habitat. *See* Judge Conti’s March 30, 2015 Order [Dkt. No. 59] at 3-4.  
 3 Plaintiffs attempted to enjoin Stanford’s activities in a separate lawsuit, *Our Children’s Earth*  
 4 *Foundation v. Stanford Univ.*, No. 13-cv-00402-JSW (N.D. Cal.).<sup>2</sup>

5 In response to what OCE contends were deficient responses to its first four FOIA requests,  
 6 plaintiffs filed their first lawsuit (*OCE I*) in April 2014. In that lawsuit, OCE challenged whether  
 7 NMFS’s responses to plaintiffs’ FOIA requests were adequate, whether NMFS had a pattern and  
 8 practice of tardy and incomplete responses, and whether FWS failed to meet its internal deadline  
 9 to respond to NMFS.<sup>3</sup> Plaintiffs filed their second lawsuit (*OCE II*) in September 2014, based on  
 10 the tardy or otherwise deficient responses to their second set of FOIA Requests (FOIA requests 5 -  
 11 8). In *OCE II* plaintiffs alleged that NMFS failed to adequately respond to their additional FOIA  
 12 requests, and reiterated their argument that NMFS had a pattern and practice of tardy and  
 13 incomplete responses to FOIA requests.<sup>4</sup> The lawsuits were related by Judge Conti.<sup>5</sup>

14 In *OCE I*, the parties moved for summary judgment. Plaintiffs argued that: (1) NMFS  
 15 failed to adequately describe its searches or conducted an inadequate search and withheld  
 16 documents without sufficient justification; (ii) they were entitled to a declaratory judgment that  
 17 NMFS violated FOIA’s deadlines in responding to their four requests and in three related internal  
 18 appeals, and FWS violated FOIA’s deadlines in responding to a referral of documents from  
 19 NMFS; and (iii) the alleged violations of the FOIA are a part of a pattern and practice of non-

20 \_\_\_\_\_  
 21 <sup>2</sup> The government contends that plaintiffs’ first FOIA request was filed “as discovery” for the  
 22 Stanford lawsuit. *Oppo*. 6.

23 <sup>3</sup> A second defendant in *OCE I*, Fisheries and Wildlife Service (FWS) was alleged to have failed  
 24 to respond to NMFS’s request that FWS review and release under the FOIA portions of FWS’s  
 25 documents that NMFS had in its possession.

26 <sup>4</sup> The Army Corps of Engineers (Corps) was also named as a defendant in *OCE II*, as having failed  
 27 to appropriately respond to plaintiffs’ FOIA requests.

28 <sup>5</sup> Plaintiffs filed a third lawsuit (*OCE III*) in June 2015, which was also related to 14-1130. In  
*OCE III*, plaintiffs asserted that NMFS had failed to provide a timely final decision in response to  
 OCE’s ninth FOIA request (from April 2015) regarding more “up-to-date information” on the  
 same subject matter. Judge Conti, on plaintiffs’ request and without opposition from NMFS,  
 dismissed *OCE III* as “prudentially moot.” October 2015 SJ Order at 17-18. Plaintiffs are not  
 seeking fees or costs related to that lawsuit. *Mot.* 4, n.1.

1 compliance with the FOIA's mandates, so the Court should enjoin NMFS and order it to comply  
2 with its FOIA obligations. March 30, 2015 Order at 6-7. The government opposed those  
3 arguments.

4 In an Order dated March 30, 2015 [Dkt. No. 59, Case No. 14-1130], Judge Conti: (i) ruled  
5 that NMFS failed to conduct adequate searches in response to OCE's first and third FOIA  
6 requests;<sup>6</sup> (ii) held in abeyance the determination as to whether NMFS adequately invoked FOIA  
7 Exemption (b)(6) to withhold names and contact information from responsive documents pending  
8 further supplementation of the factual record by NMFS (concerning the privacy concerns that  
9 would be implicated by release of that information); (iii) affirmed in part the withholding of some  
10 attorney-client documents, but concluded that NMFS had not met its burden to explain why  
11 certain portions of documents did not contain segregable and releasable information or why one  
12 specific document was withheld as attorney-client privileged and, therefore, held in abeyance the  
13 determination as to NMFS's withholding of those documents was appropriate; and (iv) granted  
14 plaintiffs' request for a declaratory judgment that NMFS failed to comply with the statutorily  
15 mandated response and appeal deadlines with respect to the four FOIA requests at issue. *Id.* at 8-  
16 26.<sup>7</sup> Judge Conti denied plaintiffs' motion and granted defendants' motion regarding  
17 withholdings, redactions, and timeliness. *Id.* at 28.<sup>8</sup>

18 NMFS then provided additional information to the Court concerning its withholdings and  
19 redactions, and plaintiffs submitted responses regarding the same.<sup>9</sup> In an Order dated July 20,

20 \_\_\_\_\_  
21 <sup>6</sup> Judge Conti granted plaintiffs' motion on the adequacy of the search as to the first and third  
22 FOIA requests, and granted defendants' motion as to the adequacy of the searches in response to  
23 the second and fourth requests. *Id.* at 12.

24 <sup>7</sup> Judge Conti, however, expressly did not reach the question of whether plaintiffs had proven that  
25 NMFS had a pattern and practice of untimely responses, because "[t]he pattern and practice and  
26 cutoff date allegations are repeated, with a fuller evidentiary record, in cross-motions for  
27 summary judgment pending in" *OCE II*, and the Judge intended to address them in a subsequent  
28 order. *Id.* at 22.

<sup>8</sup> Plaintiffs point out that in preparing its cross-motion for summary judgment in *OCE I*, NMFS  
uncovered two additional responsive documents and disclosed them in full. *See* Declaration of  
Gary Stern [Dkt. No. 41, 14-1130] ¶ 17.

<sup>9</sup> As part of its supplemental briefing, NMFS decided to release two previously withheld in full  
documents and to release three redacted documents that had previously been withheld in full. It



1 2015, Judge Conti addressed the issues remaining from *OCE I*, as well as the cross-motions filed  
 2 in *OCE II*. Judge Conti characterized the remaining arguments made by plaintiffs as: (i) NMFS  
 3 failed to adequately search for records responsive to two of its requests; (ii) NMFS improperly  
 4 withheld or overly redacted responsive records under two FOIA exemptions; (iii) NMFS was  
 5 defying Department of Commerce (of which NMFS is a part) regulations by cutting off their  
 6 search for responsive records at the date the FOIA request is received rather than the date the  
 7 search begins; and (iv) the request for a declaratory judgment that NMFS's and the Corps'  
 8 responses to plaintiffs' requests were untimely, and grant declaratory and injunctive relief to  
 9 remedy NMFS's alleged pattern and practice of FOIA violations. July 20, 2015 Order [Dkt. No.  
 10 70, Case No. 14-1130] at 3-4. NMFS and the Corps cross-moved for summary judgment, arguing  
 11 that their responses were adequate and declaratory and injunctive relief were unwarranted. *Id.* at  
 12 4.<sup>10</sup>

13 As to the substance of the adequacy of NMFS's responses, Judge Conti found that: (i)  
 14 NMFS had failed to provide sufficient information for the court to determine whether NMFS  
 15 conducted an adequate search, ordered NMFS to supplement the factual record, and held in  
 16 abeyance the issue of summary judgment on NMFS's search; (ii) NMFS had properly withheld  
 17 draft biological opinions under FOIA Exemption (b)(5), but did not adequately justify its  
 18 withholding or non-redaction of an email under (b)(5), and as such NMFS was required to  
 19 supplement the factual record to justify its withholding and non-redaction, and the court held in  
 20 abeyance summary judgment on the withholding of that document; and (iii) granted summary  
 21 judgment to NMFS withholding under FOIA Exemption (b)(7) of names in a report. *Id.* 5-17.

22 As to the issue of untimely responses and pattern and practice of delay and improper cutoff  
 23 dates, Judge Conti: (i) granted plaintiffs' request for declaratory relief that NMFS violated its  
 24 statutory duties with respect to the timeliness of its responses and appeals, but declined to enter

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25  
 26 also stated it was conducting a supplemental search for documents responsive to OCE's first and  
 27 third FOIA requests. Dkt. No. 60 at 4-5; *see also* Dkt. No. 59 at 19, 21.

28 <sup>10</sup> In its cross-motion pleadings in *OCE II*, NMFS decided "upon additional review" to release an  
 additional eleven documents in part and one in full. Dkt. No. 19 (14-4365) ¶ 28; Dkt. No. 18-1  
 (14-4365) ¶ 5.

1 declaratory relief against the Corps; (ii) determined that further facts were needed to address  
 2 plaintiffs' contention that NMFS was using an improper cutoff date when beginning its search for  
 3 documents and ordered supplemental briefing; and (iii) ordered plaintiffs to submit supplemental  
 4 briefing on the status of their pending FOIA requests as to the pattern and practice of delay claim.  
 5 *Id.* at 17-25. Finally, as to plaintiffs' request for injunctive relief, the Judge ordered NMFS "to  
 6 comply with FOIA and its deadlines, due to the Court's finding that the Fisheries Service has  
 7 failed to do so previously and the potential that these offenses might continue. Yet the Court,  
 8 having so ordered and having GRANTED declaratory relief, DENIES WITHOUT PREJUDICE  
 9 further injunctive relief at this time," in part because of "the fact that Plaintiffs appear to be  
 10 repeatedly making large requests in sufficiently rapid succession that the Fisheries Service is  
 11 unable to complete its response to one request before receiving a second" and recognizing  
 12 evidence of good faith and efforts on the part of NMFS to comply with its deadlines and  
 13 significantly improve its future performance. *Id.* at 26-27. The Court held in abeyance the  
 14 motions regarding NMFS's exemption claims, adequacy challenge, cutoff dates, and pattern and  
 15 practice allegations pending the supplementation of the record. *Id.* at 29-30.<sup>11</sup>

16 Following that round of supplementation, in an October 21, 2015 Order, Judge Conti  
 17 addressed the remaining issues and ruled that: (i) NMFS's declarants had addressed the concerns  
 18 over the adequacy of the search and granted NMFS summary judgment on that issue; (ii)  
 19 determined that one record had been appropriately withheld under (b)(5) based on a supplemental  
 20 *Vaughn* index and granted NMFS summary judgment on its withholdings under (b)(5); (iii) found  
 21 that NMFS cured its showing of non-segregability of withheld information based on its  
 22 supplemental *Vaughn* index, except as to one document,<sup>12</sup> and granted NMFS summary judgment  
 23 on segregability as to all documents except that one; and (iv) granted summary judgment to NMFS

24 \_\_\_\_\_  
 25 <sup>11</sup> As part of its supplemental briefing, NMFS decided to release a redacted document that had  
 26 been withheld in full. Dkt. No. 27 (14-4365) at 2. NMFS also explained its search cut-off policy  
 27 (which OCE contends was "new"), requiring that if one or more subject-matter expert are required  
 28 to search for documents, the date each expert starts his/her search establishes the cut-off date.  
 Dkt. No. 27-4 (14-4365), ¶18(b).

<sup>12</sup> The Court ordered NMFS to produce the document at issue, or explain further why it should be  
 withheld. October 21 2015 Order at 15. NMFS decided to produce the document.

1 based on additional information as to the cutoff dates used for searches. October 21, 2015 Order  
2 [Dkt. No 72, 14-1130] at 4-17.

3 As to the pattern and practice of delay claim, Judge Conti reviewed the evidence and found  
4 that NMFS was curing its processing and response problems and backlog, and therefore denied  
5 injunctive relief. However, in light of the “unmistakable history” of untimeliness and delay, Judge  
6 Conti granted declaratory relief to plaintiffs, concluding that: “(1) that the Fisheries Service has  
7 previously been engaged in a pattern-and-practice of failure to meet FOIA deadlines; (2) that the  
8 Fisheries Service has previously provided responses that were frequently and unreasonably  
9 delayed; (3) that due to these delays the Fisheries Service effectively provided no ability to FOIA  
10 requestors to anticipate when data might be provided; and (4) that due to these delays information  
11 was often provided after a long enough period of time that the data could be out-of-date,  
12 effectively negating its value and effectuating a complete denial of information.” *Id.* at 20-21. He  
13 also granted “limited” injunctive relief to plaintiffs, requiring NMFS to provide any outstanding  
14 production in response to certain of plaintiffs’ requests within 30 days. *Id.* at 21. Any further  
15 injunctive relief was denied without prejudice, but he required NMFS to show cause as to how it  
16 was curing its prior violations and intended to continue its response-time improvements going  
17 forward. *Id.* at 22.

18 After the case was reassigned to me in November 2015, I addressed whether any issues  
19 remained to be decided following Judge Conti’s October and November 2015 Orders as well as  
20 the supplemental briefing filed by the parties regarding NMFS’s efforts to cure its past timeliness  
21 violations and ensure those would not occur in the future. In an order dated January 20, 2016, I  
22 determined that Judge Conti had resolved all pending issues, and concluded that the evidence  
23 regarding NMFS’s substantial reduction of its FOIA-response backlog and the “technical,  
24 administrative, and staffing improvements” NMFS had implemented to ensure timely processing  
25 of FOIA requests on a forward-going basis meant that continuing injunctive relief was not  
26 warranted. January 20, 2016 Order [Dkt. No. 75]. A stipulated judgment was entered on February  
27 16, 2016. Plaintiffs now seek over \$700,000 in attorney’s fees for the hours they spent litigating  
28 *OCE I* and *OCE II*, as well as costs. Defendants oppose plaintiffs’ entitlement to any fees, and

1 challenge the reasonableness of the amount sought.

## 2 LEGAL STANDARD

3 FOIA authorizes courts to “assess against the United States reasonable attorney fees and  
4 other litigation costs reasonably incurred in any case under this section in which the complainant  
5 has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E). This provision “has as its fundamental  
6 purpose the facilitation of citizen access to the courts to vindicate the public’s statutory rights,” as  
7 the fees and costs of bringing suit could otherwise “present a virtually insurmountable barrier  
8 which [would] ba[r] the average person from forcing governmental compliance with the law.”  
9 *Exner v. F.B.I.*, 443 F. Supp. 1349, 1352 (S.D. Cal. 1978).

10 A court may grant an award of attorney’s fees under 5 U.S.C. § 552(a)(4)(E) where the  
11 plaintiff establishes that it is both eligible for and entitled to an award. *See Church of Scientology*  
12 *of California v. U.S. Postal Serv.*, 700 F.2d 486, 489 (9th Cir. 1983); *Rosenfeld v. U.S. Dep’t of*  
13 *Justice*, 903 F. Supp. 2d 859, 865 (N.D. Cal. 2012). To be eligible for an award, the plaintiff must  
14 show that “(1) the filing of the action could reasonably have been regarded as *necessary* to obtain  
15 the information; and (2) the filing of the action had a *substantial causative* effect on the delivery  
16 of the information.” *Church of Scientology*, 700 F.2d at 489 (emphasis in original).

17 If the court determines that the plaintiff is eligible for attorney’s fees, the court may then,  
18 “in the exercise of its discretion, determine that [it] is *entitled* to an award of attorney’s fees.” *Id.*  
19 at 492 (emphasis in original). In making this determination, courts consider “(1) the benefit to the  
20 public, if any, deriving from the case; (2) the commercial benefit to the complainant; (3) the nature  
21 of the complainant’s interest in the records sought; and (4) whether the government’s withholding  
22 of the records sought had a reasonable basis in law.” *Id.*; *accord Long v. U.S. I.R.S.*, 932 F.2d  
23 1309, 1313 (9th Cir. 1991). “These four criteria are not exhaustive, however, and the court may  
24 take into consideration whatever factors it deems relevant in determining whether an award of  
25 attorney’s fees is appropriate.” *Long*, 932 F.2d at 1313 (internal quotation marks omitted). Once  
26 eligibility is established, “[t]he decision to award attorney’s fees is left to the sound discretion of  
27 the trial court.” *Church of Scientology*, 700 F.2d at 492.

**DISCUSSION**

**I. WHETHER PLAINTIFFS SUBSTANTIALLY PREVAILED AND ARE ELIGIBLE FOR ATTORNEY'S FEES**

The government does not contest that plaintiffs substantially prevailed in *OCE I*, but argues that plaintiffs were not successful in *OCE II*, and therefore are not eligible for fees for that portion of the litigation. As noted above, in his July and October 2015 orders, Judge Conti addressed the claims asserted in *OCE II* (as well as issues asserted in *OCE I*). In the July Order, Judge Conti granted plaintiffs' request for a declaratory judgment that NMFS's responses to plaintiffs' FOIA requests 5-8 were untimely. July 2015 Order at 20-21. That by itself constitutes "success," albeit on a discrete issue. *See Hajro v. United States Citizenship & Immigration Servs.*, 900 F. Supp. 2d 1034, 1045 (N.D. Cal. 2012) (prevailing on summary judgment and obtaining injunctive relief on claim that defendant's responses were untimely constitutes substantial success), *reversed on other grounds by* 811 F.3d 1086, 1092 (9th Cir. 2016); *Or. Nat. Desert Ass'n v. Gutierrez*, 442 F. Supp. 2d 1096, 1098 (D. Or. 2006) (determination that agency failed to provide a timely response sufficient to create entitlement to fees), *aff'd in pertinent part, rev'd in part on other grounds by Or. Nat. Desert Ass'n v. Locke*, 572 F.3d 610 (9th Cir. 2009).

After initially finding that NMFS provided insufficient information in its declarations and *Vaughn* index to demonstrate the adequacy of some of its searches and withholdings, when NMFS provided supplemental briefing and declarations Judge Conti concluded that the searches were adequate and the withholdings justified (except as to one document under Exemption (b)(5), which NMFS decided to release). In addition, after receiving plaintiffs' summary judgment motion and while preparing its cross-motion pleadings in *OCE II*, NMFS decided "upon additional review" to release an additional eleven documents in part and one in full. Dkt. No. 19 (14-4365) ¶ 28; Dkt. No. 18-1 (14-4365) ¶ 5. Following the next round of supplemental briefing, NMFS decided to release in part yet another document that had been withheld. Dkt. No. 27 (14-4365) at 2. The evidentiary record supports plaintiffs' contention that these documents were produced as a result of *OCE II*.<sup>13</sup> Plaintiffs, therefore, prevailed, on another discrete portion of their litigation in

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<sup>13</sup> NMFS argues that its responses to Requests 5 through 8 were not produced as a result of the

1 securing these supplemental productions under a catalyst theory. *See, e.g., Dorsen v. United States*  
 2 *SEC*, 15 F. Supp. 3d 112, 120 (D.D.C. 2014) (plaintiff prevailed where FOIA suit prompted  
 3 additional or speedier release of documents); *Judicial Watch, Inc. v. United States DOJ*, 878 F.  
 4 Supp. 2d 225, 232 (D.D.C. 2012) (catalyst theory satisfied where after a final agency response and  
 5 commencement of lawsuit, additional documents were produced).

6 More importantly, in light of the “unmistakable history” of “unreasonable” untimeliness  
 7 and delay, Judge Conti granted plaintiffs’ request for a declaratory judgment that NMFS failed to  
 8 provide them with timely responses and had a past pattern and practice of untimely responses.  
 9 That judgment, along with the limited injunctive relief (requiring NMFS to respond to plaintiffs’  
 10 then-pending FOIA requests by a date certain), confers prevailing party status on plaintiffs as well.  
 11 The government in an attempt to avoid fees for *OCE II* argues that plaintiffs did not secure any  
 12 relief in *OCE II* beyond what they would have been entitled to given the claims asserted in *OCE I*.  
 13 *Oppo*. 7-8. However, Judge Conti specifically held the pattern and practice claim in abeyance in  
 14 *OCE I* to determine it on the more complete evidentiary record presented in *OCE II*. *OCE II*,  
 15 therefore, was a necessary part to the Court’s eventual determination.

16 Similarly, the fact that further, more wide-spread injunctive relief was not granted in  
 17 response to the allegations raised in both *OCE I* and *OCE II* in the October 2015 or January 2016  
 18 Orders was due to the strong showing NMFS made on the steps the agency had taken and was  
 19 continuing to take to extinguish its backlog and implement policies and practices to ensure timely  
 20 responses in the future. The government spends much time in its brief and declarations attempting  
 21 to show that the new policies and practices NMFS implemented in order to reduce the backlog  
 22 discussed by Judge Conti and myself in the October 2015 and January 2016 Orders were not  
 23 conceived in order to respond to, or spurred on by, plaintiffs’ litigation but were underway prior to  
 24 the filing of *OCE I* and *OCE II*. *See, e.g., Oppo*. 9-10. Plaintiffs counter that argument by citing  
 25 to notes and other documents produced by NMFS staff showing that efforts to reduce the backlog

26  
 27 litigation, and cites testimony showing that NMFS began work processing and responding to these  
 28 requests before the *OCE II* complaint was filed. *See Hornof Decl.* ¶ 7. NMFS also argues that the  
 three FOIA requests subject to Judge Conti’s limited order of injunctive relief, were also being  
 processed and responses “underway” before the October 21, 2015 Order. *Id.* ¶¶ 10-11.



1 were just being formulated in June 2015 and were implemented in part to avoid litigation, like the  
2 suits at issue which were the only ones pending at the relevant time. *See, e.g.*, Reply 3-4.

3 However, in order to determine that plaintiffs are eligible for an award of attorney's fees, I  
4 need not resolve this factual dispute. That plaintiffs secured additional documents from NMFS  
5 after *OCE II* was filed and after NMFS took a closer look at its searches and withholdings and,  
6 more importantly, secured another declaratory judgment recognizing that the agency failed to  
7 provide timely responses, had engaged in a pattern and practice of tardy responses, and secured  
8 limited injunctive relief as to then-pending but not sued upon FOIA requests, is success significant  
9 enough to establish plaintiffs' eligibility for fees.<sup>14</sup>

10 In sum, plaintiffs were the prevailing parties on significant portions of both *OCE I* and  
11 *OCE II* and are eligible for an award of attorney's fees and costs.<sup>15</sup> The next step is to determine  
12 if they are entitled to them.

## 13 **II. WHETHER PLAINTIFFS ARE ENTITLED TO ATTORNEY'S FEES**

14 The factors courts consider in determining whether a plaintiff is entitled to attorney's fees  
15 include "(1) the benefit to the public, if any, deriving from the case; (2) the commercial benefit to  
16 the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether  
17 the government's withholding of the records sought had a reasonable basis in law." *Church of*

18 \_\_\_\_\_  
19 <sup>14</sup> That said, the evidence on the whole indicates that NMFS took more concrete, specific, and  
20 immediate steps following Judge Conti's Orders to extinguish its backlog and commit additional  
21 resources to speeding up its response times than the agency might have taken but-for plaintiffs'  
22 suits.

23 <sup>15</sup> Plaintiffs repeatedly imply that they were successful on their improper cut-off date challenges,  
24 arguing that their lawsuits were the catalyst for NMFS's new cut-off date policy. Mot. at 8, 10.  
25 The improper cut-off date issue was raised but not decided by Judge Conti in his March 30 Order,  
26 because the issue was also raised but supported by a fuller factual record in the *OCE II* summary  
27 judgment briefing that was pending. In his July Order, Judge Conti determined that, at most, a  
28 factual dispute existed, and again held the issue in abeyance for supplemental responses. In his  
October Order, Judge Conti found that plaintiffs had not established that NMFS used improper  
cut-off dates, and instead granted summary judgment to NMFS on plaintiffs' improper search cut-  
off date claim as to plaintiffs' *own* FOIA requests. October Order at 17. Later in the October  
Order, Judge Conti recognized that the "NMFS West Coast Region appears to have an updated  
process in place, using modern software, additional personnel, and policy changes (e.g., how the  
cut-off date changes where there are multiple SMEs assigned) to speed up its process. *See* Supp.  
Malabanian Decl. ¶¶ 15-18." *Id.* at 18. Judge Conti, however, never reached the issue of whether  
these lawsuits were the catalyst for NMFS's new, updated, or clarified policy with respect to  
search cut-off dates.

1 *Scientology*, 700 F.2d at 489. I will discuss each in turn.

2 **A. Benefit to the Public**

3 In considering the public benefit factor, courts consider “the degree of dissemination and  
4 the likely public impact that might result from disclosure.” *Church of Scientology*, 700 F.2d at  
5 493. The factor generally weighs in favor of an award where the information is broadly  
6 disseminated to the public. *See, e.g., Electronic Frontier Foundation v. Office of Dir. of Nat.*  
7 *Intelligence*, No. 07-cv-05278-SI, 2008 WL 2331959, at \*3 (N.D. Cal. June 4, 2008) (finding that  
8 the public benefit factor was satisfied where the plaintiff “immediately posted the requested  
9 information on its website” and “created press releases for public access”). Even where the degree  
10 of dissemination is limited, or where the level of public interest in the requested information itself  
11 is minimal, the public benefit factor may still favor an award “as long as there is a public benefit  
12 from the fact of . . . disclosure.” *O’Neill, Lysaght & Sun v. D.E.A.*, 951 F. Supp. 1413, 1423 (C.D.  
13 Cal. 1996).

14 Courts in this circuit have found a public benefit favoring an award, despite an absence of  
15 broad dissemination or a significant level of public interest in the requested information, where (1)  
16 the case “establishe[d] that the government may not withhold certain information pursuant to a  
17 particular FOIA exemption,” *Church of Scientology*, 700 F.2d at 493; (2) the plaintiffs were  
18 environmental nonprofits whose purpose was “to oversee and enforce compliance with the [Clean  
19 Air Act]” and the requested information was “being used to inform [the plaintiffs’] ongoing  
20 oversight and enforcement efforts,” *The Sierra Club v. United States Env’tl. Prot. Agency*, 75 F.  
21 Supp. 3d 1125, 1143-44 (N.D. Cal. 2014); and (3) the requested documents revealed a “long  
22 history of abuse” by a paid DEA informant and “expos[ed] the implications of the government  
23 dealing with untrustworthy paid informants.” *O’Neill*, 951 F. Supp. at 1423-24.

24 Plaintiffs argue that just like the plaintiffs in *Sierra Club* they “utilized the documents  
25 to advance their efforts to promote compliance with environmental laws intended to broadly  
26 benefit the public interest environmental protection. Specifically, they utilized the documents to  
27 organize public support for measures designed to persuade Stanford and NMFS to do more to  
28 protect a threatened fish species and to develop ESA citizen suits claims aiming to help the



1 survival and recovery of this threatened species.” Beaman Decl. ¶¶ 6-8; Mot. 15. Plaintiffs also  
 2 disseminated the information they secured to their members, the press, and the public through  
 3 messages, website postings, press releases, and interviews. Beaman Decl. ¶¶ 6-8.

4 As NMFS points out, it is unclear what role in that public outreach (if any) the information  
 5 actually secured by OCE as a direct result of the filing of these lawsuits or Judge Conti’s Orders  
 6 played. Beaman’s declaration is not specific on that point. *See, e.g., Cotton v. Heyman*, 63 F.3d  
 7 1115, 1120 (when evaluating the public benefit prong, the court must “evaluate the specific  
 8 documents at issue in the case at hand”). NMFS does not argue (or show by declaration) that the  
 9 information produced to OCE after the inception of the suits or Judge Conti’s Orders issued was  
 10 so ministerial or obscure that it could not have supported plaintiffs’ public interest and public  
 11 disclosure goals. The Beaman declaration, while not specifically focused on documents produced  
 12 as a result of this litigation, persuasively explains how the documents OCE received through its  
 13 FOIA requests and its litigation play a significant role in OCE’s mission to inform the public  
 14 about the activities of Stanford and the Central California Coast steelhead. Dkt. Nos. 83, 96.

15 In addition, this lawsuit effectively and publicly disclosed NMFS’s history of untimely  
 16 responses and significant backlog as well as the steps NMFS was undertaking to cure those  
 17 issues. That shed important light about the agency’s non-compliance with its duty under FOIA, a  
 18 situation Judge Conti repeatedly referred to as “clear, undisputed, and troubling.” March 30, 2015  
 19 Order at 24; *see also* July 20, 2015 Order at 19 (“In short, even though the Fisheries Service does  
 20 not take the FOIA’s deadlines seriously, ‘[t]here can be no doubt that Congress [did]’”). Finally,  
 21 plaintiffs secured a significant, contested legal ruling from Judge Conti: that FOIA allows both  
 22 declaratory judgment and injunctive relief as remedies for untimely responses. NMFS vigorously  
 23 argued that the only available remedy for a violation under FOIA was an order requiring  
 24 production of withheld documents; a position that was soundly rejected by Judge Conti. March  
 25 30, 2015 Order at 24-26; July 20, 2015 Order at 19-21.

26 On this record, plaintiffs have shown that this litigation through the information released  
 27 and the legal principles established conferred a significant benefit on the public.  
 28

**B. Commercial Benefit to the Complainant/Nature of Plaintiffs' Interests**

The second and third factors are “the commercial benefit to the complainant” and “the nature of the complainant’s interest in the records sought.” *Church of Scientology*, 700 F.2d at 492. Courts regularly consider these factors together. *See, e.g., id.* at 494; *Am. Small Bus. League v. U.S. Small Bus. Admin.*, No. 08-cv-00829-MHP, 2009 WL 1011632, at \*3 (N.D. Cal. Apr. 15, 2009); *Electronic Frontier Foundation*, 2008 WL 2331959, at \*3.

As a general matter, if a “commercial benefit will inure to the plaintiff from the information,” or if the plaintiff “intends to protect a private interest” through the FOIA litigation, then “an award of attorney’s fees is not recoverable.” *Church of Scientology*, 700 F.2d at 494. On the other hand, where the plaintiff “is indigent or a nonprofit public interest group, an award of attorney’s fees furthers the FOIA policy of expanding access to government information.” *Id.* The Ninth Circuit has instructed that, pursuant to the second and third factors, a court “should generally award fees if the complainant’s interest in the information sought was scholarly or journalistic or public-oriented,” but should not do so “if his interest was of a frivolous or purely commercial nature.” *Long*, 932 F.2d at 1316.

Plaintiffs argue that their non-profit status combined with the lack of any private commercial interest in the information they secured, strongly favors an award under these factors. *See* Beaman Decl. ¶¶ 1, 6-8. The government counters that contrary to plaintiffs’ current assertion that their goal in *OCE I* and *OCE II* was to force NMFS to provide more timely and fulsome responses to their and others’ FOIA requests, the real purpose of these lawsuits was to force NMFS to produce documents that plaintiffs could and did use in their suit against Stanford University. Declaration of Robin M. Wall [Dkt. No. 92-1], Ex. L (“Stanford Summary Judgment Papers,” noting that some of the FOIA production was used on a motion to compel and on a motion for summary judgment in the Stanford case). That purpose, according to the government, is a private one that does not make plaintiffs entitled to fees. *Oppo.* 11-13.

The cases relied on by NMFS considered private litigants who used FOIA to secure evidence in support of their private lawsuits. *See Hersh & Hersh v. U.S. Dept. of Health and Human Services*, No. 06-04234-PJH, 2008 U.S. Dist. LEXIS 110977, at \*7 (N.D. Cal. July 9,

1 2008) (denying an award of attorney’s fees where “plaintiff undertook this FOIA request for  
2 decidedly commercial purposes” when plaintiff was litigating private lawsuit against a defendant  
3 regarding defective medical devices and plaintiff failed to secure disclosure of the “vast majority”  
4 of documents it sought); *Ellis v. United States*, 941 F. Supp. 1068, 1078 (D. Utah 1996) (denying  
5 fees where documents sought for assistance in private tort suit, because while documents produced  
6 under FOIA created “some slight public benefit in bringing the government into compliance with  
7 FOIA and providing information of general interest to the public, the disclosure of the records did  
8 not add to the fund of information necessary to make important political choices”).<sup>16</sup> They do not  
9 address the situation here, where non-profit environmental advocacy organizations bring suit  
10 under FOIA as part of their ongoing efforts to shed light on how an agency is (or is not) protecting  
11 the environment, albeit with respect to a specific project.

12 Moreover, while plaintiffs were undoubtedly motivated in some part to secure documents  
13 from NMFS in order to assist their litigation against Stanford, there was a significant and separate  
14 public benefit sought and secured by plaintiffs shedding light on the actions of NMFS (as  
15 opposed to the actions of Stanford) in carrying out its agency duties and on its handling of  
16 plaintiffs’ and others’ FOIA requests.<sup>17</sup>

17 These factors weigh in favor of plaintiffs’ entitlement to fees.  
18  
19

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20 <sup>16</sup> I recognize that the court in *Sierra Club v. United States EPA*, 75 F. Supp. 3d 1125, 1144 (N.D.  
21 Cal. 2014) rejected an agency’s argument that a non-profit environmental group plaintiff had a  
22 commercial interest in the FOIA litigation because they intended to bring environmental litigation,  
in part because “Plaintiffs were not pursuing a separate private lawsuit against Luminant at the  
time they initiated the FOIA request.” The court, therefore, did not directly reach the issue raised  
here.

23 <sup>17</sup> NMFS’s other cases are inapposite, as they do not address whether use of documents secured  
24 through FOIA in other litigation equals a “commercial” interest in the FOIA litigation, but stand  
25 for the proposition that having a personal interest in the records sought does not increase the  
26 access to those records under FOIA. See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143  
27 n.10 (1975) (“Sears’ rights under the Act are neither increased nor decreased by reason of the fact  
28 that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the  
average member of the public. The Act is fundamentally designed to inform the public about  
agency action and not to benefit private litigants.”); *Shannahan v. IRS*, 672 F.3d 1142, 1151 (9th  
Cir. 2012) (requestors’ interest in IRS documents about themselves to use in their civil tax suit  
does not negate applicability of FOIA exemptions preventing disclosure).

**C. Reasonable Basis in Law**

The fourth factor is “whether the government’s withholding had a reasonable basis in law”; in other words, whether the government’s actions appeared to have “a colorable basis in law” or instead appeared to be carried out “merely to avoid embarrassment or to frustrate the requester.” *Church of Scientology*, 700 F.2d at 492, 492 n.6; *see also Rosenfeld*, 903 F. Supp. 2d at 870; *Am. Small Bus. League*, 2009 WL 1011632, at \*4. This factor “is not dispositive” and can be outweighed where the other relevant factors favor an award. *Rosenfeld*, 903 F. Supp. 2d at 870 (internal quotation marks omitted); *see also O’Neill*, 951 F. Supp. at 1425 (noting that the reasonable basis in law factor “in particular should not be considered dispositive”). The burden is on the government to demonstrate that its withholding was reasonable. *Sierra Club*, 75 F. Supp. 3d at 1145.

Here, Judge Conti repeatedly found in no uncertain terms that NMFS failed to provide timely responses under FOIA. *See, e.g.*, March 30, 2015 Order at 24 (with respect to NMFS’s violation of FOIA deadlines “the record is clear, undisputed, and troubling .... In short, even though the Fisheries Service does not take the FOIA’s deadlines seriously, ‘[t]here can be no doubt that Congress [did].’”); July 20, 2015 Order at 19 (“The records in both this and the related case show a clear and undisputed breach of this [FOIA response deadline] requirement.”); October 21, 2015 Order at 18-19 (“the Court has received showing [of] an unmistakable history that the Fisheries Service fails to meet its statutory deadlines under FOIA and causes Plaintiffs (and likely others similarly situated) to suffer unpredictable, unreasonable delays.”).<sup>18</sup>

Judge Conti also found that in litigating this case, NMFS repeatedly failed to explain with sufficient detail the adequacy of its searches and the reasons for its withholdings thereby necessitating additional rounds of briefing by the parties and orders by the court.<sup>19</sup> As such, I

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<sup>18</sup> Judge Conti’s repeated use of strong adjectives like “troubling” and “unreasonable” separates this case from those relied on by NMFS where fees were denied because delayed responses were caused by confusion or “bureaucratic difficulty” in handling requests. *Oppo*. at 14.

<sup>19</sup> I recognize that Judge Conti ultimately found that NMFS had conducted adequate searches and appropriately withheld all documents except one. But those conclusions were reached only after multiple rounds of briefing and decision, necessitated by NMFS’s initially deficient declarations and *Vaughn* indexes.

1 conclude that neither NMFS's general responses to the FOIA requests nor its litigation position  
2 before this Court had a reasonable basis in law.

3 In sum, plaintiffs are entitled to an award of attorney's fees. The next step is to determine  
4 the amount owed.

### 5 **III. REASONABLE AMOUNT OF ATTORNEY'S FEES AND COSTS**

6 "[O]nce the court has determined that the plaintiff is both eligible for and entitled to  
7 recover fees, the award must be given and the only room for discretion concerns the  
8 reasonableness of the amount requested." *Long*, 932 F.2d at 1314. In making this determination,  
9 the court must scrutinize the reasonableness of (i) the hourly rates and (ii) the number of hours  
10 claimed. *Id.* at 1313-14. "If these two figures are reasonable, then there is a strong presumption  
11 that their product, the lodestar figure, represents a reasonable award." *Id.* at 1314 (internal  
12 quotation marks omitted). Nevertheless, a court "may authorize an upward or downward  
13 adjustment from the lodestar figure if certain factors relating to the nature and difficulty of the  
14 case overcome this strong presumption and indicate that such an adjustment is necessary." *Id.*

#### 15 **A. Hourly Rate**

16 NMFS argues plaintiffs' hourly rates are excessively high, and that the Court should apply  
17 the hourly rates set forth in the *Laffey* matrix plus locality adjustments, which would result in a  
18 decrease of 22.9% in the requested lodestar. *Oppo*. at 20-22. As I recognized in  
19 *Public.Resource.org v. United States Internal Revenue Serv.*, No. 13-CV-02789-WHO, 2015 WL  
20 9987018, at \*6 (N.D. Cal. Nov. 20, 2015), "[a]bsent some showing that the rates stated in the  
21 matrix are in line with those prevailing in this community . . . I agree [that] that the matrix is not  
22 persuasive evidence of the reasonableness of its requested rates." As in *Public.Resource.org*, I  
23 will not bind plaintiffs to the *Laffey* matrix, especially as statutory fee awards from this District do  
24 not establish that the *Laffey* matrix rates are in line with prevailing rates for statutory fee cases in  
25 the Bay Area legal community. *See, e.g., Public.Resource.org* (awarding rates from \$205 for  
26 paralegals up to \$645 for senior/lead counsel); *Sierra Club*, 75 F. Supp. 3d at 1152-53 (approving  
27 hourly rates of \$350 to \$650 in FOIA action); *Rosenfeld*, 904 F. Supp. 2d at 1001, 1004  
28 (approving hourly rates of \$460, \$550, and \$700 in FOIA action); *Hajro v. U.S. Citizenship &*

1 *Immigration Servs.*, 900 F. Supp. 2d 1034, 1054 (N.D. Cal. 2012) (approving hourly rates of \$450  
2 to \$625 in FOIA action) *vacated and remanded on other grounds*, 2015 WL 6405473 (9th Cir.  
3 Oct. 23, 2015); *see also Hiken v. Dep't of Def.*, 836 F.3d 1037, 1039 (9th Cir. 2016) (reversing  
4 district court order awarding fees at matrix rate).

5 The rates sought by counsel in this case are, generally, higher than the rates approved in  
6 other recent FOIA cases in this District. They are also, more importantly, significantly higher than  
7 rates that were requested and approved by these *same* counsel in recent cases in this District for  
8 environmental litigation. *See, e.g., OCE v. EPA*, 13-cv-02857 (Dkt. Nos. 82, 99) (awarding fees  
9 from \$435 to \$655/hr for work through early 2015); *San Francisco Baykeeper v. West Bay*  
10 *Sanitary Dist.*, No. 09-5676, 2011 WL 6012936 (N.D. Cal. Dec. 1, 2011) (approving \$585/hr for  
11 Sproul). Plaintiffs argue this upward departure is warranted because in the past they have relied  
12 on the *Laffey* matrix with locality adjustments, but recent cases confirm those rates under-  
13 compensate them. *See, e.g., Declaration of Christopher Sproul* [Dkt. No. 88] ¶ 15; *Declaration of*  
14 *Patricia Weisselberg* [Dkt. No. 86] ¶ 9.

15 Plaintiffs undertook a “market rate” analysis and seek compensation for that research from  
16 *this* case. The analysis was performed primarily by billing attorney Christopher Hudak. Hudak  
17 reviewed fee awards in a number of different types of cases from the Northern District, including  
18 class action litigation (antitrust, wage and hour, consumer protection, and securities) as well as one  
19 anti-SLAPP case and one FOIA case. *See, e.g., Declaration of Christopher Hudak* [Dkt. No. 84]  
20 ¶¶ 11-32. The market rate analysis did not consider more than one FOIA case (despite there being  
21 a number of cases on point) nor did it directly consider cases awarding statutory fees for  
22 environmental litigation.<sup>20</sup>

23 Plaintiffs have not demonstrated that the rates they seek here are reasonable for FOIA  
24

25 \_\_\_\_\_  
26 <sup>20</sup> The OCE attorneys did rely for “data points” on the Declaration of Richard M. Pearl from a  
27 state court case, *Citizens Committee To Complete The Refuge, Inc. v. City of Newark*, Case No.  
28 RG10530015, (CA Superior Ct. County of Alameda). The Pearl declaration focused on attorney’s  
fees rates through 2014, and did review some statutory fee-shifting awards, as opposed to the class  
action attorney’s fee awards focused on by the plaintiffs here. *See, e.g., Weisselberg Decl.* ¶¶ 11-  
16; *Sproul Decl., Ex. 32; Hudak Decl.* ¶ 34.



1 litigation (or environmental fee-shifting litigation). They seek to downplay the fact that in cases  
 2 from 2014 and 2015 *these same attorneys* requested significantly lower attorney’s fee rates. I do  
 3 not believe the case law supports limiting plaintiffs to their prior requested rates, but I do believe  
 4 that any *significant* upward departure should be justified, for example, by declarations explaining  
 5 the increases in light of increased expenses from doing business and practicing in certain markets  
 6 or other factors. I also do not find plaintiffs’ focus as support for their requested hourly rates in  
 7 these cases on large scale, complex class action cases to be persuasive. That is not to say that  
 8 FOIA cases cannot be complex. But the high rates awarded for complex class action cases can be  
 9 explained in large part by the necessity in those cases for plaintiffs’ counsel to incur significant  
 10 cost outlays (for experts, document review systems, travel, depositions, etc.) as well as attorney  
 11 time (to review hundreds of thousands of documents, numerous depositions, etc.) which are not  
 12 typically required in FOIA cases and were not required in these cases.

13 Accordingly, I find that the hourly rates plaintiffs request here are not adequately  
 14 supported and are not reasonable. This conclusion is consistent with *Hiken v. Dep’t of Def.*, 836  
 15 F.3d 1037, 1044–46 (9th Cir. 2016), where the Ninth Circuit confirmed that a “reasonable rate” is  
 16 the rate prevailing “in the community” for “similar work” performed by attorneys of comparable  
 17 skill and experience and based on record evidence of prevailing historical rates. I do not find that  
 18 plaintiffs’ survey is based on the performance of “similar work” by attorneys of comparable skill  
 19 and experience.

20 Plaintiffs shall recalculate their lodestar based on hourly rates that are consistent with the  
 21 rates they requested in prior FOIA or environmental cases for the same time periods. For  
 22 example, time spent on these cases in 2015 should be sought at the same rate previously sought  
 23 and/or awarded by a court for time spent in 2015. For time in 2016 as to which plaintiffs may  
 24 have not had an hourly rate approved by another court plaintiffs are entitled to a 10% increase  
 25 over their 2015 approved-rates, absent specific justification supported by a declaration explaining  
 26 why a particular attorney or paralegal should be granted a higher percentage increase.<sup>21</sup>

27 \_\_\_\_\_  
 28 <sup>21</sup> For any biller in these cases who has not had a prior-court-submitted or approved billing rate,  
 plaintiffs shall use a prior-court-approved billing rate for an attorney or paralegal of comparable

**B. Hours Expended**

NMFS also argues that the hours sought by plaintiffs cover time and tasks that were neither necessary nor reasonable for the prosecution of these suits and asks me to reduce the requested fee amount for the following:

- A \$188,381.47 reduction for plaintiffs’ work on the claims they lost;
- A \$26,686.22 reduction for work on pleadings and other papers that were never filed;
- A \$89,442.20 reduction for work performed at the administrative stage and review of documents produced;
- A reduction for work unrelated to *OCE I* and *OCE II*; and
- A 30-50% reduction generally for excessive, redundant, and unnecessary work.<sup>22</sup>

**1. Claims Lost**

NMFS argues that plaintiffs are not entitled to \$188,381.47 in fees (calculated at the hourly rates that NMFS objects to) for “distinct” claims they lost: (i) claims against FWS and the Corps; (ii) claims regarding the adequacy of the searches in *OCE II* (based on a frivolous argument that NMFS’s declarant’s testimony was “hearsay”); (iii) unsuccessful challenges to NMFS’s withholdings; (iv) claims regarding actual and pattern and practice search cut-off dates; and (v) plaintiffs’ response to the October 21 2015 Order to Show Cause as to whether further injunctive relief was necessary.<sup>23</sup>

With respect to the \$3,506.18 incurred with *OCE III*, plaintiffs admit they do not seek to recover for that time. So there is no longer a dispute as to that time/amount. The only other unsuccessful legal theory/claim NMFS “breaks out” time for is the \$23,032.40 plaintiffs charge

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experience.

<sup>22</sup> Plaintiffs explain that before submitting their request, most billers took 10% of the time billed “off the top” to account for any potential inefficiencies or redundancies in their work. Sproul Decl. ¶¶ 92, 97; Weisselberg Decl. ¶ 41; Isaacs Decl. ¶¶ 6-7; Costa Decl. ¶ 6; Hudak Decl. ¶ 35 (worked over 100 hours, but seeking payment for approximately 30 hours).

<sup>23</sup> NMFS breaks down the \$188,381.47 (or more accurately \$188,381.48) as follows: \$23,032.40 for 37.1 hours spent on the opposition to NMFS’s showing in response to Judge Conti’s OSC; \$161,842.90 as a 50% reduction from the \$323,685.79 plaintiffs billed for pleadings, summary judgment, supplemental briefing and the joint submission; and \$3,506.18 incurred with *OCE III*.



1 for 37.1 hours spent responding to NMFS's showing in response to Judge Conti's Order to Show  
2 Cause. Oppo. 17. However, I find that that time was reasonable and necessary. Judge Conti's  
3 OSC raised significant questions regarding the steps NMFS was taking to address its FOIA  
4 backlog, and NMFS filed a detailed response, supported by declarations. Plaintiffs filed a brief to  
5 contest some of the assertions made by NMFS, but that pleading was helpful and relied on by me  
6 in determining whether any live issues remained in the litigation, even though I denied plaintiffs'  
7 request for further injunctive relief as to the backlog.

8 NMFS does not break out the time spent on the other "unsuccessful" issues because  
9 plaintiffs' billing records do not allow them to. NMFS instead argues the 595.6  
10 hours/\$323,685.79 plaintiffs billed to pleadings for the summary judgment, supplemental briefing,  
11 and the joint submission required by the October 2015 Order should be reduced by 50% to  
12 account for plaintiffs' other losing claims/theories. Oppo. 17-18; Wall Decl., Ex. B (Summary  
13 Fee Analysis). I disagree.

14 As to claims against FWS and the Corps for their alleged part in causing repeated delays in  
15 NMFS's FOIA responses, while plaintiffs were not ultimately successful in their claims against  
16 those entities, the claims made were part and parcel of the impermissible and excessive delay  
17 claims against NMFS. This time is compensable.

18 As to claims regarding the adequacy of the searches in *OCE II* (based in part on the  
19 argument that NMFS's declarant's testimony was hearsay), while plaintiffs eventually lost this  
20 claim, Judge Conti forced NMFS to submit supplemental briefing explaining the adequacy of its  
21 searches. NMFS's initial explanations, therefore, were deficient and plaintiffs' successfully  
22 argued that deficiency to Judge Conti in their initial and supplemental briefing. This time is  
23 compensable.

24 As to the unsuccessful challenges to NMFS's withholdings, plaintiffs eventually lost all  
25 but one of these claims. But in the process of the initial and supplemental rounds of briefing,  
26 NMFS agreed to produce more documents and NMFS had to explain its actions in greater detail  
27 due to deficiencies in their initial briefing and declarations. This time is compensable.

28 And as to the eventually unsuccessful claim regarding NMFS's pattern and practice of

1 applying improper search cut-off dates, while plaintiffs did not secure an order from Judge Conti  
2 finding that NMFS had an illegal pattern or practice, the record supports at least an inference that  
3 during this litigation NMFS implemented a new or clarified policy. Even assuming it was simply  
4 a clarified policy, that clarification produced a public benefit for future FOIA requestors. This  
5 time is compensable.

## 6 **2. Pleadings and Papers Never Filed**

7 NMFS argues that plaintiffs should not be compensated for 49.1 hours/\$26,686.22 for  
8 work on pleadings that were never filed, including draft amended complaints in *OCE I* and *OCE*  
9 *II*, a motion for reconsideration, and a motion for relief. Wall Decl., Ex. G (Unfiled Papers).

10 In reply, Sproul explains: (i) the work done on the unfiled SAC in May 2014 in *OCE I* was  
11 used on the motion for summary judgment in *OCE I* and is therefore compensable (Sproul Reply  
12 Decl. ¶ 5); (ii) the 3.16 hours billed in February 2015 for a “motion for relief” was in fact work  
13 done for the Notice Regarding Submitted Matter and Request For Ruling filed on March 2, 2015  
14 (*id.* ¶ 6); (iii) 13.19 hours of work in October 2014 was for a pleading filed in *OCE II*, Dkt. 58 (*id.*  
15 ¶ 7); (iv) 1.32 hours of time billed in May 2015, was cut from the request on plaintiffs’ Reply (and  
16 not currently sought); and (iv) the remaining hours that were spent on the unfiled motion for  
17 reconsideration in January 2016 are compensable because that unfiled motion was used as  
18 leverage to get NMFS to agree to a form of judgment and produce additional documents. *Id.* ¶ 8.  
19 Weisselberg also, on review, cut 0.56 of time from her entries challenged in Wall’s Ex. G, because  
20 those entries represented work on what was to become *OCE III*. Weisselberg. Reply Decl. ¶ 11.

21 Considering the declarations, I find that all of the challenged time except the time spent on  
22 the unfiled motion for reconsideration is compensable. Plaintiffs have adequately identified how  
23 the time identified by NMFS was spent or used for pleadings actually filed in this action.  
24 However, the time spent on the unfiled motion for reconsideration in January 2016 was created  
25 voluntarily by plaintiffs and used for “leverage” but was never necessary or useful for any  
26 contested decision made by me.

## 27 **3. Administrative Efforts**

28 NMFS wants a further reduction for 157.7 hours/\$89,442.20 that plaintiffs spent drafting

1 FOIA requests, working on the agency administrative appeals, and reviewing the documents  
 2 produced. Wall Decl., Ex. I. Generally, “work performed during the pre-litigation administrative  
 3 phase of a FOIA request is not recoverable under FOIA.” *Elec. Privacy Info. Ctr. v. United States*  
 4 *Dep't of Homeland Sec.*, 811 F. Supp. 2d 216, 237 (D.D.C. 2011); *but see Public.Resource.org*,  
 5 2015 WL 9987018, at \*8 (allowing recovery for two time entries on letters seeking agency  
 6 reconsideration “given the clear overlap in subject matter between the letter and this litigation, the  
 7 letter’s explicit contemplation of a lawsuit, and the proximity in time between the letter and the  
 8 filing of” the complaint).

9 In their Reply and supporting declarations, plaintiffs cut some of the contested time for  
 10 work on the FOIA requests and administrative appeals, but kept the time spent on two specific  
 11 FOIA requests in. As explained by lead counsel Sproul:

12 I and my co-counsel have been mindful that we are not entitled to  
 13 recover for drafting all our FOIA requests and reviewing all the  
 14 documents obtained for the purpose of learning the substantive  
 15 content of those documents for the Plaintiffs’ citizen suit litigation  
 16 against Stanford or larger public advocacy campaign related to  
 17 Stanford and the San Francisquito Creek watershed. However, we  
 18 have concluded that we may recover for time spent drafting FOIA  
 19 requests specifically intended to garner information for use in this  
 20 litigation and reviewing documents for such litigation purposes. I  
 21 and my co-counsel have carefully segregated the time spent drafting  
 22 FOIA requests reviewing documents such that we are seeking  
 23 recovery only for the latter time. With respect to drafting FOIA  
 24 requests, we are seeking to recover for time spent drafting (or  
 25 appealing responses concerning) only two of the multiple FOIA  
 26 requests at issue in this proceeding that Plaintiffs specifically used to  
 27 gather information used as evidence against NMFS in this case:  
 28 FOIA requests sent on April 3, 2014 and November 24, 2015. (the  
 latter is Exhibit M to the Wall Declaration, (OCE I, Dkt. 92-1). The  
 April 3, 2014 FOIA sought documents concerning the searches done  
 by NMFS and the responses provided by NMFS to Plaintiffs in  
 response to their FOIA requests with the aim of developing evidence  
 that NMFS’s searches have not complied with FOIA. Plaintiffs’  
 November 24, 2015 FOIA request sought documents with the  
 specific intent of trying to garner evidence that Plaintiffs’ litigation  
 had catalyzed NMFS to respond more promptly to Plaintiffs’ FOIA  
 requests. The aim was to develop evidence in support of catalyst  
 theory arguments for purposes of attorney fees recovery in  
 settlement and, if necessary, a fees motion. Plaintiffs’ November 24,  
 2015 FOIA Request sought documents related to NMFS’s assertions  
 that it had instituted several FOIA reforms also with the specific  
 intent of trying to garner evidence that Plaintiffs’ litigation had  
 catalyzed NMFS to institute these reforms. Again, our aim was to  
 develop evidence in support of catalyst theory arguments for

1 purposes of attorney fees recovery in settlement and, if necessary, a  
 2 fees motion. As discussed in the Reply Declaration of Patricia  
 3 Weisselberg, Plaintiffs have in fact used documents obtained in  
 4 response to their FOIA requests as exhibits supporting the catalyst  
 theory arguments they are advancing in their Fees Motion and  
 plaintiffs agree to reduce some of their time spent on drafting the  
 FOIA requests and the administrative appeals.

5 Sproul Reply Decl. ¶ 10.

6 Accordingly, Michael Costa cut 11.91 hours/\$6,148.98 for drafting FOIA requests and  
 7 appeals, except for the work he did on the April 3, 2014 and November 24, 2015 FOIA requests  
 8 that were aimed at gathering information for this lawsuit. Costa Reply Decl. ¶ 3. Jodene Isaacs  
 9 cut 11.21 hours/\$5,599.40 for drafting FOIA requests and appeals. Isaacs Reply Decl. ¶ 2.  
 10 Weisselberg cut 8.74 hours spent on FOIA appeals, included in Wall's Ex. I. Weisselberg Reply  
 Decl. ¶ 13.

11 The bulk of the remaining time appears to be for document review conducted primarily by  
 12 Costa and Isaacs. NMFS argues that document review is simply not compensable. *See, e.g.,*  
 13 *Sierra Club v. United States EPA*, 75 F. Supp. 3d 1125, 1149 (N.D. Cal. 2014) ("As Plaintiffs  
 14 received, at least in part, the relief they sought when the EPA produced the documents, the time  
 15 they expended reviewing the documents was is properly characterized as post-relief activity,  
 16 separate from the litigation."); *Citizens for Responsibility & Ethics v. United States DOJ*, 825 F.  
 17 Supp. 2d 226, 231 (D.D.C. 2011) ("Plaintiff would have had to expend this time had DOJ timely  
 18 produced the documents without litigation; the cost of reviewing documents produced in response  
 19 to a FOIA request is simply the price of making such a request.").

20 Plaintiffs respond that in this case, where the adequacy of NMFS's searches and  
 21 withholdings were central claims, plaintiffs needed to spend significant amounts of time reviewing  
 22 the documents to support those claims in litigation. That might be true but plaintiffs'  
 23 withholding claims were almost totally rejected (except for one document) and plaintiffs'  
 24 inadequate search claims were likewise mostly unsuccessful (except for two narrow wins in *OCE*  
 25 *I*). Plaintiffs also do not cite any case law allowing for recovery of time spent reviewing document  
 26 productions where that review is necessary for a plaintiff to be able to challenge the adequacy of  
 27 an agency's search or the propriety of withholdings.  
 28

1 Based on the declarations, I find that the Costa time spent on the two identified FOIA  
2 requests is compensable, given the overlap in subject matter between requests and this litigation as  
3 well as the proximity in time between those requests and the filing of pleadings in this case. The  
4 time spent reviewing the documents produced is not compensable.

5 **4. Work Unrelated to *OCE I* and *OCE II***

6 NMFS argues that plaintiffs should not be compensated for 8.9 hours/\$4,461.23 billed by  
7 Sproul, Weisselberg, Isaacs, and Costa that it contends is unrelated to *OCE I* and *OCE II*,  
8 including litigation with Stanford and entries related to FWS and the Corps. Wall Decl., Ex. H  
9 (Unrelated Matters). In Reply, Weisselberg explains the relevance of her entries listed on Exhibit  
10 H to *OCE I* and *OCE II*. Weisselberg Reply Decl. ¶ 12. Sproul also addresses the 8.9 hours listed  
11 in Exhibit H, and other than two mistakes accounting for 0.35/hours (which were cut in the Reply)  
12 adequately explains that those hours billed were necessary for *OCE I* and *OCE II*. Sproul Reply  
13 Decl. ¶ 9; *see also* Costa Reply Decl. ¶ 16. This time is compensable.

14 NMFS also argues that plaintiffs have (perhaps inadvertently) claimed time for work on  
15 *OCE III*, despite their claim that they are not seeking that time. In its Opposition and supporting  
16 declaration, NMFS identified 5.9 hours/\$3,506.18 it contends was incurred on *OCE III*. *See* Wall  
17 Decl., Ex. D. As noted above, this time is not compensable.

18 **5. Reduction for Excessive or Redundant Work**

19 NMFS asks the Court to reduce by 30-50% any fee award to account for excessive,  
20 cumulative, and inefficient billing. *Oppo.* at 24. NMFS specifically challenges: (i) the 158 hours  
21 spent on the opening attorney's fees motion and declarations; (ii) 249 hours on summary judgment  
22 and supplemental briefing in *OCE I*; (iii) 263.8 hours on summary judgment and supplemental  
23 briefing in *OCE II*; (iv) 157.7 hours on the "administrative phase" including record review; and (v)  
24 the fact that five attorneys worked on the case, which NMFS contends is excessive given the  
25 nature of these cases and is demonstrated by the 173.7 hours/\$107,885.73 billed for telephone  
26 calls and email correspondence between counsel for "coordination" purposes. Wall Decl., Ex. F  
27 (Coordination Activities).

28 In their Reply declarations, two of the billing attorneys exercised "more" billing judgment

1 to cut hours in light of potential redundancy. *See* Costa Reply Decl. ¶ 4 (cutting 4.05  
2 hours/\$2,136.38); Isaacs Reply Decl. ¶ 3 (cutting just over 14 hours/\$7,087.91). No other  
3 reductions for excessive or redundant work appear to have been made, other than the 10%  
4 “off the top” that each of the billing attorneys took off their time initially.

5 The time spent on the opening attorney’s fees motion and declarations is excessive and  
6 unreasonable. In particular, plaintiffs should not be compensated for the time Hudak spent  
7 (unsuccessfully as addressed above) surveying cases in order to determine what billing rates  
8 should be used for plaintiffs in this fee motion. Moreover, the time spent in drafting the fee  
9 motion which itself does not raise any unique issues or issues of first impression is excessive.  
10 Plaintiffs purport to be experienced FOIA and environmental litigators; submission of fee petitions  
11 is a regular part of that work. I recognize that reviewing the time records, exercising billing  
12 judgment, and creating supporting declarations will take significant time in each case no matter  
13 how experienced counsel is. But the time spent on the *brief* appears to be excessive in and of  
14 itself. A 25% reduction in the time spent on the opening attorney’s fees motion is appropriate, as  
15 is elimination of the time Hudak spent on his inapposite attorney’s fees survey.

16 As to time spent on the Reply brief and declarations (which NMFS did not have the  
17 opportunity to attack), I conclude that the time spent on the brief itself is reasonable, but not the  
18 time spent reviewing the time slips and submitting supplemental declarations, because much of  
19 *that* time was spent accounting for errors pointed out by NMFS and then making additional  
20 reductions for improper or otherwise redundant billing. Only 50% of the time spent on the  
21 declarations in support of the Reply is compensable.

22 As to the 249 hours spent on summary judgment and supplemental briefing in *OCE I* as  
23 well as the 263.8 hours spent on summary judgment and supplemental briefing in *OCE II*, I find  
24 that the time is reasonable and compensable. The summary judgment briefing was extensive,  
25 detailed and addressed a number of issues where there was little precedent. In these circumstances  
26 I cannot say the time spent was unreasonable.

27 As to the 157.7 hours on the “administrative phase” including record review, as noted  
28 above, plaintiffs have voluntarily cut all time on drafting the FOIA requests, except for time Costa



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1 spent on two, and I have already found that time spent reviewing the documents produced is not  
2 compensable.

3 Finally, as to the time spent on coordination between counsel, I find that 173.7 hours is  
4 excessive. While this case was complex in the sense that there were a large number of FOIA  
5 requests at issue, at least three lawsuits filed, and multiple rounds of summary judgment and  
6 additional briefing required, the sheer number of attorneys involved many of whom it appears  
7 were involved in part because of the Stanford litigation meant that there was an excessive  
8 amount of “coordination.” A 25% reduction in the amount of time spent on coordination is  
9 appropriate.

10 **C. Costs**

11 Plaintiffs seek \$3,190.39 in costs. Dkt. No. 94. NMFS does not oppose the amount of  
12 costs, but argues instead that in light of the limited nature of plaintiffs’ success and the agency’s  
13 good faith, costs are not warranted. Oppo. at 24-25. Having concluded that plaintiffs are  
14 substantially prevailing and that the agency’s defenses were without a reasonable basis in law, an  
15 award of costs is appropriate. Plaintiffs are awarded \$3,190.39 in costs.

16 **CONCLUSION**

17 For the foregoing reasons, plaintiffs will be awarded attorney’s fees, but at a significantly  
18 reduced amount, and are awarded \$3,190.39 in costs.

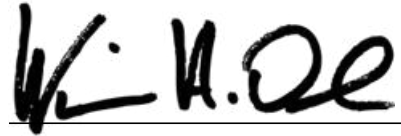
19 Within twenty days of the date of this Order, plaintiffs shall, after meeting and conferring  
20 with defense counsel, submit a *joint* supplemental brief and proposed judgment containing a  
21 revised request for attorney’s fees that excludes all of the time I have identified above as not being  
22 compensable. The parties shall make all reasonable efforts to reach agreement on the time to be  
23 included in light of the time that has been excluded by this Order. If the parties cannot agree, any  
24 remaining disputes shall be explained in no more than two pages.

25 Plaintiffs must also recalculate their lodestar, using hourly rates that were approved for  
26 them in past years and using a rate for 2016 that is no more than 10% above their 2015 rates,  
27 unless otherwise justified. At the time the joint supplemental brief and proposed judgment is filed,  
28 plaintiffs shall submit a declaration explaining and identifying: (i) the rates for each biller for each

1 year billed; (ii) the case(s) for which each biller's rates have been requested and approved; (iii) the  
2 basis for the 2016 hourly rates sought; and (iv) the basis for any hourly rate sought for a biller who  
3 has not had her or his time approved by a prior court order.

4 **IT IS SO ORDERED.**

5 Dated: March 1, 2017

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8 William H. Orrick  
9 United States District Judge  
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United States District Court  
Northern District of California



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**From:** Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>  
**Sent:** Thursday, March 9, 2017 5:50 PM  
**To:** Mark Graff - NOAA Federal  
**Cc:** Jerome McNamara; Chi Kang - NOAA Federal  
**Subject:** Re: NEW DOC FOIA TASK: DOC-OS-2017-000628  
**Attachments:** NOAA Response Cox 2017-000628- Dept Wide Input Memo.docx; NOAA Reporting of Cyber Incidents.pdf

Hi Mark (b)(5)

"?"

See attachments. Please advise. If my suggestion is acceptable, please sign/return the attached tasker.

Thanks!  
Lola

On Thu, Mar 9, 2017 at 5:28 PM, Chi Kang - NOAA Federal <[chi.y.kang@noaa.gov](mailto:chi.y.kang@noaa.gov)> wrote:  
Standing by :)

--

Chi Y Kang  
Deputy Director for Operations (Acting), Cyber Security Division  
Office of the Chief Information Officer  
(301) 628-5738, [Chi.Y.Kang@noaa.gov](mailto:Chi.Y.Kang@noaa.gov)

On Mar 9, 2017 2:40 PM, "Lola Stith - NOAA Affiliate" <[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)> wrote:

Thank you for the reminder Jerry. (b)(5)

Thank you.

Lola

On Thu, Mar 9, 2017 at 2:10 PM, Jerome McNamara - NOAA Federal <[jerome.mcnamara@noaa.gov](mailto:jerome.mcnamara@noaa.gov)> wrote:

Lola,

(b)(5)

So I was not able to see how we answered last time.

FOIA Online is a frustrating system.

Jerry

On Thu, Mar 9, 2017 at 12:05 PM, Lola Stith - NOAA Affiliate <[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)> wrote:  
Hi Chi/Jerry - We have received task to respond to a DOC FOIA request for the following:

This is a request under the Freedom of Information Act. I hereby request the following records: - All incident reports about, concerning, or related to cyber attacks on the agency from January 1st 2010 to the date of this request [February 15, 2017]. Period of search is January 1, 2010 to February 15, 2017.

Chi - I'm working with Jerry to get this fulfilled for NOAA OCIO. Please let me know what you need from us to assist with this request. If there is someone else I should contact, please let me know.

Thank you very much.

R/

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6)

[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)

--

[Jerome.McNamara@noaa.gov](mailto:Jerome.McNamara@noaa.gov)

NOAA, Office of the Chief Information Officer

Governance and Portfolio Division

[\(301\) 628-5752](tel:(301)628-5752)

*"The NOAA CIO Council's mission is to improve practices related to the design, acquisition, development, modernization, use, sharing, and performance of NOAA's information resources."*

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)

--

Lola Stith

Contractor - The Ambit Group, LLC

NOAA Office of the Chief Information Officer (OCIO)

(c (b)(6) [REDACTED])

[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)



**UNITED STATES DEPARTMENT OF COMMERCE**  
**Chief Financial Officer and**  
**Assistant Secretary for Administration**  
Washington, D.C. 20230

March 7, 2017

MEMORANDUM FOR:      Gordon Keller, OCIO                      Vernon E. Curry, Census  
                                 Pam Moulder, ESA                              Stephen Kong, EDA  
                                 Jennifer Kuo, BIS                                Victor Powers, ITA  
                                 Josephine Arnold, MBDA                      Catherine Fletcher, NIST  
                                 Wayne Strickland, NTIS                      Stacy Cheney, NTIA  
                                 **Robert Swisher, NOAA**                      Jennifer Piel, OIG  
                                 Ricou Heaton, PTO                              Dondi Staunton, BEA

FROM:                              Michael Toland  
                                 Departmental FOIA Officer  
                                 Office of Privacy and Open Government

SUBJECT:                              FOIA Request from Joseph Cox  
                                 - DOC-OS-2017-000628

I am forwarding a copy of the attached FOIA request for your immediate attention. Please conduct a search for responsive records. “This is a request under the Freedom of Information Act. I hereby request the following records: - All incident reports about, concerning, or related to cyber attacks on the agency from January 1st 2010 to the date of this request [February 15, 2017].”

**In order to be responsive to this request in a timely manner, we need all responsive records by C.O.B. March 21, 2017. Separate the Tasker from the responsive records when uploading to FOIAonline. Taskers should be uploaded in Case File/Correspondence/Other. Only the tasker signed by the FOIA Officer/Senior Official from the Bureau should be uploaded. Please do not upload Sub-Agency Taskers.**

Please identify whether you believe the document, or any portion of it, should be withheld from disclosure. You must include the FOIA exemption next to any information you identify as protected from disclosure. Link - List of Exemptions: <http://www.osec.doc.gov/omo/FOIA/exemptions.htm>.

- A clean copy and redacted copy shall be uploaded on FOIAonline.
- The Clean Copy will be uploaded with an UU (Unredacted Unreleaseable) Publish Option.
- Redacted copy of responsive documents are to be uploaded in Case/Records and grouped by exemptions applied, i.e., RR (Redacted- Releasable) - (b)6, (b)5 (please include the privilege used).
- The format to be used for “Title” of uploaded documents: **ITA - 24 documents, RR, (b)4, (b)6.** (Bureau -not sub agency - number of documents - Publish Options exemptions).

- For documents that are completely withheld UU-Unredacted Unreleasable; and RU-Redacted-Unredacted, you must apply an Exemption in the Action Column.
- For referred documents use the following format for “Title:” 15 documents refer to NTIA.

**You must begin the search immediately. Documents created outside the date range of this request, are not responsive to the request. The responsive date range is “January 1, 2010 to February 15, 2017.” If the search is delayed for any reason, please notify me immediately, but no later than 24 hours from the date listed.**

THIS RESPONSE MUST BE SIGNED BY A SENIOR OFFICIAL IN YOUR OFFICE.

Please contact me if you have any questions about the scope of this request or the FOIA exemptions, at 202-482-3258.

Please sign this sheet of paper and check all of the appropriate boxes

Uploaded in FOIAonline are all documents in the possession of my office which are responsive and can be released in entirety.

Uploaded in FOIAonline are all documents within the possession of my office which are responsive and we have found reason to partially withhold. **One clean copy and one redacted copy have been uploaded.**

Uploaded in FOIAonline are all documents within the possession of my office which are responsive and we have found reason to withhold entirely, each document to be withheld entirely has been noted.

Uploaded in FOIAonline are all documents within the possession of my office which are responsive and must be referred to the originating office, bureau, or federal agency for disclosure determinations.

My office has found no responsive documents.

All disclosure determinations have been made by the Commerce Office that originated or has control of the documents

A foreseeable harm review and analysis has been completed for all withheld documents and portions of documents and it has been determined that disclosure of the withheld material would result in harm to an interest protected by the asserted exemption or that disclosure is prohibited by law. Name of person most knowledgeable with the issue of foreseeable harm: \_\_\_\_\_.

Interim response                       Final response

\_\_\_\_\_  
Signature (Senior Official) Bureau                      3/9/17  
Date



Lola Stith - NOAA Affiliate &lt;lola.m.stith@noaa.gov&gt;

---

**Fwd: Reporting of Cyber Incidents**

1 message

---

**Chi Kang - NOAA Federal** <chi.y.kang@noaa.gov>  
To: Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>

Thu, Aug 25, 2016 at 11:53 AM

----- Forwarded message -----

From: Eric Williams - NOAA Affiliate <eric.d.williams@noaa.gov>  
Date: Thu, Jul 21, 2016 at 11:20 AM  
Subject: Fwd: Reporting of Cyber Incidents  
To: Chi Kang - NOAA Federal <chi.y.kang@noaa.gov>

----- Forwarded message -----

From: Zachary Goldstein - NOAA Federal <zachary.goldstein@noaa.gov>  
Date: Wed, Jan 21, 2015 at 11:57 PM  
Subject: Fwd: Reporting of Cyber Incidents  
To: Lawrence Reed - NOAA Federal <lawrence.reed@noaa.gov>  
Cc: Diane Davidowicz - NOAA Federal <diane.davidowicz@noaa.gov>, Eric Williams - NOAA Affiliate <eric.d.williams@noaa.gov>, Robert Brunner - NOAA Federal <robert.brunner@noaa.gov>

Larry,

The direction we received from Steve Cooper regarding reporting incidents to the DOC CIRT instead of to the US CERT has been issued by the Secretary (see below).. As Steve had said, the direction was effective January 1, 2015, so our practices should already reflect this reporting . Please confirm we already have implemented this direction.

Thanks,  
Zach

----- Forwarded message -----

From: Mike Devany - NOAA Federal <mike.devany@noaa.gov>  
Date: Wed, Jan 21, 2015 at 1:40 PM  
Subject: Fwd: Reporting of Cyber Incidents  
To: Zachary Goldstein - NOAA Federal <zachary.goldstein@noaa.gov>

Please implement.

Thanks

Vice Admiral Michael Devany  
NOAA Deputy Under Secretary for Operations

Begin forwarded message:

From: Penny Pritzker <PSP38@doc.gov>  
Date: January 21, 2015 at 1:32:23 PM EST  
Subject: Reporting of Cyber Incidents

Cyber incidents present a very real threat to our ability to deliver our services to the public, protect American lives, assist American businesses, and to damage the Department's reputation.

To more effectively manage the risk posed by cyber attacks to the Department, I and my executive management team require proactive and timely notification of a cyber related incident which may result in or has the potential to adversely impact the Department.

Our ongoing review of the recent NOAA cyber incident has identified an opportunity to improve our internal coordination and reporting. Currently, our larger operating units report cyber incidents directly to the Department of Homeland Security's United States Computer Emergency Response Team (US-CERT). This process has led to some time lapses in notification to my office and to senior management across the department.

Effective 01 January 2015, all operating units will report cyber incidents directly to the Department of Commerce Cyber Incident Response Team (DOC-CIRT). Operating units are no longer authorized to report directly to US-CERT. DOC-CIRT will provide the required reporting to US-CERT and coordination with other outside entities and law enforcement authorities. This change in internal reporting will ensure enhanced awareness, coordination, and communication among all appropriate offices and personnel when a cyber incident occurs.

The Department's Chief Information Officer (CIO) will coordinate this new reporting process with the Bureau CIOs, and with the Chief Information Security Officer community. The Department CIO and Bureau CIOs will have continued responsibility to notify their executive management of cyber incidents.

--

Zachary G. Goldstein  
Acting Chief Information Officer and Director, High Performance  
Computing and Communications  
National Oceanic and Atmospheric Administration

--

Eric D. Williams <[Eric.D.Williams@noaa.gov](mailto:Eric.D.Williams@noaa.gov)> - Sr. Security Engineer, Team Lead  
NOAA Cyber Incident Response Team (N-CIRT) <[ncirt@noaa.gov](mailto:ncirt@noaa.gov)>  
PGP Key: <https://www.csp.noaa.gov/ncirt.asc> (must remove spaces)  
N-CIRT Hotline: +1.301.713.9111  
Direct Dial: 301-628-5773

--

Chi Y Kang  
Staff, NOAA Cyber Security Division  
Office of the Chief Information Officer  
(301) 628-5738, [Chi.Y.Kang@noaa.gov](mailto:Chi.Y.Kang@noaa.gov)

Image not available for this document, ID: 0.7.3707.5337



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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Friday, March 10, 2017 10:15 AM  
**To:** Stephen Lipps - NOAA Federal; John Almeida - NOAA Federal; Holmes, Colin; Robert Moller - NOAA Federal; Scott Smullen - NOAA Federal; Jeff Dillen - NOAA Federal; Kristen Gustafson - NOAA Federal  
**Cc:** Tom Taylor; Kimberly Katzenbarger - NOAA FEDERAL; Charles; Dennis Morgan - NOAA Federal; Stacey Nathanson - NOAA Federal; Robert Swisher - NOAA Federal; Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate; Lola Stith - NOAA Affiliate; Zachary Goldstein - NOAA Federal; Douglas Perry - NOAA Federal; Nkolika Ndubisi - NOAA Federal; Jeri Dockett - NOAA Affiliate; Cc: OCIO/OPPA; Troy Wilds - NOAA Federal  
**Subject:** Weekly FOIA Incoming and High Visibility Requests  
**Attachments:** CREW - stip of dismissal.pdf; Weekly FOIA Incoming and High Visibility Requests 03.01.17 - 03.09.17.xls; Karl-related requests 3.9 extraction.xls

Good Morning,

Attached is this week's report.

Notable requests include another request from the Delaware Riverkeeper regarding projects impacting Atlantic sturgeon in the Delaware River (DOC-NOAA-2017-000752). Also submitted to the Department, and tasked to NOAA, was a request from MuckRock News asking for all incident reports about cyber attacks on the agency from January, 2010 to the present. (DOC-OS-2017-000687).

Additionally, in the *CREW v. DOC* litigation, the Plaintiff filed a joint Stipulated Dismissal of their FOIA lawsuit (attached). Their original request sought questionnaires sent from the President Trump Transition Team.

Also attached is a spreadsheet outlining all of the Climate Change Paper-related requests NOAA currently is processing.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

Confidentiality Notice: This e mail message is intended only for the named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately that you have received this message in error, and delete the message.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND	)
ETHICS IN WASHINGTON,	)
	)
Plaintiff,	)
	)
v.	)
	)
U.S. DEPARTMENT OF COMMERCE,	)
	)
Defendant.	)
	)

Civil No. 1:17-cv-00135 (APM)

**JOINT STIPULATION OF DISMISSAL**

IT IS HEREBY STIPULATED AND AGREED by and between the parties, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), that the above-captioned action shall be dismissed with prejudice, each party to bear its own attorney fees and costs.

March 8, 2017

Respectfully submitted,

/s/ Anne L. Weismann  
(D.C. Bar No. 298190)  
Stuart C. McPhail  
(D.C. Bar No. 1032529)  
Citizens for Responsibility and  
Ethics in Washington  
455 Massachusetts Ave., N.W.  
6th Floor  
Washington, D.C. 20001  
Phone: (202) 408-5565  
Fax: (202) 588-5020  
[aweismann@citizensforethics.org](mailto:aweismann@citizensforethics.org)

Attorneys for Plaintiff

CHAD A. READLER  
Acting Assistant Attorney General, Civil Division

MARCIA BERMAN  
Assistant Director, Federal Programs Branch

/s/ Dena M. Roth  
Dena M. Roth (D.C Bar No. 1001184)  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave., N.W., Room 7107  
Phone: (202) 514-5108  
Fax: (202) 616-8470  
Email: [Dena.m.roth@usdoj.gov](mailto:Dena.m.roth@usdoj.gov)

Attorneys for Defendant

<b>Tracking Number</b>	<b>Type</b>	<b>Status</b>	<b>Requester</b>
DOC-NOAA-2017-000579	Request	Assignment Determination	Emily Yehle
DOC-NOAA-2017-000580	Request	Assignment Determination	Bill Marshall
DOC-NOAA-2017-000613	Request	Assignment Determination	Dan Vergano
DOC-NOAA-2017-000614	Request	Assignment Determination	Kendra Pierre-Louis
DOC-NOAA-2017-000573	Request	Assignment Determination	Jason Plautz

<b>Requester Organization</b>	<b>Submitted</b>	<b>Assigned To</b>	<b>Due</b>
Environment & Energy Publishing	02/08/2017	Maria S. Williams	03/10/2017
Judicial Watch	02/08/2017	OCIO	03/10/2017
BuzzFeed News	02/07/2017	Maria S. Williams	03/15/2017
Popular Science	02/14/2017	Karen Robin	03/21/2017
National Journal	02/07/2017	NWS	03/10/2017

**Description/Basis for Appeal**

I request all communications from NOAA principal scientist John Bates concerning the study authored by Thomas Any and all records of communication between NOAA scientist Thomas Karl and Director of the Office of Science Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of any and all records, data or documents associated with the former National Oceanic and Atmospheric Administration. I am requesting all emails between the address "john.bates@noaa.gov" and any email address with the domain na

Karl that appears in the June 2015 issue of Science (now titled "Possible artifacts of data biases in and Technology Policy John Holdren. The time frame for the requested records is January 20, 2009 through agency communications to, or from, Dr. John Bates regarding the 2015 Karl et al study in Science magazine (NOAA) employee Jack Bates, associated with his tenure at the National Climatic Data Center. This time "mail.house.gov" between the dates October 1, 2015 and January 31, 2016.

the recent global surface warming hiatus"). Please include e-mails, letters, hand-written notes, m  
ugh January 20, 2017.  
e (see <http://science.sciencemag.org/content/348/6242/1469>) from July 30, 2014 to February 4, 2017. I  
is to include but not be limited to the following personnel records, yearly performance reviews, professic

memorandums, voice and video recordings and other documented forms of communication.

would like to receive the information in electronic form, preferably a searchable PDF or in XML format.  
annual certifications, awards for accomplishments, disciplinary paperwork associated with the employee, ar



rd documents sufficient to show length of employment/tenure in this position and all previous positions v

with NOAA, job descriptions of all positions within NOAA, and communications between John Bates and

Thomas R. Karl.

Tracking Number	Type	Requester	Requester Organization
DOC-NOAA-2017-000752	Request	Sarah B. Brady	Delaware Riverkeeper Network
DOC-NOAA-2017-000744	Request	Zeenat Mian	
DOC-NOAA-2017-000737	Request	Matthew Johnston	Lewis Brisbois Bisgaard & Smith LLP
DOC-OS-2017-000628	Other	Joseph Cox	MuckRock
DOC-OS-2017-000687	Other	Jamiles Lartey	MuckRock

Submitted	Received	Assigned To	Case File Assigned To	Perfected?	Due
03/08/2017	03/08/2017	NMFS	NMFS	Yes	04/06/2017
03/08/2017	03/08/2017	NMFS	NMFS	Yes	04/06/2017
03/07/2017	03/07/2017	NMFS	NMFS	Yes	04/06/2017
03/07/2017		NOAA	Ayana Crawford	Yes	03/21/2017
03/07/2017		NOAA	Ayana Crawford	Yes	03/21/2017

Closed Date	Status
TBD	Assignment Determination
TBD	Assignment Determination
TBD	Assignment Determination
TBD	Open
TBD	Open

### Detail

Any and all requests for technical assistance for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River;

Any and all requests for informal consultation for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River;

NMFS/NOAA responses to requests for informal consultation for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River;

Any and all requests for formal consultation for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River;

NMFS/NOAA responses to requests for formal consultation for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River;

Biological opinions issued by NMFS/NOAA for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River;

All reports received by NMFS of Atlantic sturgeon takes, kills, or injuries within the Delaware River system; and

Any and all NMFS/NOAA comments on environmental assessments or environmental impact statements regarding initiatives that would impact the Atlantic sturgeon in the Delaware River including scoping comments drafted to inform such EAs or EISs.

Under the Freedom of Information Act I would like to request all documents and communications inter office (within NOAA) and intra office (between NOAA and external sources/entities) where the hawaiian monk seal

This is a request under the Freedom of Information Act, 5 U.S.C. §552, et seq., and made pursuant to the instructions of Elena Onaga, the Deputy Section Chief of NOAA's Office of General Counsel. I am and at all times relevant to this inquiry was the owner and operator of the SEA QUEEN II, a commercial fishing vessel. As such, I hereby request that you provide me with the following information: 1. The names and contact information of all observers assigned to the SEA QUEEN II in August 1, 2009 - June 1, 2010 through the National Marine Fisheries Service Observer Program; 2. Any and all reports or information given by observers assigned to the SEA QUEEN

This is a request under the Freedom of Information Act. I hereby request the following records: - All incident reports about, concerning, or related to cyber attacks on the agency from January 1st 2010 to the date of this

Any emails or internal memorandum which address agency policy or practices with regards to communications with the public. This is to specifically include, but is not limited to: social media conduct, use of and all official agency or sub-department Twitter accounts, employee communication with reporters or media, press releases

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**From:** Ana Liza Malabanan - NOAA Federal <ana.liza.malabanan@noaa.gov>  
**Sent:** Friday, March 10, 2017 1:09 PM  
**To:** Mark Graff - NOAA Federal; Samuel Dixon - NOAA Affiliate  
**Cc:** Shawn Martin; Doug Chow  
**Subject:** Fwd: Supplement to FOIA DOC-NOAA-2016-001479  
**Attachments:** Supplement Release FOIA DOC-NOAA-2016-001479.zip; Supplement 2016-001479.pdf; UPS CampusShip Shipment Label.pdf

(b)(5)

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Ana Liza

----- Forwarded message -----

**From:** Ana Liza Malabanan - NOAA Federal <[ana.liza.malabanan@noaa.gov](mailto:ana.liza.malabanan@noaa.gov)>  
**Date:** Fri, Mar 10, 2017 at 9:53 AM  
**Subject:** Supplement to FOIA DOC-NOAA-2016-001479  
**To:** Christopher Hudak <[christopherwhudak@gmail.com](mailto:christopherwhudak@gmail.com)>  
**Cc:** [FEMA-FOIA@fema.dhs.gov](mailto:FEMA-FOIA@fema.dhs.gov), John DeClerck <[John\\_DeClerck@fws.gov](mailto:John_DeClerck@fws.gov)>, FOIA Office <[foia@noaa.gov](mailto:foia@noaa.gov)>

Good morning Christopher,

Please see attached pertaining to your Freedom of Information Act (FOIA) request DOC-NOAA-2016-001479.

Let me know if you have any questions.

Regards,

Ana Liza

--

Ana Liza S. Malabanan  
Freedom of Information Act (FOIA) Coordinator  
Information Services and Management Branch  
Operations, Management & Information Division  
NOAA Fisheries West Coast Region  
U.S. Department of Commerce  
Office: 562-980-4008







# United States Department of the Interior

FISH AND WILDLIFE SERVICE

Washington, D.C. 20240

DEC 04 2014



In Reply Refer To:  
FWS/AES/DER/BCH/058970

Mr. Roy Wright  
Federal Emergency Management Agency  
Federal Insurance and Mitigation Administration  
1800 S. Bell Street  
Arlington, Virginia 20598-3020

Subject: Federal Emergency Management Agency National Floodplain Insurance Program  
Section 7 Coordination Meeting and Next Steps

Dear Mr. Wright:

Thank you for your September 23, 2014, letter summarizing the key issues we discussed at the August 29, 2014, meeting. The Fish and Wildlife Service (Service) appreciates the ongoing dialog with the Federal Emergency Management Agency (FEMA) and National Marine Fisheries Service (NMFS), and we are optimistic we will reach a mutual agreement on how to move forward with this consultation. The purpose of this letter is for the Service to clarify two of the takeaways described in FEMA's September 23, 2014, letter.

The first bullet of FEMA's September 23, 2014, letter states in part that the authorities and limitations of the National Floodplain Insurance Program (NFIP), as defined by FEMA, will be used for the boundaries of the section 7 consultation and identification of any program modifications. The Service agrees that FEMA determines what its legal authorities are regarding the NFIP and the limitations on those authorities. The Service also recognizes that, if needed, any reasonable and prudent measures or reasonable and prudent alternatives developed as part of the formal consultation process must be consistent with the authorities and limitations of the NFIP. However, when we evaluate the potential effects of implementation of the NFIP in our biological opinion, we must evaluate all the effects of the action (as defined in 50 CFR 402.02) and cumulative effects of the action on listed species and critical habitat (50 CFR 402.14 (g)). Therefore, FEMA should describe all of the direct, indirect, and cumulative effects of implementing the NFIP when it prepares its biological assessment.

The Service fully supports the intent of FEMA's draft proposed rule, which is to strengthen FEMA's regulatory floodplain management criteria to provide better protection for ESA listed species and critical habitat. However, the Service does not support FEMA's proposed approach of sending communities and applicants, whose actions fall under the NFIP, to the Service under Section 10 of the ESA as an adequate way to address FEMA's Section 7 responsibility. Doing so is untenable and would not fulfill FEMA's legal obligations under Section 7.

We look forward to our future coordination on these issues and moving forward with a consultation approach that meets the needs of the public, trust resources, FEMA, NMFS, and the Service. If you have any questions, please contact Ms. Patrice Ashfield at 703-358-2478.

Sincerely,

Handwritten signature of Gary Frazer, consisting of a stylized 'G' and 'F'.

Gary Frazer  
Assistant Director for  
Ecological Services

cc: Donna Wieting

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Alvin

Alvin Chua

Attorney

Office of the General Counsel | General Law Division

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 16-cv-03007-DME-MJW

FRIENDS OF ANIMALS, and  
SEA SHEPHERD LEGAL

Plaintiffs,

v.

NATIONAL OCEANIC AND  
ATMOSPHERIC ADMINISTRATION,

Defendant.

---

**STIPULATION OF SETTLEMENT AND DISMISSAL**

---

Plaintiffs Friends of Animals and Sea Shepherd Legal (“Plaintiffs”) and Defendant National Oceanic Atmospheric Administration, an agency of the United States Department of Commerce (“Defendant”) (collectively, the “Parties”), by and through their undersigned counsel, hereby enter into this Stipulation of Settlement and Dismissal (“Stipulation”) in the above-captioned case. Specifically, the Parties stipulate and agree as follows:

**RECITALS**

1. On April 12, 2016, Plaintiffs submitted a Freedom of Information Act request to Defendant seeking records on thirteen topics that pertained to human activities impacting the Cook Inlet beluga whale. *See* Friends of Animals’ FOIA Request for Records, attached as Ex. 1 at 2-3.

2. On May 16, 2016, Defendant extended its response deadline of May 12, 2016

by ten business days for unusual circumstances.

3. Defendant made three interim releases responsive to Plaintiffs' request on June 9, July 26, and October 21, 2016.

4. On December 8, 2016, Plaintiffs filed the instant civil action.

5. On or about February 27, 2017, the Parties reached an agreed upon schedule of production for the remaining responsive records and the terms of settlement.

### **STIPULATION**

1. Plaintiffs agree to dismiss the instant civil action without prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii).

2. In consideration for Plaintiffs' agreement to Paragraph 1 above, Defendant shall pay Plaintiffs the amount of four thousand ninety dollars (\$4,090.00), in full and complete satisfaction of Plaintiffs' claims for the attorneys' fees and litigation costs incurred in the above-captioned case. In the event of further litigation, Plaintiffs will not be entitled to claim any attorneys' fees or costs incurred prior to this settlement.

3. Defendant shall make payment of the total settlement amount, set forth in Paragraph 2 above, by electronic transfer of funds to Plaintiffs within forty-five (45) days of the dismissal of the above-captioned case (Plaintiffs' electronic funds transfer information will be provided separately). Plaintiffs' counsel shall cooperate with Defendant to ensure that all documentation required to process this payment is complete and accurate and submitted sufficiently in advance to allow for payment processing within forty-five days of dismissal.

4. Defendant shall release documents responsive to Plaintiffs' FOIA request in accordance with the following production schedule:



4.1 Defendant will produce a set of records **by March 14, 2017** that Defendant finds are responsive to topics (3) and (4) of the FOIA request. *See* Ex. 1 at 2. In a release letter accompanying this production, NOAA agrees to include a statement from the Assistant Administrator for National Marine Fisheries Service (“NMFS”), a division of NOAA, that describes how the search was reasonably calculated to uncover all responsive documents. The statement will describe which files were searched, the search method(s) used (electronic, manual, etc.), the locations searched, and the topics and terms searched. Further, in the release letter for the production of records responsive to topics (3) and (4), NMFS will provide a description of the methods used to segregate records NMFS found to be responsive to topics (3) and (4).

4.2 NOAA will produce a second set of records **by May 1, 2017**. This set of records will include responsive records that were not produced in prior releases to Plaintiffs.

4.3 NOAA will produce a third set of records **by August 1, 2017**. This set of records will include responsive records that were not produced in prior releases to Plaintiffs.

4.4 NOAA will produce a Vaughn Index for documents withheld pursuant to an applicable FOIA exemption in paragraphs 4.1, 4.2, and 4.3 **by August 31, 2017**.

4.5 NOAA will produce a final set of records **by September 30, 2017**. This set of records will include documents for the time period of April 12, 2016 (the date of the initial FOIA request) to December 31, 2016 that are responsive to the topics in the FOIA request.

4.6 In the event that Plaintiffs take issue with any of Defendant’s actions outlined in terms 4.1 to 4.5 above, Plaintiffs will promptly notify the undersigned counsel and/or an agreed upon NOAA contact of all such issues. The Parties agree to work together in good faith

to resolve such issues. If the Parties are unable to resolve any such issues within 45 days of Plaintiffs first presenting the issues to Defendant, Plaintiffs may pursue all available remedies in court. Plaintiffs shall have until **January 30, 2018** to present NOAA with any issues concerning the release of documents in paragraphs 4.1 to 4.5 above.

5. This Stipulation of Settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, the United States Department of Commerce, the National Oceanic Atmospheric Administration, their agents, servants, employees, or officers, and is entered into by the Parties for the purpose of compromising disputed claims and avoiding the expense and risks of further litigation. The Parties' agreement to this settlement is without prejudice to any claims or defenses any party may assert in the future.

6. This Stipulation contains the entire agreement between the Parties hereto and supersedes any and all previous agreements, whether written or oral, between the Parties relating to the subject matter hereof. No promise or inducement has been made except as set forth herein, and no representation or understanding, whether written or oral, that is not expressly set forth herein shall be enforced or otherwise be given any force or effect in connection herewith.

7. The Parties acknowledge that the preparation of this Stipulation was collaborative in nature, and thereby agree that any presumption or rule that an agreement is construed against its drafter shall not apply to the interpretation of this agreement or any term or provision hereof.

8. This Stipulation may be executed in two or more counterparts, each of which

shall be deemed to be an original and all of which together shall be deemed to be one and the same agreement. A facsimile or other duplicate of a signature shall have the same effect as a manually-executed original.

9. Upon execution of this Stipulation by all Parties hereto, the Stipulation of Settlement and Dismissal shall be binding upon and inure to the benefit of the Parties and their respective heirs, personal representatives, administrators, successors, and assigns. Each signatory to this Stipulation represents and warrants that he or she is fully authorized to enter into this Stipulation on behalf of his or her client.

10. Execution and filing of this Stipulation of Settlement and Dismissal by counsel for the Parties shall constitute a dismissal of the instant civil action, without prejudice.

Respectfully submitted this 10th day of March, 2017.

Respectfully submitted,

/s/ Michael Harris

Michael Ray Harris  
Director, Wildlife Law Program  
Friends of Animals  
7500 E. Arapahoe Road, Suite 385  
Centennial, CO 80112  
Phone: (720) 949-7791  
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*Attorney for Plaintiff Friends of Animals*

/s/ Brett Sommermeyer

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*Attorney for Plaintiff Sea Shepherd Legal*

ROBERT C. TROYER  
Acting United States Attorney

/s/ Marisela D. Sandoval

Special Assistant United States Attorney  
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Telephone: (303) 454-0100  
Fax: (303) 454-0404  
Email: Marisela.Sandoval@usdoj.gov

*Counsel for Defendant*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

**CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on this 10th day of March, 2017, I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to any party who has entered an appearance in this matter to the email addresses provided in CM/ECF.

s/ Marisela D. Sandoval  
Office of the U.S. Attorney

---

**From:** Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>  
**Sent:** Tuesday, March 14, 2017 1:41 PM  
**To:** Mark Graff - NOAA Federal  
**Cc:** Rose Stanley; Rod Vieira; Nathanson Stacey  
**Subject:** Interesting New DDC FOIA Decision re Private Email Address

## WHITE HOUSE

### No need to turn over Obama science aide's emails — judge

Amanda Reilly, E&E News reporter

Published: Tuesday, March 14, 2017

A federal judge ruled yesterday that the White House Office of Science and Technology Policy does not have to furnish emails from a top Obama administration official's personal account.

Senior Judge Gladys Kessler of the U.S. District Court for the District of Columbia said she could trust that John Holdren, the former White House science adviser, followed agency policy of forwarding work-related emails to his government account.

The court "has no reason to doubt" that Holdren forwarded all work emails from his private Woods Hole Research Center account, Kessler wrote in an opinion yesterday.

Thus, Kessler wrote, any emails furnished by the government from Holdren's Woods Hole account would be duplicates of message already located on OSTP's server.

The ruling is a blow for the right-leaning Competitive Enterprise Institute, which filed the lawsuit accusing the Obama of violating the Freedom of Information Act by failing to produce work-related emails from Holdren's Woods Hole account.

Holdren led the Massachusetts-based think tank before beginning work at OSTP in 2009. He allegedly used the Woods Hole account as a personal email account until around January 2014, sometimes using it for OSTP-related correspondence. In February, Holdren rejoined Woods Hole as a senior adviser to its president.

The district court initially dismissed CEI's lawsuit, but the U.S. Court of Appeals for the District of Columbia Circuit in July 2016 revived the case, sending it back to the lower court ([Greenwire](#), July 5, 2016).

In December, Kessler ordered Holdren to preserve all messages and records in his Woods Hole account until the resolution of the litigation.

"It is better to be safe than sorry," Kessler, a Clinton appointee, wrote then ([Greenwire](#), Dec. 13, 2016). Yesterday's decision grants the government's motion for summary judgment in the case.

The Competitive Enterprise Institute, whose members played key roles in President Trump's transition, "failed to convincingly challenge" that Holdren didn't follow OSTP policy requiring him to forward work-related emails, Kessler said.

She accused CEI of engaging in a "creative exercise in semantics" to dispute Holdren's contention that he forwarded all the relevant emails from his personal account.

Kessler noted that the government submitted evidence showing that Holdren complied with OSTP policy on 4,500 occasions.

CEI, on the other hand, couldn't point to a specific instance when the former science adviser did not comply with OSTP's policy, Kessler wrote.

"The fact that Dr. Holdren forwarded work-related e-mails from the Woods Hole account to his OSTP account on 4,500 occasions," the opinion says, "makes it more likely than not that he forwarded any particular work-related Woods Hole e-mail to his OSTP account."



---

**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Tuesday, March 14, 2017 1:46 PM  
**To:** Ruth Ann Lowery - NOAA Federal  
**Cc:** Rose Stanley; Rod Vieira; Nathanson Stacey  
**Subject:** Re: Interesting New DDC FOIA Decision re Private Email Address

Fantastic (b)(5)

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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On Tue, Mar 14, 2017 at 1:40 PM, Ruth Ann Lowery - NOAA Federal <[ruthann.lowery@noaa.gov](mailto:ruthann.lowery@noaa.gov)> wrote:

## WHITE HOUSE

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[Click here](#) to read the opinion.

Twitter: [@apeterka](#) Email: [areilly@eenews.net](mailto:areilly@eenews.net)

Ruth Ann Lowery, Attorney-Advisor

NOAA Office of General Counsel

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**From:** Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>  
**Sent:** Wednesday, March 15, 2017 12:20 PM  
**To:** Mark Graff - NOAA Federal  
**Subject:** FW: Judicial Watch v. Dep't of Commerce - Draft Reply Brief  
**Attachments:** Second Graff Decl. 3 15 2017.docx; 3 13 17 Reply.docx; reply to statement of material facts.docx; Dkt. 16 - Motion for Summary Judgment.pdf; Dkt. 22 - Cross Motion for Summary Judgment.pdf

(b)(5)  
[Redacted]

RA

Ruth Ann Lowery, Attorney-Advisor  
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**From:** Snell, Kevin (CIV) [mailto:[Kevin.Snell@usdoj.gov](mailto:Kevin.Snell@usdoj.gov)]  
**Sent:** Wednesday, March 15, 2017 11:30 AM  
**To:** Myers, Jordan (Federal); Hillary Davidson  
**Cc:** Rose Stanley - NOAA Federal; Ruth Ann Lowery - NOAA Federal  
**Subject:** Judicial Watch v. Dep't of Commerce - Draft Reply Breif

All,

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[Redacted]

As always, happy to further discuss.

Thanks for your help on this case.

Kevin

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Docket No. 15-cv-2088 (CRC)

**MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56, Defendant U.S. Department of Commerce hereby moves for summary judgment on all of Plaintiff's claims. This motion is supported by a statement of material facts as to which there is no genuine issue, a memorandum of points and authorities, the Declarations of Mark Graff and Dr. Richard Spinrad, and a *Vaughn* index. A proposed order is attached.

Dated: December 15, 2016

Respectfully submitted,

BENJAMIN C. MIZER  
Principal Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO  
Deputy Director, Federal Programs Branch

/s/ Kevin M. Snell  
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*Counsel for Defendant*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Docket No. 15-cv-2088 (CRC)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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## **INTRODUCTION**

In this Freedom of Information Act (“FOIA”), Plaintiff Judicial Watch requested from the National Oceanographic and Atmospheric Administration (“NOAA”), a component of the Department of Commerce, records relating to different temperature metrics and datasets.<sup>1</sup> The parties conferred and reached an agreement regarding the scope of the request and relevant search parameters. Using those agreed-upon parameters, NOAA conducted a search and ultimately produced responsive, non-exempt material.

Plaintiff now challenges the adequacy of NOAA’s search and all of its redactions and withholdings. But as discussed more fully herein, NOAA conducted a search that was reasonably calculated to locate all non-duplicative records in its possession responsive to Plaintiff’s request. Moreover, all of the challenged information and records that NOAA withheld were properly exempt from production. The Court should therefore grant summary judgment in favor of the Department of Commerce.

## **FACTUAL BACKGROUND**

### **I. The Hiatus Paper**

The FOIA request at issue centers around a June 4, 2015 study authored by NOAA scientists and published in the journal *Science* entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* (“Hiatus Paper” or “the Paper”). Between September 2013 and November 2014, the Intergovernmental Panel on Climate Change (“IPCC”) released a report in stages that concluded that the upward global surface temperature trend from 1998-2012

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<sup>1</sup> The FOIA request also sought communications between NOAA and the House of Representatives Committee on Science, Space, and Technology. The agency made a separate production of these records, which Plaintiff’s counsel indicated in writing that Plaintiff did not intend to challenge. Therefore, this motion for summary judgment and accompanying documents do not address the agency’s response to that aspect of the request.

was lower than that from 1951-2012. Declaration of Mark Graff (“Graff Decl.”) Decl. ¶ 9 (attached herein as Exhibit A). The apparent observed slowing of the global surface temperatures was dubbed the “hiatus.” *Id.* The Hiatus Paper, drafted after that report by a team of NOAA scientists, sought to properly account for the alleged “hiatus.”

NOAA’s National Centers for Environmental Information (“NCEI”) produces and maintains datasets for global ocean areas and global land areas. *Id.* ¶ 6. Scientists throughout the government, including scientists at agencies other than NOAA, and outside of the government, use the sea surface temperature and land surface temperature datasets for a variety of purposes, including for climatic research and climate assessments. *Id.* NCEI scientists continually work to improve the datasets to provide the public the most up-to-date and accurate information. *Id.* There were two significant developments related to the “hiatus” after the IPCC’s report. In particular, 2013 and 2014 were two of the five warmest years on record for the globe. *Id.* ¶ 10. Also, NOAA scientists made significant improvements to its sea surface temperature dataset, one of largest being a correction that accounted for the difference in data collected from ships and buoys. *Id.* Buoys have been increasingly used since the 1970s to measure sea surface temperatures, and scientists developed a method to correct for the difference between these two observing systems and incorporated those corrections into the dataset. *Id.*

NCEI scientists regularly interpret and analyze datasets and release to the public the most up-to-date climate science, often through publication in scientific journals. *Id.* ¶ 7. The Hiatus Paper is an example of analysis and interpretation of the updated underlying data. *Id.* ¶ 8.

Around late October 2014, Tom Karl, then the Director of NCEI, circulated a draft paper to a group of NOAA scientists that developed an idea for properly accounting for the alleged “hiatus” based on the additional two years of global temperature data and the improvements to

NOAA's sea surface temperature dataset. *Id.* ¶ 11. Karl sought feedback on the draft paper, and a team of scientists at NOAA worked to develop a manuscript. *See id.* ¶¶ 11-13. Many drafts and revisions were exchanged among these scientists, along with emails discussing various aspects of the paper or its content, including suggestions on how best to describe the data, opinions on statistical error uncertainty ranges, thoughts on the implications of other researchers' work, and so on. *Id.* ¶ 13. Such collaboration via discussions and drafts is standard practice at NCEI. *Id.* ¶ 13.

In December 2014, the authors submitted the draft paper to the journal *Science*. *Id.* ¶ 14. Once there, the draft paper went through the journal's peer review process, in which five anonymous peer reviewers weighed in on the manuscript. *Id.* ¶ 20. When the authors received feedback, they discussed internally how to respond in writing to the comments they received, and also revised the manuscript to address the questions and concerns raised. *See id.* ¶ 21. After a second round of peer review, NOAA received word that the article would be published, and *Science* published the Paper on its website on June 4, 2015. *Id.* ¶ 23.

## **II. The FOIA Request and NOAA's Response**

Plaintiff's FOIA request, dated October 30, 2015, sought in relevant part:

1. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the methodology and utilization of Night Marine Air Temperatures to adjust ship and buoy temperature data.
2. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the use of other global temperature datasets for both NOAA's in-house dataset improvements and monthly press releases conveying information to the public about global temperatures.
3. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the

utilization and consideration of satellite bulk atmospheric temperature readings for use in global temperature datasets.

Graff Decl. ¶ 24; *see also* Answer, ECF No. 8-1.

Upon review of the request, NOAA officials determined that it did not reasonably describe the records requested. Graff Decl. ¶ 25. Through counsel, NOAA conferred with Plaintiff to negotiate a clear description of the material sought. *Id.* During the course of those discussions, NOAA indicated to Plaintiff that it understood the request to reflect an interest in the Hiatus Paper and accordingly suggested modifying the request to call for a search for all documents and communications referring to the Hiatus Paper from its nine authors. *Id.* ¶ 26. Plaintiff confirmed its interest in that study, but indicated that it sought only records referring to the topics listed in its initial FOIA request. *Id.*

The parties ultimately “reached an agreement regarding the scope of the request and relevant search parameters.” Second Joint Status Report, ECF No. 10 at 2. For Plaintiff’s FOIA request, NOAA agreed to search the records of the nine authors of the Hiatus Paper for records referring to that paper and that contain one of the following search terms: “NMAT,” “Night Marine Air Temperatures,” “ISTI,” “ICOADS,” “sea ice,” “satellite,” “Advanced Very High Resolution Radiometer,” “AVHRR,” “Advanced Microwave Scanning Radiometer,” and “AMSR.” *Id.*; Graff Decl. ¶ 27.

After NOAA directed those custodians to run the agreed-upon searches, it made a production on May 27, 2016 of 102 pages of material in its entirety and 90 partially redacted pages. *See* Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12 at 2. NOAA withheld in their entirety 8,013 pages of records, and informed Plaintiff that because it sought records from nine separate custodians, a significant amount of duplicative material existed in the responsive records. *See* Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12. The parties then

discussed the details of potential challenges to NOAA's production, and NOAA agreed to provide Plaintiff a draft *Vaughn* index in an attempt to narrow the issues in dispute. *See* Fifth & Sixth Joint Status Report, ECF Nos. 13 & 14. Upon further review of the withheld information, on September 16, 2016, NOAA released to Plaintiff an additional 44 pages of material (7 of those pages were partially redacted to exclude Mr. Karl's cell phone number), Graff Decl. ¶ 30, and contemporaneous with this filing on December 15, 2016, NOAA released an additional 62 records, Graff Decl. ¶ 31.

### **STANDARD OF REVIEW**

A court reviews an agency's response to a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B). "FOIA cases are typically and appropriately decided on motions for summary judgment." *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009). In deciding at the summary judgment stage whether an agency has fully discharged its obligations under FOIA, "the agency must show, viewing the facts in the light most favorable to the requester, that there is no genuine issue of material fact." *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994).

### **ARGUMENT**

#### **I. NOAA's Search Was Reasonable, Adequate, and Satisfies Its Obligation Under the FOIA**

##### **A. The Standard for an Adequate Search**

The touchstone for determining whether an agency should prevail on a motion for summary judgment in FOIA litigation is whether the agency demonstrates that its "search for documents was adequate." *Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009). An agency's search is adequate if "it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The adequacy of a FOIA

search is thus gauged “not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.” *Ancient Coin Collectors Guild v. U.S. Dep’t of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) (quoting *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003)). In short, “[t]he adequacy of the search . . . is judged by a standard of reasonableness.” *Steinberg*, 23 F.3d at 551; *see also DiBacco v. U.S. Army*, 795 F.3d 178, 194 95 (D.C. Cir. 2015) (“A search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request.” (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986))).

“In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith.” *Id.* (quoting *Weisberg v. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). Such affidavits are sufficient if they “set[] forth the search terms and the type of search performed, and aver[] that all files likely to contain responsive materials (if such records exist) were searched.” *Chambers v. U.S. Dep’t of Interior*, 568 F.3d 998, 1003 (D.C. Cir. 2009) (quoting *McCready v. Nicholson*, 465 F.3d 1, 7 (D.C. Cir. 2006)). This standard does not require that “the affidavits of the responding agency set forth with meticulous documentation the details of an epic search for the requested records.” *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). “Rather, in the absence of countervailing evidence or apparent inconsistency of proof, affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice . . . .” *Id.* Moreover, “[s]uch agency affidavits attesting to a reasonable search ‘are afforded a presumption of good faith,’ and ‘can be rebutted only with evidence that the agency’s search was not made in good faith.’” *Riccardi v. US Dep’t of Justice*, 32 F. Supp. 3d 59, 63 (D.D.C. 2014) (quoting *Def. of Wildlife v. U.S. Dep’t of Interior*, 314 F. Supp.2d 1, 8 (D.D.C. 2004)).

Finally, courts in this circuit recognize the “well-worn rule . . . that the adequacy of a FOIA search is not to be judged by its results.” *Rosenberg v. United States Dep’t of Immigration & Customs Enf’t*, 13 F. Supp. 3d 92, 104 (D.D.C. 2014). “The question is not ‘whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was *adequate*.’” *Steinberg*, 23 F.3d at 551 (quoting *Weisberg v. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)) (emphases in original). Thus, courts have rejected challenges to the adequacy of a search, even when a “slim yield may be intuitively unlikely” and a “reasonable observer would find th[e] result[s] unexpected.” *Ancient Coin Collectors Guild*, 641 F.3d at 514. Moreover, “mere speculation that as yet uncovered documents might exist[] does not undermine the determination that the agency conducted an adequate search for the requested records.” *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004); *see also Sheffield v. Holder*, 951 F. Supp. 2d 98, 101 (D.D.C. 2013) (noting that a requester “cannot rest . . . on mere conjecture or ‘purely speculative claims about the existence and discoverability of other documents’” (quoting *Elec. Privacy Info. Ctr. v. Dep’t of Homeland Sec.*, 384 F. Supp. 2d 100, 107 (D.D.C. 2005))).

## **B. NOAA Conducted an Adequate Search**

As set forth in Mark Graff’s Declaration, NOAA’s search for records responsive to Plaintiff’s FOIA request was more than adequate. *See Perry*, 684 F.2d at 127. Judicial Watch and NOAA reached an agreement as to how the search would be carried out. The agency would search the records of the nine Hiatus Paper authors for any record referring to that study and containing the term “NMAT,” “night marine air temperatures,” “ISTI,” “ICOADS,” “sea ice,” “satellite,” “advanced very high resolution radiometer,” “AVHRR,” “advanced microwave scanning radiometer,” and “AMSR.” Graff Decl. ¶ 27; Second Joint Status Report at 2, ECF No.

10. The timeframe for the search would be October 1, 2014 to June 4, 2015. *Id.* NOAA determined that the records requested resided within one office, NCEI, because all of the agreed-upon custodians work or had worked there during the time frame in which responsive records were created. *Id.* ¶ 33. NOAA then directed those custodians to search their email, electronic, and paper files for records referring to the Karl Study and containing the agreed-upon search terms. *Id.* ¶ 35. Those scientists searched their electronic files (including email) and non-electronic files, collected any potentially responsive material, and forwarded that material for responsiveness and exemption review. *Id.* ¶¶ 36-38.<sup>2</sup> There were no common areas at NCEI for NOAA to search. *Id.* ¶ 37. Thus, all files determined to be reasonably likely to contain responsive, non-duplicative material were searched. *Id.* ¶ 44.

On this record, NOAA's search should be upheld under FOIA. NOAA has provided "a reasonably detailed [declaration], setting forth the search terms and the type of search performed," and averred that all files likely to contain responsive, non-duplicative materials were searched. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby*, 920 F.2d at 68). NOAA has "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68.

## II. NOAA Properly Withheld Information Under Exemption 5

FOIA does not require disclosure of "matters that are . . . inter-agency or intra-agency memorandums or letters [which] would not be available by law to a party other than an agency in

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<sup>2</sup> One custodian had retired from NCEI by the time the search was conducted and so that former employee's archived email was searched by another custodian. *See* Graff Decl. ¶ 36 n.1. No additional records responsive to this request from that author are known to have existed following his retirement. *See id.*



litigation with the agency.” 5 U.S.C. § 552(b)(5). “Exemption 5 . . . exempt[s] those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 thus protects the attorney-client privilege, the attorney work product privilege, and the deliberative process privilege. *Id.*; see also *Rockwell Int’l Corp. v. Dep’t of Justice*, 235 F.3d 598, 601 (D.C. Cir. 2001).

The deliberative process privilege “allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). According to the D.C. Circuit,

There are essentially three policy bases for this privilege. First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that officials should be judged by what they decided, not for matters they considered before making up their minds.

*Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (quoting *Jordan v. Dep’t of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978)).

The privilege is necessary because “those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process.” *Sears*, 421 U.S. at 150-51. “[E]fficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to ‘operate in a fishbowl.’” *EPA v. Mink*, 410 U.S. 73, 87 (1973), *abrogated on other grounds*, Pub. L. No. 93-502, 88 Stat. 1561 (1974). There are “[t]wo requirements [that] are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative.” *In re Sealed Case*, 121 F.3d at 737.

The agency is best situated “to know what confidentiality is needed ‘to prevent injury to the quality of agency decisions.’” *Chem. Mfrs. Ass’n v. Consumer Prod. Safety Comm’n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting *Sears*, 421 U.S. at 151). NOAA’s justification for asserting Exemption 5 is “sufficient if it appears ‘logical’ or ‘plausible.’” *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007).

Here, NOAA properly withheld information under Exemption 5 that is protected by the deliberative process privilege because the information withheld reflects deliberations in preparation for decisions of how to analyze and present data and theory, as well as decisions about how to respond to peer review comments and deliberations on developing public communications and congressional presentations. *See* Graff Decl. ¶¶ 50-63. Disclosure of such information, which is predecisional and deliberative, and contains selected factual material intertwined with opinion, would inhibit candid internal discussions and the expression of recommendations and judgments. *Id.* ¶ 64. Disclosure of the details of these confidential discussions and drafts could reasonably be expected to chill the open and frank exchange of comments and opinions that NOAA officials engage in, as well as inhibit candid internal discussions and recommendations regarding preferred courses of action for agency personnel. *Id.*

The documents withheld in full or in part under the deliberative process privilege fall generally into three categories: (1) drafts of the Hiatus Paper; (2) internal deliberations, including email exchanges; and (3) peer review materials, both formal and informal. As explained below and in the attached *Vaughn*, each redacted or withheld document contains both predecisional and deliberative information. Accordingly, NOAA properly asserted Exemption 5 based on the deliberative process privilege.

## 1. Drafts of the Hiatus Paper

NOAA withheld pursuant to Exemption 5 inter- or intra-agency, predecisional, and deliberative draft versions of the Hiatus Paper (including drafts of its accompanying figures and “supplementary materials”) that were produced while NOAA scientists were developing the Paper. Graff Decl. ¶ 51.<sup>3</sup> “[D]raft documents by their very nature, are typically predecisional and deliberative, because they reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors.” *In re Apollo Grp., Inc. Sec. Litig.*, 251 F.R.D. 12, 31 (D.D.C. 2008) (non-FOIA case) (citation omitted). Accordingly, “drafts are commonly found exempt under the deliberative process exemption.” *People for the Am. Way Found. v. Nat’l Park Serv.*, 503 F. Supp. 2d 284, 303 (D.D.C. 2007). Among other reasons for this, disclosure of “decisions to insert or delete material or to change a draft’s focus or emphasis . . . would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work.” *Dudman Commc’ns Corp. v. Dep’t of Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987). Indeed, drafts are ordinarily exempt regardless of whether or to what extent segments of the draft made their way into the final product: “If the segment appeared in the final version, it is already on the public record and need not be disclosed. If the segment did not appear in the final version, its omission reveals an agency deliberative process: for some reason, the agency decided not to rely on that fact or argument after having been invited to do so.” *Exxon Corp. v. Dep’t of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983) (quoting *Lead Industries Ass’n v. OSHA.*, 610 F.2d 70, 86 (2d Cir. 1979)); see *ViroPharma Inc. v. HHS*, 839 F. Supp. 2d 184, 193 (D.D.C. 2012) (“The choice of what factual

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<sup>3</sup> The fact that some draft versions were shared for peer review purposes outside of the federal government does not affect those drafts’ status as inter- or intra-agency. See *infra* at Section II.3.

material . . . to include or remove during the drafting process is itself often part of the deliberative process, and thus is properly exempt under Exemption 5.”); *cf. Marzen v. HHS*, 825 F.2d 1148, 1155 (7th Cir. 1987) (noting that privilege “protects not only the opinions, comments and recommendations in the draft, but also the process itself”).

These drafts are predecisional inasmuch as they were generated to assist the agency in preparing the final version of the Hiatus Paper. *See Quarles v. Dep’t of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (explaining that materials are predecisional when “prepared in order to assist an agency decisionmaker in arriving at . . . decisions”). And they are deliberative in that they reflect the development of the final paper; these non-final, predecisional drafts contain opinions and recommendations of the NOAA authors; draft language, data, and data interpretation for consideration by other NOAA authors; comments on previous drafts of the paper; and/or responses to other NOAA authors’ or peer reviewers’ comments on earlier drafts of the paper. *See* Graff Decl. ¶ 51; *Vaughn* part 2 Category A. Withholding this material under Exemption 5 was proper, and the release of such drafts would inhibit agency scientists from expressing their views and deter NOAA scientists from participating candidly in the development of scientific products in the future. *See* Graff Decl. ¶ 51.<sup>4</sup>

## **2. Communications Among NOAA Personnel**

Also integral to the drafting of the Hiatus Paper, the authors frequently communicated and exchanged ideas with one another via email during the Paper’s development. Here, NOAA

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<sup>4</sup> Equally appropriate, NOAA’s *Vaughn* also shows that the agency withheld draft documents that aided in or related to the development of the Paper, such as “[d]raft graphs of land and ocean temperature data created by NOAA scientists to be used in the paper,” *Vaughn* part 2 at bates pages 1170-73, “[d]raft graphs and charts of SST data to be used in [the] development of the paper,” *Vaughn* part 2 at bates pages 2071-76, and a “[d]raft powerpoint by [an] author presenting information on global temperature and presenting data analysis done by NOAA scientists for the paper,” *Vaughn* part 2 at bates pages 1876-86.

withheld inter- or intra-agency, predecisional, and deliberative communications. *See* Graff Decl. ¶ 50. In pursuing a research objective, scientists may begin with only a rough idea, and then develop, test, and revise that idea as data is collected and interpreted. Declaration of Richard W. Spinrad (“Spinrad Decl.”) ¶ 14 (attached herein as Exhibit B). Possible interpretations are generated and tested in part through candid debates and exchanges among peers. *Id.* ¶ 15. Indeed, the exchange and debate among peers is the mechanism that allows NOAA to ensure its scientific products are robustly developed and accurately tested. *Id.* ¶ 16. And there is a general and well-established presumption that such discussions are not intended to be, and will not be, shared with a wider audience, as confidentiality is essential to ensuring participants feel free to propose new ideas or explanations without fear of misinterpretation or being taken out of context. *Id.* ¶ 20. It is critical that this type of information be protected so as not to chill candid exchanges and debates, as well as to avoid the risk of confusing the public with preliminary or incomplete information. *See id.* ¶¶ 23-25.

NOAA’s *Vaughn* index reinforces that these types of predecisional and deliberative communications occurred here, were integral to the development of the Hiatus Paper, and were appropriately withheld or redacted. *See Abteu v. U.S. Dep’t of Homeland Sec.*, 808 F.3d 895, 898 (D.C. Cir. 2015) (“[O]fficials should be judged by what they decided, not for matters they considered before making up their minds” (citation and internal quotation mark omitted)). For example, NOAA is redacting or withholding communications between scientists in which authors asked for clarification on data analysis conducted for developing the Paper, *Vaughn* part 1 at bates pages 22-23, shared opinions on the results of a draft data analysis for developing the Paper, *Vaughn* part 1 at bates page 15, offered opinions as to the best approach to take in the Paper, *Vaughn* part 1 at bates pages 300, 335, 362-63, and provided opinions on statistical error

uncertainty ranges for development of the Paper, *Vaughn* part 1 at bates page 245. Moreover, NOAA withheld a document that presented questions and draft graphs to spur discussion among the NOAA scientists. This document was created and circulated for the purpose of author discussions during the development of the Hiatus Paper, and shows NOAA scientists considering what constitutes the best data analysis and presentation for the Paper. *See Vaughn* part 2 Category E; Graff Decl. ¶ 52.<sup>5</sup>

In addition to withholding communications concerning the development of the Hiatus Paper, NOAA also withheld communications and information reflecting the development of a plan by its officials for communications and press release in preparation for publication of the paper, *e.g. Vaughn* part 1 at bates page 289-90, *Vaughn* part 2 at bates page 7446-50, as well as the agency's development of a presentation to Congress, *e.g., Vaughn* part 1 at bates pages 143, 324 (explaining that redacted email reflected "NOAA scientist discussing climate change research and developing the agency's presentation for Congress"). This withheld information, which reflects NOAA's development of how to brief Congress and the public, is predecisional and deliberative and falls squarely within Exemption 5. *E.g., Judicial Watch, Inc. v. U.S. Dep't of the Treasury*, 796 F. Supp. 2d 13, 31 (D.D.C. 2011) (noting email discussing response to press inquiry protected under deliberative process privilege).

All of this material is precisely the sort of information that the deliberative process privilege is designed to protect. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854,

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<sup>5</sup> Similarly, NOAA withheld information reflecting discussions among scientists concerning potential scientific inquiries. *See, e.g., Vaughn* part 1 at bates page 75 (discussing future climate research and asking for opinion on this research and on possible role of NOAA scientists in this research). Again, such material is predecisional and deliberative, and therefore is exempt from disclosure. *E.g., Sears*, 421 U.S. at 151 n.18 (explaining that protection extends to records that are part of decisionmaking process even where process does not produce actual decision by agency).

866 (D.C. Cir. 1980) (document is “predecisional” if it is “generated before the adoption of an agency policy” and “deliberative” if it “reflects the give-and-take of the consultative process”); *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 9 (2001) (explaining that deliberative process privilege’s “object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government”) (citation omitted); *Russell*, 682 F.2d at 1048 (“[T]he exemption protects not only communications which are themselves deliberative in nature, but all communications which, if revealed, would expose to public view the deliberative process of an agency.”). Moreover, any factual material in the withheld documents reflect the authors’ selection and presentation of factual material, Graff Decl. ¶ 65, and as such it too is covered by the deliberative process privilege. *See, e.g., Ancient Coin Collectors Guild*, 641 F.3d at 513 (explaining that factual material can be withheld where it reflects “an exercise of discretion and judgment calls” and that the “legitimacy of [the] withholding” turns on “whether the selection or organization of facts is part of an agency’s deliberative process”).

Because all of the redacted and withheld information is inter- or intra-agency, predecisional, and deliberative in nature, NOAA properly applied Exemption 5.

### **3. Peer Review Material**

NOAA also withheld inter- or intra-agency material reflecting the different peer review processes its analyses and drafts underwent prior to publication of the Hiatus Paper. *Science* follows a formal peer review process in which subject matter experts evaluate the rigor and merit of the paper, and provide feedback on an array of issues. Graff Decl. ¶ 15. Those anonymous, impartial reviewers share their reviews with the authors, *Science*’s board, and potentially other reviewers (for cross-comment). *Id.* ¶ 17.

Here, *Science* sent the manuscript to five anonymous peer reviewers, and the scientists received two rounds of comments. Upon receiving these reviewers' comments, the NOAA scientists deliberated internally as to how to respond in writing to every comment received. NOAA properly withheld peer reviewer comments, the agency's internal draft responses to these peer reviewer comments, draft cover letters NOAA's scientists wrote to accompany their response, as well as the agency's final responses to peer reviewer comments. See Graff Decl. ¶¶ 53-54; *Vaughn* part 2 Category B, C, D.

The D.C. Circuit has specifically held that comments provided by peer reviewers during the peer review process for publication of scientific articles in scientific journals are covered by Exemption 5 because they are both "pre-decisional because it preceded the agency's decision whether and in what form to publish" the paper and were part of the agency's deliberative process "because the agency secured review commentary in order to make that decision." See *Formaldehyde Inst. v. U.S. Dep't of Health and Human Servs.*, 889 F.2d 1118, 1123-25 (D.C. Cir. 1989). As that Court recognized, agency scientists "must regularly rely on the comments of expert scientists to help them evaluate the readiness of agency work for publication [and i]n that sense they must rely on the opinions and recommendations of temporary consultants." *Id.* at 1125.

The scientists' draft responses to the peer reviewer comments are also covered by Exemption 5 since these materials, including personal opinions and recommendations, draft language, data, and data interpretation for consideration, as well as comments on previous drafts of the responses, reflect predecisional and deliberative discussions. See *Vaughn* part 2 Category C; Graff Decl. ¶ 54. Similarly, the final responses to peer review comments that NOAA submitted to *Science* during the peer review process reflect the agency's response to constructive



criticism and advice, and were part of the process to assist in the authors' deliberation as to whether and in what form to publish the paper. *See Vaughn* part 2 Category D; Graff Decl. ¶ 55. These final responses, then, fit comfortably within Exemption 5. *See Petroleum Info. Corp.*, 976 F.2d at 1434 (agency documents that were "prepared in order to assist an agency decisionmaker in arriving at his decision" are "predecisional" (citation omitted)); *Coastal States Gas Corp.*, 617 F.2d at 866. Finally, the draft cover letters to *Science* accompanying the scientists' responses to the peer review comments contain edits or otherwise do not include the final wording of the letter, reflecting that the scientists' final approach had not been finalized at that point. *Vaughn* part 2 Category B; Graff Decl. ¶ 53. Withholding such draft material was appropriate.

The fact that the peer review comments were sent by *Science*, and the responses to those peer reviewer comments were sent back to *Science*, does not affect their status as "intra-agency" materials that may be protected by Exemption 5. "Recognizing that the purpose of the exemption was to promote the quality of agency policy decisions and that often these policy decisions were best made by incorporating the advice of outside experts, [the D.C. Circuit] developed a 'consultant corollary' whereby communications with temporary consultants would be considered 'intra-agency' for the purposes of Exemption 5." *Judicial Watch v. U.S. Dep't of Transp.*, 950 F. Supp. 2d 213, 216 (D.D.C. 2013) (citing cases). "When communications between an agency and a non-agency aid the agency's decision-making process and the non-agency did not have an outside interest in obtaining a benefit that is at the expense of competitors, the communication must be considered an intra-agency communication for the purposes of FOIA Exemption 5." *Judicial Watch*, 950 F. Supp. 2d at 218-19 (citing *Nat'l Inst. of Military Justice v. U.S. Dep't of Defense*, 512 F.3d 677 680-85 (D.C. Cir. 2008) ("*NIMJ*"); *Lardner v. U.S. Dep't of Justice*, No. 03-0180, 2005 WL 758267, at \*1 (D.D.C. Mar. 31, 2015);

*see also, e.g., Hooker v. HHS*, 887 F. Supp. 2d 40, 55 (D.D.C. 2012) (upholding agency’s withholding of predecisional and deliberative letter from former employee where he “played the same role in the agency’s process of deliberation after his departure that he would have played had he remained”), *aff’d*, No. 13-5280, 2014 WL 3014213 (D.C. Cir. May 13, 2014); *see also Elec. Privacy Info. Ctr. v. DHS*, 892 F. Supp. 2d 28, 46 (D.D.C. 2012) (“In order to be excluded from the exemption, the contractors must assume a position that is ‘necessarily adverse’ to the government.”).<sup>6</sup>

Moreover, maintaining the confidentiality of these communications is important, as disclosure would discourage the sharing of candid thoughts of the reviewers and scientists. Graff Decl. ¶ 55, 64; *see also* Spinrad Decl. ¶¶ 20-21 (explaining importance of confidentiality in developing scientific products). Here, as in *Formaldehyde*, it is “indisputable” that both “reviewers’ comments are expected to be confidential” and “disclosure of reviewers’ comments would seriously harm the deliberative process.” 889 F.2d at 1124 (internal citations and quotations omitted).

Outside of *Science*’s formal peer review process, NOAA scientists welcomed the informal peer review from a limited number of consultants in evaluating the underlying datasets

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<sup>6</sup> *Department of the Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), holding that Exemption 5 did not protect documents submitted by American Indian Tribes to the Interior Department addressing tribal interests that were then the subject of state and federal water allocation proceedings, does not prevent the application of the consultant corollary here. Rather, the D.C. Circuit “has allowed any communication that aids the agency’s deliberative process to be protected as ‘intra-agency,’” and “*Klamath* only modifies this by requiring that we not protect communications with interested parties seeking a government benefit that is adverse to others seeking that benefit.” *Judicial Watch*, 950 F. Supp. 2d at 218 (footnote omitted).

Also, to fall within the consultant corollary, there is no requirement that an individual must possess a contractual relationship with the agency in question. *See, e.g., NIMJ*, 512 F.3d at 679-87 (deliberative process privilege exempted from disclosure comments received by Department of Defense, in the course of issuing regulations, from non-governmental lawyers who were former high ranking governmental officials or academics or both).

and developing the Hiatus Paper. Graff Decl. ¶ 56; *see also Formaldehyde Inst.*, 889 F.2d at 1125. In the field of climate science, only a small number of scientists have the relevant, specialized expertise, *see* Spinrad ¶ 17, and it is common for scientists to seek input from colleagues both inside and outside the federal government, *id.* ¶ 19. Sometimes experts that are located outside of the federal government have an expertise that can aid the agency. *See id.* ¶ 17. The consultants here, each of whom is highly regarded in his specialized field, Graff Decl. ¶ 58, share the common goal with NOAA of advancing scientific inquiry and developing accurate information on climate science, *see id.* ¶ 56; *see also Formaldehyde*, 889 F.2d at 1122, quoting *Ryan v. Dep't of Defense*, 617 F.2d 781, 789-90 (D.C. Cir. 1980) (“In the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.”).

As the *Vaughn* and Mark Graff’s declaration make clear, withholding this informal peer review was also appropriate, as their input was used by NOAA to ensure that only the highest quality scientific product would be released. Tom Karl, for example, asked a scientist affiliated with the National Center for Atmospheric Research to comment on a draft while the paper was in development, and that scientist provided insights and feedback in response. Graff Decl. ¶ 59; *Vaughn* part 1 bates 66-67 (explaining redacted information contained feedback and review of a data analysis for the paper and raises issue for further discussion). Other climate science experts responded to the authors upon learning from *Science* of the pending publication, as commonly occurs after an author submits a high-profile scientific paper for publication. *See* Graff Decl. ¶ 60. Two other experts provided feedback on the Paper, discussed implications of the Hiatus

Paper’s conclusion, or provided and discussed data analyses, Graff Decl. ¶¶ 62-63, *Vaughn* part 1 at bates 292-93, which helped provide important feedback about the agency’s product and informed the agency’s continuous, ongoing work of updating agency datasets and trend analyses, Graff Decl. ¶¶ 62-63; *see Vaughn* part 1 at bates 295-96 (noting that expert’s work may be incorporated into a future NOAA analysis). With respect to these types of communications, a general and well-established presumption exists that these communications will not be shared with a wider audience, which is essential to scientific exchanges and the testing and refinement of ideas that help ensure that the agency’s scientific products are well developed and robust. *See Spinrad* Decl. ¶ 20. Disclosing this material could inhibit candid discussions and exchanges and chill the open and frank exchanges upon which NOAA scientists rely. *See Graff* Decl. ¶ 64.

In sum, NOAA’s *Vaughn* and declarations make plain that the agency appropriately applied Exemption 5 to redact and withhold information protected by the deliberative process privilege.

### **III. NOAA Properly Withheld Information Under Exemption 6**

Exemption 6 protects the privacy of individuals from unwarranted invasion. Exemption 6 allows the withholding of information about individuals in “personnel and medical files and similar files” when the disclosure of such information would constitute a “clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Exemption 6 requires the agency to balance the individual’s right to privacy against the public’s interest in disclosure. *See U.S. Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976); *Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991). When weighing the public interest involved in disclosure, the court considers: (1) whether disclosure would serve the “core purpose” for which Congress enacted the FOIA. *i.e.*, to show “what the government is up to,” and (2) the public interest in general, not particular interests of

the person or group seeking the information. *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 750, 775 (1989).

Here, Exemption 6 has been applied to protect information in which individuals have a recognized privacy interest, specifically, the phone numbers of NOAA scientists. *See, e.g., Vaughn* part 1 at bates 23. Because this information can be identified as applying to a specific individual, the information withheld under Exemption 6 constitutes “similar files” within the meaning of statute; courts have routinely held that phone numbers meet this threshold test. *See, e.g., Judicial Watch, Inc. v. U.S. Dep't of State*, 875 F. Supp. 2d 37, 47 (D.D.C. 2012); *Smith v. Dep't of Labor*, 798 F. Supp. 2d 274, 283 (D.D.C. 2011); *Lowy v. IRS*, No. C 10-767, 2011 WL 1211479, at \*16 (N.D. Cal. Mar. 30, 2011).

This threshold test having been met, the next step is to compare the privacy interest at stake with the benefit disclosure would provide toward the public’s understanding of how government operates. *Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994). Here, there is a substantial privacy interest at stake in preventing the burden of unsolicited phone calls and harassment. *See Moore v. Bush*, 601 F. Supp. 2d 6, 14 (D.D.C. 2009); *United Am. Fin., Inc. v. Potter*, 667 F. Supp. 2d 49, 65-66 (D.D.C. 2009); *cf. Shurtleff v. EPA*, 991 F. Supp. 2d 1, 18 (D.D.C. 2013) (protecting email address). By contrast, an individual’s phone number sheds no light on the operations and activities of the agency. NOAA balances the individual’s strong privacy interests against the fact that release of this information would fail to shed any light on the conduct of governmental business, and reasonably concluded that, with regard to the information withheld pursuant to Exemption 6, the individual privacy interests outweighed any public interest in disclosure. Graff Decl. ¶ 66. *See FLRA*, 510 U.S. at 497 (“We must weigh the privacy interest . . . in nondisclosure . . . against the only relevant public interest in the FOIA

balancing analysis the extent to which disclosure of the information sought would she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know what their government is up to."'). Accordingly, Exemption 6 was properly applied.

#### **IV. NOAA Has Produced All Reasonably Segregable Information**

The FOIA requires that, if a record contains information that is exempt from disclosure, any "reasonably segregable" information must be disclosed after deletion of the exempt information, 5 U.S.C. § 552(b), unless the non-exempt portions are "inextricably intertwined with exempt portions." *Mead Data Ctr. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977); *Kurdyukov v. U.S. Coast Guard*, 578 F. Supp. 2d 114, 128 (D.D.C. 2008). This provision does not, however, require disclosure of records in which the non-exempt information that remains is meaningless. *See Nat'l Sec. Archive Fund v. CIA*, 402 F. Supp. 2d 211, 221 (D.D.C. 2005) (concluding that no reasonably segregable information existed because "the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words"). Consistent with this obligation, NOAA has reviewed each of the documents redacted or withheld and has concluded that there is no additional non-exempt information that may reasonably be segregated and released. *See Graff Decl.* ¶ 67. Accordingly, no further non-exempt material is subject to release.

#### **CONCLUSION**

NOAA has conducted an adequate search for documents responsive to Plaintiff's request, and properly withheld information exempt from disclosure under Exemptions 5 and 6. Furthermore, all reasonably segregable information has been released to Plaintiff. For these reasons, the Department of Commerce respectfully requests that summary judgment be entered in its favor.

Dated: December 15, 2016

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Docket No. 15-cv-2088 (CRC)

**STATEMENT OF MATERIAL FACTS IN SUPPORT OF UNITED STATES  
DEPARTMENT OF COMMERCE’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Civil Rule 7(h)(1), the following is a statement of material facts as to which the movant, the United States Department of Commerce (“the Department”), contends there is no genuine issue:

1. Between September 2013 and November 2014, the Intergovernmental Panel on Climate Change released a report in stages that concluded that the upward global surface temperature trend from 1998-2012 was lower than that from 1951-2012. Declaration of Mark Graff (“Graff Decl.”) ¶ 9.
2. The apparent observed slowing of the global surface temperatures was dubbed the “hiatus.” Graff Decl. ¶ 9.
3. The National Centers for Environmental Information (“NCEI”) at NOAA produces and maintains datasets for global ocean areas and global land areas. Graff Decl. ¶ 6.
4. NCEI scientists continually work to improve the datasets to provide the public the most up-to-date and accurate information. Graff Decl. ¶ 5.



5. NCEI scientists regularly interpret and analyze datasets and release to the public the most up-to-date climate science, often through publication in scientific journals. Graff Decl. ¶ 7.
6. On June 4, 2015, a study authored by NOAA scientists was published in *Science* entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* (“Hiatus Paper” or “the Paper”). Graff Decl. ¶ 23.
7. The Hiatus Paper is an example of analysis and interpretation of the updated underlying data. Graff Decl. ¶ 10.
8. Around late October 2014, Tom Karl, then the Director of NCEI, circulated a draft paper to a group of NOAA scientists that developed an idea for properly accounting for the alleged “hiatus” based on the additional two years of global temperature data and the improvements to NOAA’s sea surface temperature dataset. Graff Decl. ¶ 11.
9. Karl sought feedback on the draft paper, and a team of scientists at NOAA formed to develop a manuscript. *See* Graff Decl. ¶¶ 11-13.
10. Many drafts and revisions were exchanged among these scientists, along with emails discussing various aspects of the paper or its content, including suggestions on how best to describe the data, opinions on statistical error uncertainty ranges, thoughts on implications of other researchers’ work, and so on. Graff Decl. ¶ 13.
11. Such collaboration via discussions and drafts is standard practice at NCEI. Graff Decl. ¶ 13.
12. In December 2014, the authors submitted the draft paper to the journal *Science*. Graff Decl. ¶ 14.

13. Once there, the draft paper went through the journal's peer review process, in which five anonymous peer reviewers weighed in on the manuscript. Graff Decl. ¶ 20.
14. When the authors received feedback, they discussed internally how to respond in writing to the comments they received, and also revised the manuscript to address the questions and concerns raised. *See* Graff Decl. ¶ 21.
15. After a second round of peer review, NOAA received word that the article would be published, and *Science* published the Paper on its website on June 4, 2015. Graff Decl. ¶ 23.
16. Plaintiffs' FOIA request, dated October 30, 2015, sought in relevant part:
  1. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the methodology and utilization of Night Marine Air Temperatures to adjust ship and buoy temperature data.
  2. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the use of other global temperature datasets for both NOAA's in-house dataset improvements and monthly press releases conveying information to the public about global temperatures.
  3. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the utilization and consideration of satellite bulk atmospheric temperature readings for use in global temperature datasets.Graff Decl. ¶ 24; *see also* ECF No. 8-1.
17. Upon review of the request, NOAA officials determined that it did not reasonably describe the records requested. Graff Decl. ¶ 25.
18. Through counsel, NOAA conferred with Plaintiff to negotiate a clear description of the material sought. Graff Decl. ¶ 25.

19. During the course of those discussions, NOAA indicated to Plaintiff that it understood the request to reflect an interest in the Hiatus Paper and accordingly suggested modifying the request to call for a search for all documents and communications referring to the Hiatus Paper from its nine authors. Graff Decl. ¶ 26.
20. Plaintiff confirmed its interest in that study, but indicated that it sought only records referring to the topics listed in its initial FOIA request. Graff Decl. ¶ 26.
21. The parties ultimately “reached an agreement regarding the scope of the request and relevant search parameters.” Second Joint Status Report, ECF No. 10 at 2.
22. For Plaintiff’s FOIA request, NOAA agreed to search the records of the nine authors of the Hiatus Paper for records referring to that paper and that contain one of the following search terms: “NMAT,” “Night Marine Air Temperatures,” “ISTI,” “ICOADS,” “sea ice,” “satellite,” “Advanced Very High Resolution Radiometer,” “AVHRR,” “Advanced Microwave Scanning Radiometer,” and “AMSR.” Second Joint Status Report, ECF No. 10 at 2; Graff Decl. ¶ 27.
23. NOAA determined that the records requested resided within one office, NCEI, because all of the agreed-upon custodians work or had worked there during the time frame in which responsive records were created. Graff Decl. ¶ 33.
24. NOAA then directed those custodians to search their email, electronic, and paper files for records referring to the Karl Study and containing the agreed-upon search terms. Graff Decl. ¶ 35.
25. Those scientists searched their electronic files (including email) and non-electronic files, collected any potentially responsive material, and forwarded that material for responsiveness and exemption review. Graff Decl. ¶¶ 36-38.

26. One custodian had retired from NCEI by the time the search was conducted and so that former employee's archived email was searched by another custodian. No additional records responsive to this request from that author are known to have existed following his retirement. *See* Graff Decl. ¶ 36 n.1.
27. There were no common areas at NCEI for NOAA to search. Graff Decl. ¶ 37.
28. Thus, all files determined to be reasonably likely to contain responsive, non-duplicative material were searched. Graff Decl. ¶ 44.
29. On May 27, 2016, NOAA produced 102 pages of material in its entirety and 90 partially redacted pages. Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12 at 2. NOAA withheld in their entirety 8,013 pages of records. Graff Decl. ¶ 29; Fourth Joint Status Report, ECF No. 12 at 2
30. NOAA informed Plaintiff at that time that because it sought records from nine separate custodians, a significant amount of duplicative material existed in the responsive records. *See* Graff Decl. ¶ 29
31. Upon further review of the withheld information, NOAA made two supplemental productions. *See* Graff Decl. ¶¶ 30-31.
32. On September 16, 2016, NOAA released to Plaintiff an additional 44 pages of material (7 of those pages were partially redacted to exclude Mr. Karl's phone number), Graff Decl. ¶ 30.
33. Contemporaneously with this filing (on December 15), NOAA is releasing an additional 62 records. Graff Decl. ¶ 31.
34. NOAA withheld information pursuant to FOIA Exemption 5 and the deliberative process privilege. *See Vaughn* Index.

35. NOAA withheld information pursuant to FOIA Exemption 6. *See Vaughn* Index.

Dated: December 15, 2016

Respectfully submitted,

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*Counsel for Defendant*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 15, 2016, I filed the attached electronically with the Clerk of the United States District Court for the District of Columbia through the CM/ECF system, which caused the following counsel of record to be served by electronic means:

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*Attorney for Plaintiff*

/s/ Kevin M. Snell

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-2088 (CRC)
	)	
U.S. DEPARTMENT OF	)	
COMMERCE,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby cross-moves for summary judgment against Defendant U.S. Department of Commerce. As grounds therefor, Plaintiff respectfully refers the Court to the accompanying “Brief in Support of Plaintiff’s Cross-Motion for Summary Judgment and in Opposition to Defendants’ Motion for Summary Judgment,” and “Plaintiff’s Response to Defendants’ Statement of Material Facts Not in Dispute and Statement of Material Facts in Support of Cross-Motion for Partial Summary Judgment.”

Dated: February 21, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
	)	
<i>Plaintiff,</i>	)	
	)	Civ. No. 1:15-cv-2088 (CRC)
v.	)	
	)	
U.S. DEPARTMENT OF COMMERCE,	)	
	)	
<i>Defendant.</i>	)	
_____	)	

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S  
OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND IN  
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch (“Plaintiff” or “Judicial Watch”), by counsel, respectfully submits this memorandum in opposition to Defendant Department of Commerce’s (“Defendant” or “Commerce Department”) motion for summary judgment and to support Plaintiff’s cross-motion for summary judgment.

**INTRODUCTION**

Defendant has failed to provide all records in its possession, or at least the reasonably segregable, non-exempt portions of such records, and has, therefore, unreasonably withheld material responsive to Plaintiff’s FOIA request. Failing to meet its burden of proof, Defendant cannot justify the withholding of responsive documents as validly exempt under FOIA and should be ordered to disclose the improperly withheld records.

Defendant is improperly withholding information and records asserting Exemption 5 under FOIA. However, the information and documents Defendant is withholding do not validly fall within the parameters of Exemption 5 as part of the “deliberative process privilege” as intended by Congress. The “deliberative” nature of the records being withheld is factual,



investigative, scientific research related to a study published in a non-agency, peer-review journal, *Science*. The information reflects no policy or law of the agency. Therefore, the information and records being withheld are not validly exempt from disclosure under FOIA.<sup>1</sup>

### **BACKGROUND**

In June, 2015, the independent, scientific, peer-review journal *Science* published a scientific study by Thomas Karl and eight other scientists, entitled *Possible Artifacts of Data Biases in the Recent Global Surface Warming Hiatus* (“Karl Study”) See Defendant’s Statement of Material Facts (“Def’s SOF”) ¶6, ECF 16 (attached to Defendant’s Motion for Summary Judgment). The Karl Study specifically set out to investigate and formulate a conclusion regarding the “pause” or “slowdown” in global warming as reported the previous year (September 2013-November 2014) by the Intergovernmental Panel on Climate Change (“IPCC”). See Pl.’s SOF ¶ 1. The IPCC report concluded that the upward global surface temperature trend from 1998-2012 was lower than that from 1951-2012. See Def’s SOF ¶ 1. The Karl Study claimed that the ‘pause’ or ‘slowdown’ in global warming reported in the IPCC report never existed. See Plaintiff’s Statement of Material Facts (“Pl.’s SOF”) ¶ (attached herein).

Following publication of the Karl Study, Congressman Lamar Smith, Chairman of the House Committee on Science, Space, and Technology Committee, issued a subpoena requesting communications and documents related to the Karl Study. See Pl. SOF ¶ 11. NOAA officials did not comply with the subpoenas and refused to turn over internal discussions among the scientists who authored the Karl Study claiming confidentiality. *Id.*

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<sup>1</sup> Plaintiff initially challenged the adequacy of Defendant’s search for responsive records. Having reviewed the Declaration of Mark Graff submitted with Defendant’s motion for summary judgment, Plaintiff is no longer challenging the adequacy of the search. Plaintiff has no objection to Defendant withholding phone numbers of NOAA scientists pursuant to Exemption 6 under FOIA for privacy considerations. Plaintiff’s Opposition and Cross-Motion for Summary Judgment addresses only its challenges to Defendant’s B5 assertions.

On October 30, 2015, Plaintiff submitted a FOIA request to NOAA, *Seeking access to:*

1. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the methodology and utilization of Night Marine Air Temperatures to adjust ship and buoy temperature data.
2. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the use of other global temperature datasets for both NOAA's in-house dataset improvements and monthly press releases conveying information to the public about global temperatures.
3. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to the utilization and consideration of satellite bulk atmospheric temperature readings for use in global temperature datasets.
4. Any and all documents and records of communications sent to or from NOAA officials, employees and contractors regarding, concerning or relating to a subpoena issued for the aforementioned information by Congressman Lamar smith on October 13, 2015.<sup>2</sup>

*See* Complaint (“*Compl.*”) ¶5, ECF No. 1.

Plaintiff filed this FOIA lawsuit on December 2, 2015 after NOAA violated its obligations in 5 U.S.C. § 552, the Freedom of Information Act (“FOIA”). *See* *Compl.* ¶¶ 7-10. On February 4, 2016, counsel for NOAA contacted Plaintiff to discuss the request. *See* *Pl.*'s SOF 1. Plaintiff agreed to narrow its request and limit the agency's search parameters to the topics specifically identified in its request. *See* *Def.*'s SOF ¶ 22. On May 27, 2016, Plaintiff received 102 pages of records produced in full and 90 pages of records produced in part. *See* *Fourth Joint Status Report*, ECF No. 12 ¶ 2. NOAA informed Plaintiff it was withholding 8,013 pages of records in full as duplicative or exempt under FOIA. *See* *Fourth Joint Status Report*, ECF No. 12. Plaintiff requested NOAA provide a draft *Vaughn* index to review the specific

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<sup>2</sup> Plaintiff is not challenging Defendant's production of records related to this portion of the FOIA request.

exemptions and withholdings being asserted. *See* Fifth & Sixth Joint Status Reports, ECF Nos. 13 & 14. Following review of the draft *Vaughn* index, Plaintiff narrowed the issues and specific records it was challenging and informed Defendant it was challenging the documents withheld under Exemptions 5 and 6 and the adequacy of the search. *See* Pl.'s SOF ¶ 2. On September 16, 2016, Plaintiff received an additional 44 pages of responsive records previously withheld by Defendant. *See* Def's SOF ¶32. On December 15, 2016, Plaintiff received 62 additional records previously withheld. *See* Def's SOF ¶ 33.

On February 4, 2017, DailyMail.com, a British news blog website, reported that a high level whistleblower from NOAA, Dr. John J. Bates, former NOAA scientist had evidence that the Karl Study “was based on misleading, ‘unverified’ data.” *See* Pl.'s SOF 4. The article reports the Karl Study was never subject to NOAA’s “rigorous internal evaluation process.” *See* Pl.'s SOF 5. Dr. Bates accused Tom Karl of “insisting on decisions and scientific choices that maximized warming and minimized documentation...in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy.” *Id.* The article reports it learnt [*sic*] “that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming.” *Id.* “[t]he land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings ‘unstable.’”

### **LEGAL STANDARD**

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). In FOIA cases, agency decisions to “withhold or disclose information under FOIA are reviewed *de novo*.” *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 256 (D.D.C. 2004). In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the requester. *Weisberg v. U.S. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

Also in FOIA litigation, but unlike in most other federal litigation, the agency defending the action, not the plaintiff, must prove. 5 U.S.C. § 552(a)(4)(B) (“the burden is on the agency to sustain its action”); *accord Military Audit Project v. Casey*, 656 F.2d 724, 739 (D.C. Cir. 1981). “[T]he agency must demonstrate beyond material doubt that its search was ‘reasonably calculated to uncover all relevant documents.’” *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (*quoting Truitt v. U.S. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)).

FOIA requires complete disclosure of requested agency information unless the information falls into one of FOIA’s nine exemptions. 5 U.S.C. § 552(b); *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7-8 (2001); *See also Dep’t of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (discussing the history and purpose of FOIA and the structure of FOIA exemptions). “These limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Id.* Because of FOIA’s goal of promoting agency disclosure, the exemptions are to be construed narrowly. *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136, 150-151 (1989). “[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.” *U.S. Department of State v. Ray*, 502 U.S. 164, 173 (1991).

## ARGUMENT

### 1. Defendant Improperly Applies the Deliberative Process Privilege

Defendant is withholding information and records responsive to Plaintiff's FOIA request asserting the deliberative process privilege under Section 5 of FOIA. The withheld documents reflect communications among scientists related to factual data and conclusions of the scientific investigation reported in the Karl Study. *See Vaughn* index, Exhibit 1 to Declaration of Mark Graff ("Vaughn index"), ECF No. 16-2. The withheld records do not contain suggestions or recommendations on legal or policy matters. *See Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). Rather, any recommendations or opinions in the documents are of a scientific, factual, and investigatory nature. The information and records are related to a scientific research study published in a non-agency, peer review journal, *Science*. The communications and analysis do not reflect the "agency policy" envisioned by Congress as requiring protection from disclosure. *See Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1437 (D.C. Cir. 1992) (a "salient characteristic" of information eligible for protection under deliberative process privilege is its "association with a significant *policy* decision") (emphasis in original).

#### a. Scientific deliberations and decisions are not policy-related

Deliberative process covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated," *Sears, Roebuck & Co.*, 421 U.S. at 150 (internal quotation marks omitted). Congress did not intend to shield the public from the scientific discovery and research process. To withhold information under the deliberative process privilege, an agency must demonstrate that the information would "reveal 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *In*

*re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)). Further, the information must be “pre-decisional and it must be deliberative[,]” and the agency should “not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual.” *Id.* (citations omitted).

Scientific deliberations are not equivalent to policy deliberations. Scientific studies, such as this one, are objective, factual presentations of research and investigatory reports. The material is not part of the policy-making process and does not fall into the category of predecisional deliberative memoranda under Exemption 5. The deliberative process privilege is a limited privilege. In applying the deliberative process privilege, courts assess the substance of the records requested to determine if the information is purely factual or policy-related; (2) whether factual material is “reasonably segregable”, and (3) whether the material is both predecisional and deliberative. *See Nat’l Wildlife Fed’n*, 861 F.2d at 1118-20; *Senate of P.R. v. U.S. Dep’t of Justice*, 823 F.2d 574 (D.C. Cir. 1987).

To be part of the deliberative process, the document must be part of the decision-making process, or, as the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) has described, “[must] reflect[] the give-and-take of the consultative process.” *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). “[T]he agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process.” *Id.* at 868.

To determine whether the Defendant’s claim that the documents are validly being withheld, it is crucial to understand the function the documents serve within the agency. *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 858 (D.C. Cir. 1980); *NLRB v. Sears*,

*Roebuck & Co.*, 421 U.S. 132 (1975). Defendant asserts the drafts and information withheld contain opinions and recommendations of the authors and responses to peer review which qualify the material as “deliberations”. Defendant’s Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment (“Def.’s SJM”), ECF No. 16 at 10. However, such opinions, recommendations and peer responses are part of a *scientific deliberation* process and are not shielded from public disclosure under FOIA. Here, Defendant misconstrues the internal functioning of the scientific deliberative process. The withheld communications are not the documents Congress intended to be protected under the deliberative process privilege. *See Coastal States*, 617 F.2d at 867. They are not “suggestions or recommendations as to what agency policy should be.” *Id.*

Rather, the “deliberative” information and documents Defendant is attempting to withhold are more “resource opinion” relating to the applicability of existing and discovered - science to a certain set of existing and developing - data and methodology. Shielding such deliberations from the public is unnecessary and no protection from disclosure exists under FOIA.

Defendant provides the declaration of Dr. Richard W. Spinard who points to the “exchange and debate among peers as the mechanism that allows us to ensure that the scientific products we develop and release to the public are robustly developed and accurately tested. Such rigorous vetting is critical to developing and releasing scientific information of the highest possible quality to inform the public and decision-makers.” Spinrad Decl. ¶ 15.

Communications among the authors and their peers involve discussions about the tests, results, data, conclusions, etc., and analysis, theory, and presentation. Def.’s SJM at 10. Scientific answers and discoveries are realized through this open forum discussion and scientific progress

is advanced. However, Defendant argues that revealing the collaboration among scientists and disclosing these discussions will hinder the “robustness of the scientific progress.” Spinrad Decl. ¶ 24. However, the purpose of Exemption 5’s deliberative process protection specifically relates to agency policy-making. What purpose does Exemption 5 shield scientific deliberations that do not amount to agency policy? Scientific deliberations contemplate real, conclusive answers derived from concrete, measurable findings. Policy deliberations consider theoretical opinions and ideas molded into creating a rule or law. Congress’ intention to shield the theoretical “molding process” of policy deliberations cannot be concluded to similarly apply to the investigative research process of scientific deliberations.

Here, *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001) is instructive. There is no support for application of exemption 5 to scientific deliberations (as opposed to policy deliberations) in the statutory text, which the Supreme Court has “insisted be read strictly in order to serve FOIA’s mandate of broad disclosure”, which was expected and intended to affect Government operations (refusing to read an “Indian trust” exemption into the statute noting “as a general rule we are hesitant to construe statutes in light of legislative inaction” *citing Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983)).

Dr. Richard W. Spinrad asserts “these requests for input often lead to candid discussions and debates that can be thought of as a type of informal peer review that fulfills a valuable role in developing scientific thought and promoting scientific understanding.” Decl. ¶19. However, Candid discussions and informal peer review do not lead to the development of or advising on agency policy. Rather, these discussions among peers involve analysis and application of factual material and investigative techniques that “generate new ideas” in science. There is no advising



on agency policy. Rather, such deliberations are part of the scientific process in any research endeavor—the end result of which is not creation of policy, but factual, scientific discovery.

The D.C. Circuit has held that information is part of the deliberative process if disclosing such materials would expose the agency's decision-making process in such a way to discourage candid discussion within agency and undermine the agency's ability to perform its functions. *Dudman*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). Here, Defendant's Motion for Summary Judgment Memorandum and supporting declarations repeatedly state that disclosure of the withheld information and documents would inhibit candid internal discussions" and "chill the open and frank exchange of comments and opinions." Def.'s SJM at 10; Spinrad Decl. ¶¶ 22, 23, 27; Graff Decl. ¶ 64. However, the communications and deliberations related to the Karl Study at issue here do not reflect agency policy, there is no force of law. The purpose of these communications and deliberations was to adequately and accurately publish scientific findings in a peer-review journal, not to create agency policy. FOIA—and Congress in creating specific statutory exemptions—does not apply to the scientific method statutorily. Nor has it been held by courts it was the intention of Congress for exemption 5 to be so expansive as to encompass all intellectual or developmental discussions among peers. Exemption 5 relates to policy deliberations specifically. Even courts that have edged on judicial expansion of the meaning of deliberative process have cautioned and not done what Defendants *Seek* here.

In *Petroleum Information Corp. v. U.S. DOI*, 976 F.2d 1429, 1435 (D.C. Cir. 1992), the D.C. Cir. held that factual information should be shielded by the privilege, or not, according to "whether the agency has plausibly demonstrated the involvement of a policy judgment in the decisional process relevant to the requested documents." *See Mink*, 410 U.S. at 87 (privilege designed to promote "frank discussion of legal and policy matters") (quoting S.REP. No. 813,

89<sup>th</sup> Cong., 1<sup>st</sup> Sess. 9 (1965)); *id.* at 89 (“Exemption 5 requires different treatment for material reflecting deliberative or policy-making processes” and “purely factual, investigative matters”); *Coastal States*, 617 F.2d at 869 (resting conclusion that documents were not within Exemption 5 in part on ground that the documents did not “discuss the wisdom or merits of a particular agency policy, or recommend new agency policy”). “Conversely, when material could not reasonably be said to reveal an agency’s or official’s mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable.” *Petroleum Information Corp. v. DOI*, 976 F. 2d at 1435; *See Playboy Enterprises v. Department of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) (holding that fact report was not within privilege because compilers’ mission was simply “to investigate the facts,” and because report was not “intertwined with the policy-making process.”) Here, Defendant cannot point to any agency policy sought to be protected. Rather, Defendant asks the court to conclude a sufficient justification for applying Exemption 5 to scientific deliberations analogous to policy-making deliberations of an agency. The deliberations are comments among the authors and scientific community peers there is no agency policy decision. Defendant fails to point to any agency policy at issue that warrants Exemption 5 privilege protection. The results of research are factual, not deliberative, information and are not the discussions Congress intended to protect under the deliberative process privilege. *See Hennessey*, 1997 WL 537998 (“report does not bear on a policy-oriented judgment of the kind contemplated by Exemption 5” *citing Petroleum Info*, 976 F.2d at 1437); *Ethyl Corp. v. EPA*, 25 F.3d 1241 (4<sup>th</sup> Cir. 1994) (“privilege does not protect a document which is merely peripheral to actual policy formulation”); *Chi Tribune Co., v. HHS*, No. 95 C 3917, 1997 U.S. Dist. LEXIS 2308 (N.D. Ill. Feb. 26, 1997) (magistrate’s recommendation) (scientific judgments not protectable when they do not address agency policymaking.) Disclosure of the

scientific discussions within the withheld records will not “impinge[] on the policymaking decisional processes intended to be protected by this exemption.” *EPA v. Mink*, 410 U.S. 73, 92. The disclosure sought by Plaintiff will not reveal the deliberative process that Exemption 5 protects.

Disclosure of records under FOIA is required unless it squarely falls within one of the enumerated exemptions as written and specifically intended by Congress. Defendant argues this transparency requirement Congress placed on federal agencies will halt scientific progress by hampering scientists from discussing factual, scientific processes and findings. *See* Def’s SJM at 10, 20; Spinrad Decl. ¶¶ 21, 23, 24.

It cannot be possible that a scientist performing his duties would be less “frank” or “honest” if he or she knew the document might be made public. Here, withholding the communications serves no legitimate policy interest of the government. *See Coastal States*, 617 F.2d 854, 869.

Dr. Richard W. Spinard asserts “This would narrow the range of perspectives taken into account in generating our scientific products and therefore reduce the overall robustness of the scientific process.” Decl. ¶ 24. However, “robustness of the scientific process” is not statutorily protected under FOIA. Science is not Policy. While deliberations about judgments, opinions, and theories are part of the scientific research process, such exchanges among non-policy decision-makers are not protected from disclosure under FOIA. Such communications are necessary and play a major role in development of science and furthering research, but the substantive nature of scientific research is objective reporting of facts and findings, not subjective policy decisions.

## **2. The Evidence Revealed by Dr. John Bates Shows Misconduct Sufficient to Defeat Privilege**

In this Circuit, the government misconduct exception to the deliberative process privilege applies in two circumstances. First, the “deliberative process privilege disappears altogether when there is any reason to believe government misconduct occurred.” *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) (internal quotations omitted). And second, “where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve the public’s interest in honest, effective government.” *Id.* at 738 (internal quotations omitted). There is more than enough “reason to believe” government misconduct may have occurred here. Former top NOAA scientist recently revealed to DailyMail.com that the Karl Study is based on “unverified” data and was never subject to rigorous internal evaluation process. *See* Pl.’s SOF. Dr. Bates reports the Karl Study was never subject to NOAA’s “rigorous internal evaluation process.” *See* Pl.’s SOF. Dr. Bates accused Tom Karl of “insisting on decisions and scientific choices that maximized warming and minimized documentation...in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy.” *Id.* The article reports “that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming.” *Id.* “[t]he land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings ‘unstable.’ This is not mere speculation. Rather, Dr. Bates purports to have “irrefutable evidence”. *Id.*

This standard has been further elaborated by this Court. For instance, documents that constitute “circumstantial evidence” of wrongdoing should be released under the misconduct exception. *Alexander v. FBI*, 186 F.R.D. 154, 164 (D.D.C. 1999).

This Court has held that the government misconduct exception applies to documents withheld under FOIA. *Nat’l Whistleblower Ctr. v. HHS*, 903 F. Supp. 2d 59, 66 (D.D.C. 2012) (“With respect to Defendant’s legal argument, there is no authority supporting its contention that the government-misconduct exception cannot apply in FOIA cases.”).

In addition, a finding that the government misconduct exception applies does not require the Court to make a “determination as to the ultimate question of the lawfulness of Defendant’s actions,” but only requires a finding of sufficient “misconduct.” *Nat’l Whistleblower Ctr. v. HHS*, 903 F. Supp. 2d 59, 69 (D.D.C. 2012)

Even if the Court determined the communications are deliberative, NOAA must produce the records because the government misconduct exception applies here.

Government misconduct can be “nefarious” or “extreme” or a “serious breach of the responsibilities of representative government,” in which to apply the exception. *ICM Registry, LLC v. U.S. Dep’t of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008). Misleading the public about scientific data...is nefarious and extreme wrongdoing. Coupled with NOAA’s refusal to comply with Representative Smith’s congressional subpoena, there is ample evidence to *See* that government misconduct is an issue here.

The misconduct here is arguably more nefarious and extreme than the alleged misuse of the IRS at issue in *Tax Reform Research Grp. V. Internal Revenue Serv*, 419 F.Supp. 415, 426 (D.D.C. 1976), in which the exception was found to apply

### **3. Defendant Failed to Produce Reasonably Segregable Information**

The segregability analysis required by FOIA cannot be understated. In *Mead Data Central v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977), the Court held that “even where specific exemptions apply, the agency is required to conduct a segregability analysis and determine if any non-exempt portions of the record can be released.” This requirement is so essential that, “before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld ... [and] [i]f the district court approves withholding without such a finding, remand is required even if the requester did not raise the issue of segregability before the court.” *Sussman*, 494 F.3d at 1116 (internal citations omitted); *See also Soucie v. David*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971) (non-exempt material may be protected only if it is “inextricably intertwined” with exempt information).

Defendants’ declaration offers only the barest, conclusory statement that the withheld information is not segregable. *See* Def’s SJM at 22. This is inadequate to meet Defendant’s burden in FOIA litigation. Conclusory language in agency declarations that provides no specific basis for segregability findings by district courts may be found inadequate. *See Dorsett v. United States Dep’t of the Treasury*, 307 F. Supp. 2d 28, 41 (D.D.C. 2004) (denying summary judgment in part “[b]ecause of [agency’s] inadequate and conclusory segregability explanation,” and ordering renewed motion with affidavit solely addressing segregability); *Animal Legal Def. Fund v. Dept. of Air Force*, 44 F. Supp. 2d 295, 301 (D.C. Cir. 1999) (conclusory statement regarding segregability are “patently insufficient”); *Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep’t of State*, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992) (finding that “boilerplate” statement that “no segregation of nonexempt, meaningful information can be made for disclosure” is “entirely insufficient”); *See also Patterson v. IRS*, 56 F.3d 832, 839 (7th Cir. 1995) (“[B]ecause

the [agency declaration] lumps all of the withheld information together in justifying nondisclosure, the district court could not have independently evaluated whether exempt information alone was being withheld or deleted in each instance.”)

#### **4. *In Camera* Review is Warranted**

Courts have departed from routine reliance on agency affidavits where exemptions are not sufficiently proven, or where other good cause may exist to order release information under FOIA. The Court has “the option to conduct *in camera* review.” *Juarez v. DOJ*, 518 F.3d 54, 59-60 (D.C. Cir. 2008); *Allen v. CIA*, 636 F.2d 1287, 1298 (D.C. Cir. 1980) (“Where the agency fails to meet that burden, a not uncommon event, the court may employ a host of procedures that will provide it with sufficient information to make its *de novo* determination, including *in camera* inspection.”). Here, the court should undergo an *in camera* review to determine the appropriateness of Defendants’ asserted claims of deliberative process privilege.

Because the requested records are “few in number and of short length,” the Court may reasonably review the responsive records *in camera*. *Allen*, 636 F.2d at 1298. *In camera* review is “particularly appropriate” in cases like this one, where the “agency affidavits are insufficiently detailed to permit meaningful review of exemption claims.” *Quinon & Strafer v. Federal Bureau of Investigation*, 86 F.3d 1222, 1228 (D.C. Cir. 1996). In addition, as the D.C. Circuit Court has explained:

In cases that involve a strong public interest in disclosure there is also a greater call for *in camera* inspection... When citizens request information to ascertain whether a particular agency is properly serving its public function, the agency often deems it in its best interest to stifle or inhibit the probes. It is in these instances that the judiciary plays an important role in reviewing the agency’s withholding of information. But since it is in these instances that the representations of the agency are most likely to be protective and perhaps less than accurate, the need for *in camera* inspection is greater. *Allen*, 636 F.2d at 1299.

The public interest in disclosure, and the distinct possibility of the agency being “protective” of information given the circumstances, dictates such a review here.

**Conclusion**

For all of the foregoing reasons and the reasons, Plaintiff’s cross-motion for summary judgment should be granted and the material should be produced to Plaintiff.

Dated: February 21, 2017

Respectfully submitted,

/s/ Lauren M. Burke

Lauren M. Burke

DC Bar No. 472919

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

_____	)	
JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-2088 (CRC)
	)	
U.S. DEPARTMENT OF	)	
COMMERCE,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S RESPONSE TO DEFENDANT’S STATEMENT OF MATERIAL FACTS  
NOT IN DISPUTE AND PLAINTIFF’S STATEMENT OF MATERIAL FACTS IN  
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Local Civil Rule 7(h), respectfully submits this response to Defendant’s Statement of Material Facts Not in Dispute (ECF 25-5) and Plaintiff’s Statement of Material Facts in Support of Cross-Motion for Summary Judgment:

**I. Plaintiff’s Response to Defendants’ Statement of Material Facts Not in Dispute.**

General Objection

As an initial matter, Plaintiff objects that Defendant’s statement does not comply with Local Civil Rule 7(h)(1). The failure to comply with the requirement to file a proper statement of material facts in “making or opposing a motion for summary judgment may be fatal to the delinquent party’s position.” *Gardels v. Central Intelligence Agency*, 637 F.2d 770, 773 (D.C. Cir. 1980); *see also Adagio Investment Holding Ltd. v. Federal Deposit Insurance Corp.*, 338 F. Supp.2d 71, 75 (D.D.C. 2004); *Smith Property Holdings, 4411 Connecticut L.L.C. v. U.S.*, 311 F. Supp. 2d 69, 78 (D.D.C. 2004); *Robertson v. American Airlines*, 239 F. Supp.2d 5, 8-9 (D.D.C.

2002). Defendants' statement of material facts contains an improper mix of fact and legal conclusions and therefore fails to "assist the court in isolating the material facts, distinguishing disputed from undisputed facts, and identifying the pertinent parts of the record . . ." *Robertson*, 239 F. Supp. 2d at 9 (citations omitted).

Specific Objections

1. Not disputed.
2. Not disputed. as plaintiff lacks sufficient knowledge to confirm or deny whether Defendant directed its search efforts as described. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the asymmetrical distribution of knowledge between a FOIA requester and an agency in FOIA cases).
3. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.
4. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.
5. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.
6. Not disputed.
7. Disputed
8. Disputed
9. Disputed
10. Disputed
11. Disputed

12. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

13. Disputed

14. Disputed.

15. Disputed

16. Disputed

17. Disputed

18. Not disputed

19. Not disputed

20. Not disputed

21. Not disputed

22. Not disputed

23. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

24. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

25. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

26. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

27. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

28. Disputed, as Plaintiff lacks sufficient knowledge to confirm or deny the facts asserted.

29. Not disputed

30. Not disputed

31. Not disputed as to supplemental productions. Otherwise, disputed.

32. Not disputed

33. Not disputed

34. Not disputed as to NOAA's asserted exemption

35. Not disputed as to NOAA's asserted exemption

**II. Plaintiff's Statement of Material Facts Not in Dispute in Support of Cross-Motion for Summary Judgment.**

1. On February 4, 2016, counsel for NOAA contacted Plaintiff to discuss the request.

2. Following review of the draft *Vaughn* index, Plaintiff narrowed the issues and specific records it was challenging and informed Defendant it was challenging the documents withheld under Exemptions 5 and 6 and the adequacy of the search.

3. On February 4, 2017, David Rose from Britain's Mail on Sunday column on the DailyMail.com blog website published an article entitled: Exposed: How World Leaders Were Duped Into Investing Billions Over Manipulated Global Warming Data. The article can be found on the DailyMail.com website at:

<http://www.dailymail.co.uk/sciencetech/article-4192182/World-leaders-duped-manipulated-global-warming-data.html>

4. The article reported that a high level whistleblower from NOAA, Dr. John J. Bates, former NOAA scientist had evidence that the Karl Study "was based on misleading, 'unverified'

data.”

5. The article reports the Karl Study was never subject to NOAA’s “rigorous internal evaluation process.”

6. Dr. Bates accused Tom Karl of “insisting on decisions and scientific choices that maximized warming and minimized documentation...in an effort to discredit the notion of a global warming pause, rushed so that he could time publication to influence national and international deliberations on climate policy.”

7. The article reports it learnt [sic] “that NOAA has now decided that the sea dataset [used in the study] will have to be replaced and substantially revised just 18 months after it was issued, because it used unreliable methods which overstated the speed of warming.”

8. Additionally, “The land temperature dataset used by the study was afflicted by devastating bugs in its software that rendered its findings ‘unstable.’”

9. The article reports that the Karl Study specifically set out to investigate and formulate a conclusion regarding the “pause” or “slowdown” in global warming as reported by the Intergovernmental Panel on Climate Change (“IPCC”).

10. The article reports that the Karl Study claimed that the ‘pause’ or ‘slowdown’ in global warming reported in the IPCC report never existed.

11. Following publication of the Karl Study, Congressman Lamar Smith, Chairman of the House Committee on Science, Space, and Technology Committee, issued a subpoena requesting communications and documents related to the Karl Study.

12. NOAA officials did not comply with the congressional subpoenas and refused to turn over internal discussions among the scientists who authored the Karl Study claiming confidentiality.

Dated: February 21, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ Lauren M. Burke

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*Attorneys for Plaintiff*

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**From:** Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>  
**Sent:** Thursday, March 16, 2017 2:43 PM  
**To:** Kristen Gustafson - NOAA Federal; Mark Graff - NOAA Federal  
**Subject:** FW: Judicial Watch v. Dep't of Commerce - Draft Reply Brief  
**Attachments:** 3 13 17 Reply.ral.docx; reply to statement of material facts.ral.docx

Fyi (b)(5) [REDACTED]

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor  
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**From:** Ruth Ann Lowery - NOAA Federal [mailto:[ruthann.lowery@noaa.gov](mailto:ruthann.lowery@noaa.gov)]  
**Sent:** Thursday, March 16, 2017 2:42 PM  
**To:** 'Snell, Kevin (CIV)'; 'Myers, Jordan (Federal)'; 'Hillary Davidson'  
**Cc:** Rose Stanley - NOAA Federal; Rod Vieira ([rod.vieira@noaa.gov](mailto:rod.vieira@noaa.gov))  
**Subject:** RE: Judicial Watch v. Dep't of Commerce - Draft Reply Brief

Thanks, Kevin (b)(5) [REDACTED] (b)(5) [REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Let me know if folks think we should discuss.

Ruth Ann

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**From:** Snell, Kevin (CIV) [<mailto:Kevin.Snell@usdoj.gov>]  
**Sent:** Wednesday, March 15, 2017 11:30 AM  
**To:** Myers, Jordan (Federal); Hillary Davidson  
**Cc:** Rose Stanley - NOAA Federal; Ruth Ann Lowery - NOAA Federal  
**Subject:** Judicial Watch v. Dep't of Commerce - Draft Reply Breif

All,

(b)(5)  
[Redacted text block]

As always, happy to further discuss.

Thanks for your help on this case.

Kevin

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Thursday, March 16, 2017 5:06 PM  
**To:** Stephen Lipps - NOAA Federal; John Almeida - NOAA Federal; Holmes, Colin; Robert Moller - NOAA Federal; Scott Smullen - NOAA Federal; Jeff Dillen - NOAA Federal; Kristen Gustafson - NOAA Federal  
**Cc:** Tom Taylor; Kimberly Katzenbarger - NOAA FEDERAL; Charles; Dennis Morgan - NOAA Federal; Stacey Nathanson - NOAA Federal; Robert Swisher - NOAA Federal; Steven Goodman - NOAA Federal; Samuel Dixon - NOAA Affiliate; Lola Stith - NOAA Affiliate; Zachary Goldstein - NOAA Federal; Douglas Perry - NOAA Federal; Nkolika Ndubisi - NOAA Federal; Jeri Dockett - NOAA Affiliate; Cc: OCIO/OPPA; Troy Wilds - NOAA Federal  
**Subject:** Weekly FOIA Incoming and High Visibility Requests  
**Attachments:** FoA v NOAA - Stipulation of Settlement and Dismissal.pdf; Weekly FOIA Incoming and High Visibility Requests 03.08.17 - 03.15.17.xls; Karl-related requests 3.9 extraction v. 2.xls

Good Afternoon,

Attached is this week's report.

One request was submitted by the Natural Resources Defense Council, which sought records of guidance or policies regarding the removal of information, documents, or records from NOAA's webpages. (DOC-NOAA-2017-000794).

Also, a request was received from Friends of the Clearwater seeking all records between NOAA and the US Forest Service regarding the Johnson Bar Salvage Sale since February 12, 2016. (DOC-NOAA-2017-000785).

Lastly, the Center for Investigative Reporting submitted another request seeking records of closed investigations regarding the harassment of fisheries observers. (DOC-NOAA-2017-000780).

In litigation, a stipulated dismissal was filed in the *Friends of Animals v. NOAA* FOIA litigation. NOAA agreed to make continuing productions of the remaining responsive records following dismissal. (attached)

Also attached is the updated spreadsheet of the Hiatus Paper-related FOIA requests with their current status and progress in processing.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 16-cv-03007-DME-MJW

FRIENDS OF ANIMALS, and  
SEA SHEPHERD LEGAL

Plaintiffs,

v.

NATIONAL OCEANIC AND  
ATMOSPHERIC ADMINISTRATION,

Defendant.

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**STIPULATION OF SETTLEMENT AND DISMISSAL**

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Plaintiffs Friends of Animals and Sea Shepherd Legal (“Plaintiffs”) and Defendant National Oceanic Atmospheric Administration, an agency of the United States Department of Commerce (“Defendant”) (collectively, the “Parties”), by and through their undersigned counsel, hereby enter into this Stipulation of Settlement and Dismissal (“Stipulation”) in the above-captioned case. Specifically, the Parties stipulate and agree as follows:

**RECITALS**

1. On April 12, 2016, Plaintiffs submitted a Freedom of Information Act request to Defendant seeking records on thirteen topics that pertained to human activities impacting the Cook Inlet beluga whale. *See* Friends of Animals’ FOIA Request for Records, attached as Ex. 1 at 2-3.

2. On May 16, 2016, Defendant extended its response deadline of May 12, 2016

by ten business days for unusual circumstances.

3. Defendant made three interim releases responsive to Plaintiffs' request on June 9, July 26, and October 21, 2016.

4. On December 8, 2016, Plaintiffs filed the instant civil action.

5. On or about February 27, 2017, the Parties reached an agreed upon schedule of production for the remaining responsive records and the terms of settlement.

### **STIPULATION**

1. Plaintiffs agree to dismiss the instant civil action without prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii).

2. In consideration for Plaintiffs' agreement to Paragraph 1 above, Defendant shall pay Plaintiffs the amount of four thousand ninety dollars (\$4,090.00), in full and complete satisfaction of Plaintiffs' claims for the attorneys' fees and litigation costs incurred in the above-captioned case. In the event of further litigation, Plaintiffs will not be entitled to claim any attorneys' fees or costs incurred prior to this settlement.

3. Defendant shall make payment of the total settlement amount, set forth in Paragraph 2 above, by electronic transfer of funds to Plaintiffs within forty-five (45) days of the dismissal of the above-captioned case (Plaintiffs' electronic funds transfer information will be provided separately). Plaintiffs' counsel shall cooperate with Defendant to ensure that all documentation required to process this payment is complete and accurate and submitted sufficiently in advance to allow for payment processing within forty-five days of dismissal.

4. Defendant shall release documents responsive to Plaintiffs' FOIA request in accordance with the following production schedule:

4.1 Defendant will produce a set of records **by March 14, 2017** that Defendant finds are responsive to topics (3) and (4) of the FOIA request. *See* Ex. 1 at 2. In a release letter accompanying this production, NOAA agrees to include a statement from the Assistant Administrator for National Marine Fisheries Service (“NMFS”), a division of NOAA, that describes how the search was reasonably calculated to uncover all responsive documents. The statement will describe which files were searched, the search method(s) used (electronic, manual, etc.), the locations searched, and the topics and terms searched. Further, in the release letter for the production of records responsive to topics (3) and (4), NMFS will provide a description of the methods used to segregate records NMFS found to be responsive to topics (3) and (4).

4.2 NOAA will produce a second set of records **by May 1, 2017**. This set of records will include responsive records that were not produced in prior releases to Plaintiffs.

4.3 NOAA will produce a third set of records **by August 1, 2017**. This set of records will include responsive records that were not produced in prior releases to Plaintiffs.

4.4 NOAA will produce a Vaughn Index for documents withheld pursuant to an applicable FOIA exemption in paragraphs 4.1, 4.2, and 4.3 **by August 31, 2017**.

4.5 NOAA will produce a final set of records **by September 30, 2017**. This set of records will include documents for the time period of April 12, 2016 (the date of the initial FOIA request) to December 31, 2016 that are responsive to the topics in the FOIA request.

4.6 In the event that Plaintiffs take issue with any of Defendant’s actions outlined in terms 4.1 to 4.5 above, Plaintiffs will promptly notify the undersigned counsel and/or an agreed upon NOAA contact of all such issues. The Parties agree to work together in good faith

to resolve such issues. If the Parties are unable to resolve any such issues within 45 days of Plaintiffs first presenting the issues to Defendant, Plaintiffs may pursue all available remedies in court. Plaintiffs shall have until **January 30, 2018** to present NOAA with any issues concerning the release of documents in paragraphs 4.1 to 4.5 above.

5. This Stipulation of Settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, the United States Department of Commerce, the National Oceanic Atmospheric Administration, their agents, servants, employees, or officers, and is entered into by the Parties for the purpose of compromising disputed claims and avoiding the expense and risks of further litigation. The Parties' agreement to this settlement is without prejudice to any claims or defenses any party may assert in the future.

6. This Stipulation contains the entire agreement between the Parties hereto and supersedes any and all previous agreements, whether written or oral, between the Parties relating to the subject matter hereof. No promise or inducement has been made except as set forth herein, and no representation or understanding, whether written or oral, that is not expressly set forth herein shall be enforced or otherwise be given any force or effect in connection herewith.

7. The Parties acknowledge that the preparation of this Stipulation was collaborative in nature, and thereby agree that any presumption or rule that an agreement is construed against its drafter shall not apply to the interpretation of this agreement or any term or provision hereof.

8. This Stipulation may be executed in two or more counterparts, each of which



shall be deemed to be an original and all of which together shall be deemed to be one and the same agreement. A facsimile or other duplicate of a signature shall have the same effect as a manually-executed original.

9. Upon execution of this Stipulation by all Parties hereto, the Stipulation of Settlement and Dismissal shall be binding upon and inure to the benefit of the Parties and their respective heirs, personal representatives, administrators, successors, and assigns. Each signatory to this Stipulation represents and warrants that he or she is fully authorized to enter into this Stipulation on behalf of his or her client.

10. Execution and filing of this Stipulation of Settlement and Dismissal by counsel for the Parties shall constitute a dismissal of the instant civil action, without prejudice.

Respectfully submitted this 10th day of March, 2017.

Respectfully submitted,

/s/ Michael Harris

Michael Ray Harris  
Director, Wildlife Law Program  
Friends of Animals  
7500 E. Arapahoe Road, Suite 385  
Centennial, CO 80112  
Phone: (720) 949-7791  
Email: Michaelharris@friendsofanimals.org

*Attorney for Plaintiff Friends of Animals*

/s/ Brett Sommermeyer

Brett Sommermeyer  
Legal Director  
Sea Shepherd Legal  
2226 Eastlake Ave, E.  
No. 108  
Seattle, WA 98102  
Email: Brett@seashepherdlegal.org

*Attorney for Plaintiff Sea Shepherd Legal*

ROBERT C. TROYER  
Acting United States Attorney

/s/ Marisela D. Sandoval

Special Assistant United States Attorney  
1801 California Street, Suite 1600  
Denver, CO 80202  
Telephone: (303) 454-0100  
Fax: (303) 454-0404  
Email: Marisela.Sandoval@usdoj.gov

*Counsel for Defendant*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

**CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on this 10th day of March, 2017, I filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to any party who has entered an appearance in this matter to the email addresses provided in CM/ECF.

s/ Marisela D. Sandoval  
Office of the U.S. Attorney

Tracking Number	Due Date	Status	Requester
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DOC-NOAA-2017-000579	3/24/2017	Uploading Records	Emily Yehle
DOC-NOAA-2017-000580	4/5/2017	Assignment Determination	Bill Marshall
DOC-NOAA-2017-000613	3/29/2017	Assignment Determination	Dan Vergano
DOC-NOAA-2017-000614	(On Hold)	Seeking Clarification	Kendra Pierre-Louis
DOC-NOAA-2017-000573	3/24/2017	Assignment Determination	Jason Plautz

Requester Organization	Submitted	Assigned To
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Environment & Energy Publishing	02/08/2017	Maria S. Williams
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Judicial Watch	02/08/2017	OCIO
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BuzzFeed News	02/07/2017	Maria S. Williams
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Popular Science	02/14/2017	Karen Robin
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National Journal	02/07/2017	NWS
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## Description/Basis for Appeal

I request all communications from NOAA principal scientist John Bates concerning the study authored by Thomas

Any and all records of communication between NOAA scientist Thomas Karl and Director of the Office of Science

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of any ag

Any and all records, data or documents associated with the former National Oceanic and Atmospheric Administrat

I am requesting all emails between the address "john.bates@noaa.gov" and any email address with the domain na

Karl that appears in the June 2015 issue of Science (now titled "Possible artifacts of data biases in  
and Technology Policy John Holdren. The time frame for the requested records is January 20, 2009 through  
agency communications to, or from, Dr. John Bates regarding the 2015 Karl et al study in Science magazine

ion (NOAA) employee Jack Bates, associated with his tenure at the National Climatic Data Center. This

time "mail.house.gov" between the dates October 1, 2015 and January 31, 2016.



the recent global surface warming hiatus"). Please include e-mails, letters, hand-written notes, m

ugh January 20, 2017.

re (see <http://science.sciencemag.org/content/348/6242/1469>) from July 30, 2014 to February 4, 2017. I

is to include but not be limited to the following personnel records, yearly performance reviews, professic

memorandums, voice and video recordings and other documented forms of communication.

would like to receive the information in electronic form, preferably a searchable PDF or in XML format.

annual certifications, awards for accomplishments, disciplinary paperwork associated with the employee, ar

and documents sufficient to show length of employment/tenure in this position and all previous positions v

with NOAA, job descriptions of all positions within NOAA, and communications between John Bates and

Thomas R. Karl.

Tracking Number	Type	Requester
DOC-NOAA-2017-000744	Request	Zeenat Mian
DOC-NOAA-2017-000794	Request	Jared E. Knicley
DOC-NOAA-2017-000790	Request	Brian Gaffney
DOC-NOAA-2017-000781	Request	Olga Pristin
DOC-NOAA-2017-000780	Request	Thomas Knudson
DOC-NOAA-2017-000785	Request	Gary Macfarlane
DOC-NOAA-2017-000768	Request	Julio C. Gomez
DOC-NOAA-2017-000784	Request	Russ Rector
DOC-NOAA-2017-000753	Request	David MacDonald
DOC-NOAA-2017-000752	Request	Sarah B. Brady
DOC-OS-2017-000578	Request Detail Task	Derek Kravitz
DOC-OS-2017-000687	Request Detail Task	Jamiles Lartey
DOC-OS-2017-000552	Other	Jennifer Janisch
DOC-OS-2017-000770	Other	Shaan Gajiria

Requester Organization	Submitted	Received	Assigned To
	03/08/2017	03/08/2017	Kehaupuaokal Kamaka
Natural Resources Defense Council	03/14/2017	03/14/2017	NOAA
Law Office of Brian Gaffney	03/14/2017	03/14/2017	NOAA
	03/12/2017	03/13/2017	NOAA
Center for Investigative Reporting	03/10/2017	03/13/2017	NMFS
Friends of the Clearwater	03/13/2017	03/13/2017	NOAA
GOMEZ LLC Attorney At Law	03/10/2017	03/10/2017	NWS
	03/10/2017	03/10/2017	NOAA
	03/08/2017	03/09/2017	USEC
Delaware Riverkeeper Network	03/08/2017	03/08/2017	Amanda J. Patterson
ProPublic	03/09/2017		Karen Robin
MuckRock	03/09/2017		USEC
CBS News	03/09/2017		NOAA
Democratic Senatorial Campaign Committee	03/10/2017		NOAA

<b>Case File Assigned To</b>	<b>Perfected?</b>	<b>Due</b>	<b>Closed Date</b>	<b>Status</b>
Kehaupuaokal Kamaka	Yes	04/06/2017	TBD	Assignment Determination
NOAA	No	TBD	TBD	Submitted
NOAA	No	TBD	TBD	Submitted
NOAA	No	TBD	TBD	Submitted
NMFS	Yes	04/12/2017	TBD	Assignment Determination
NOAA	No	TBD	TBD	Submitted
NWS	Yes	04/12/2017	TBD	Assignment Determination
NOAA	No	TBD	TBD	Submitted
USEC	Yes	04/06/2017	TBD	Assignment Determination
Amanda J. Patterson	Yes	04/06/2017	TBD	Assignment Determination
Harriette Boyd	Yes	03/10/2017	03/09/2017	Closed
Ayana Crawford	Yes	03/21/2017	TBD	Open
James Davis	Yes	03/20/2017	TBD	Open
Ayana Crawford	Yes	03/15/2017	TBD	Open





**Detail**

Under the Freedom of Information Act I would like to request all documents and communications inter office (within NOAA) and intra office (between NOAA and external sources/entities) where the hawaiian monk seal

Please produce records of the following types in NOAA's possession, custody or control: 1. All records setting forth general policy or guidance for NOAA staff to apply when determining whether to remove information, documents, or webpages from a NOAA website. 2. All records from January 20, 2017 through the present instructing NOAA staff within the Office of Communications to remove specific information, documents, or

...all records from January 1, 2015 to the present discussing, documenting, memorializing, or otherwise concerning: (1) weather modification within the Weather Service Organization Workforce Analysis; (2) the reason

I would like to get an inventory on cetaceans at Mystic Aquarium ( CT ), all cetaceans that ever lived at Mystic, For calendar year 2013: A.) Copies of all closed National Marine Fisheries Service law enforcement investigations pertaining to harassment of fisheries observers, intimidation of fisheries observers, sexual harassment of fisheries observers, assault of fisheries observers, interference with fisheries observers, coercion of fisheries

Pursuant to the FOIA, Friends of the Clearwater requests all records, including but not limited to emails, phone logs, letters, and other communication between NOAA Fisheries and the US Forest Service regarding the

Copies of all reports submitted to the Secretary of Commerce pursuant to 15 U.S.C. &sect;330a, concerning "weather modification" as defined by federal law 15 U.S.C. &sect;330, from 1971 (the date this federal law was

Please send me the latest mmir for the navy dolphin program just living and dead.

Any correspondence (including emails and attachments) between the Under Secretary of Commerce for Oceans and Atmosphere and anyone from the Canadian Department of Fisheries and Oceans, and/or with an email

Any and all requests for technical assistance for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River;

Any and all requests for informal consultation for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River;

NMFS/NOAA responses to requests for informal consultation for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River;

Any and all requests for formal consultation for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River;

NMFS/NOAA responses to requests for formal consultation for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River;

Biological opinions issued by NMFS/NOAA for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River;

All reports received by NMFS of Atlantic sturgeon takes, kills, or injuries within the Delaware River system; and

Any and all NMFS/NOAA comments on environmental assessments or environmental impact statements regarding initiatives that would impact the Atlantic sturgeon in the Delaware River including scoping comments drafted to inform such EAs or EISs.

ppointees under Temporary Transition Schedule C (TTC) Authority and Temporary Transition SES Appointing Authorities (NC SES) hired between January 20, 2017 and present (the return of this request), as specified in this

Any emails or internal memorandum which address agency policy or practices with regards to communications with the public. This is to specifically include, but is not limited to: social media conduct, use of and and all official agency or sub-department Twitter accounts, employee communication with reporters or media, press releases

Under the provisions of the Freedom of Information Act, I request records from the following electronic search: "all emails from the domain EOP.gov to the Secretary, Assistant Secretaries, Deputy Secretaries and Under Secretaries. encompassed within the required agency system for retaining emails of senior officials. Frequently this records management policy/system is described by the name Capstone. <https://www.archives.gov/records->

Any Freedom of Information Act requests and the responsive materials thereof filed January 2011 to present regarding Senator Elizabeth Warren or the staff or representatives of Senator Elizabeth Warren, in both her

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Monday, March 20, 2017 2:43 PM  
**To:** Lola Stith - NOAA Affiliate  
**Subject:** Re: ACTION REQUIRED: Task for DOC-OS-2017-000770 (Review/Signature Needed)  
**Attachments:** NOAA Response Gajria DOC-OS-2017-000770 Fee Estimate Tasker mhg.pdf

Awesome--signed and attached.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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On Mon, Mar 20, 2017 at 1:40 PM, Lola Stith - NOAA Affiliate <[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)> wrote:

Hi Mark - Please find the fee estimate tasker for the subject DOC FOIA attached.

Please sign/return to me. Let me know if you have questions.

Thanks!

Lola

--

Lola Stith  
Contractor - The Ambit Group, LLC  
NOAA Office of the Chief Information Officer (OCIO)  
(c (b)(6))  
[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)



**UNITED STATES DEPARTMENT OF COMMERCE**  
**Chief Financial Officer and**  
**Assistant Secretary for Administration**  
Washington, D.C. 20230

March 10, 2017

MEMORANDUM FOR:      Gordon Keller, OCIO                      Vernon E. Curry, Census  
                                 Pam Moulder, ESA                      Stephen Kong, EDA  
                                 Jennifer Kuo, BIS                      Victor Powers, ITA  
                                 Josephine Arnold, MBDA              Catherine Fletcher, NIST  
                                 Wayne Strickland, NTIS              Stacy Cheney, NTIA  
                                 Robert Swisher, NOAA              Jennifer Piel, OIG  
                                 Ricou Heaton, PTO                      Dondi Staunton, BEA

FROM:                      Michael Toland, Ph.D.  
                                 Departmental FOIA Officer  
                                 Office of Privacy & Open Government

SUBJECT:                      Fee Estimate for FOIA Request    DOC-OS-2017-000770  
                                 Shaan Gajria, Democratic Senatorial Campaign Committee

The Department has received a Freedom of Information Act (FOIA) request from Shaan Gajria, Democratic Senatorial Campaign Committee. The short description of the FOIA request is, “Any Freedom of Information Act requests and the responsive materials thereof filed January 2011 to present [March 10, 2017] regarding Senator Elizabeth Warren or the staff or representatives of Senator Elizabeth Warren, in both her capacity as a United States Senator and as a private citizen.” The FOIA requester is in the “Other” category. Per the statutory guidelines of 15 C.F.R.§4.11:

- The chargeable services for “Commercial” are search, review and duplication.
- The chargeable services for “Media, Educational, and/or Non-commercial Scientific Institution” are duplication, excluding the first 100 pages.
- The chargeable services for “Other” are search and duplication, excluding the first two hours of search and the first 100 pages.

Please determine the fee estimate with respect to responsive documents located within your office. **DO NOT SEARCH YET.** Rather, we need an **ESTIMATE** from you as to how many hours/pages you may locate for this request. **This is only a good faith estimate, you should not search in order to come up with the estimate.** Also, a search need not actually find documents in order to be chargeable, so long as, at the outset, there is a reasonable likelihood that there may be responsive documents, and the search is conducted with due diligence.



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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Monday, March 20, 2017 4:28 PM  
**To:** Toland, Michael  
**Cc:** Lola Stith - NOAA Affiliate; Dennis Morgan - NOAA Federal; Robert Swisher - NOAA Federal  
**Subject:** DOC Draft Regulations with Comments  
**Attachments:** FOIA Regs 2016-11-30-draft(red-lined) mhg.docx

Hello Mike,

Attached are my comments on the draft regs. (b)(5)

[Redacted]

[Redacted]

With this review, we consider this data call complete.

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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**From:** Mark Graff - NOAA Federal <mark.graff@noaa.gov>  
**Sent:** Monday, March 20, 2017 5:26 PM  
**To:** Robert Swisher - NOAA Federal; Dennis Morgan - NOAA Federal; Lola Stith - NOAA Affiliate  
**Subject:** PEER Litigation Release Complete  
**Attachments:** 3.20 FAL in litigation mhg.pdf; PEER Vaughn index - Final.xlsx

Hey Guys,

We've completed the final release in the PEER litigation. (b)(5) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

Lola--although we ultimately did not need to bring you onto a "Tiger Team" processing group like we thought we might--thank you for your willingness early on to take on that burden, even when the volume of records looked unmanageable. You're amazing as always--

Mark H. Graff  
FOIA Officer/Bureau Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

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**From:** Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>  
**Sent:** Wednesday, March 22, 2017 3:39 PM  
**To:** Maria Williams - NOAA Federal  
**Cc:** Mark Graff - NOAA Federal; Lola Stith - NOAA Affiliate  
**Subject:** RE: 580 - Release  
**Attachments:** 16-000603 Int.3 Full Rel Final Ltr signed.pdf; First IR 580.ral.docx

Thanks, Maria (b)(5)

[Redacted]

[Redacted]

[Redacted] ?

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor  
NOAA Office of General Counsel  
Fisheries & Protected Resources Section  
1315 East-West Highway, SSMC III, Room 15114  
Silver Spring, MD 20910  
(301)713-9671  
Fax: (301) 713-0658

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**From:** Maria Williams - NOAA Federal [mailto:[maria.williams@noaa.gov](mailto:maria.williams@noaa.gov)]  
**Sent:** Wednesday, March 22, 2017 3:22 PM  
**To:** Ruth Ann Lowery - NOAA Federal  
**Cc:** Mark Graff - NOAA Federal; Lola Stith - NOAA Affiliate  
**Subject:** Re: 580 - Release

Ruth Ann,

Here is the letter for your edits.

*Respectfully,*

**Maria S. Williams**

National Oceanic and Atmospheric Administration  
Satellite and Information Service  
Office of the Assistant Chief Information Officer  
Phone (b)(6)

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**"Talent wins games, but teamwork and intelligence wins championship"**

On Wed, Mar 22, 2017 at 3:00 PM, Ruth Ann Lowery - NOAA Federal <[ruthann.lowery@noaa.gov](mailto:ruthann.lowery@noaa.gov)> wrote:

(b)(5)

| [REDACTED]

| [REDACTED]

| [REDACTED]

| [REDACTED] ?

(b)(5). If you'd like me to make some notes, please send me the Word version.

Thanks,

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor

NOAA Office of General Counsel

Fisheries & Protected Resources Section

1315 East-West Highway, SSMC III, Room 15114

Silver Spring, MD 20910

[\(301\)713-9671](tel:(301)713-9671)

Fax: [\(301\) 713-0658](tel:(301)713-0658)

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**From:** Maria Williams - NOAA Federal [mailto:[maria.williams@noaa.gov](mailto:maria.williams@noaa.gov)]

**Sent:** Wednesday, March 22, 2017 2:08 PM

**To:** Ruth Ann Lowery - NOAA Federal

**Cc:** Mark Graff - NOAA Federal; Lola Stith - NOAA Affiliate

**Subject:** Re: 580 - Release

Ruth,

(b)(5)  
[Redacted]  
[Redacted]  
[Redacted].

*Respectfully,*

*Maria S. Williams*

National Oceanic and Atmospheric Administration

Satellite and Information Service

Office of the Assistant Chief Information Officer

Phone (b)(6)

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**"Talent wins games, but teamwork and intelligence wins championship"**

On Wed, Mar 22, 2017 at 2:04 PM, Ruth Ann Lowery - NOAA Federal <[ruthann.lowery@noaa.gov](mailto:ruthann.lowery@noaa.gov)> wrote:

(b)(5)

Ruth Ann

Ruth Ann Lowery, Attorney-Advisor

NOAA Office of General Counsel

Fisheries & Protected Resources Section

1315 East-West Highway, SSMC III, Room 15114

Silver Spring, MD 20910

[\(301\)713-9671](tel:(301)713-9671)

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**From:** Maria Williams - NOAA Federal [mailto:[maria.williams@noaa.gov](mailto:maria.williams@noaa.gov)]  
**Sent:** Wednesday, March 22, 2017 1:55 PM  
**To:** Mark Graff - NOAA Federal  
**Cc:** Ruth Ann Lowery - NOAA Federal; Lola Stith - NOAA Affiliate  
**Subject:** Re: 580 - Release

Thanks Mark. Let me know when you are ready.

*Respectfully,*

*Maria S. Williams*

*Property\NESDIS FOIA Liaison\Admin Officer\FAC-COR II*

National Oceanic and Atmospheric Administration

Satellite and Information Service

Office of the Assistant Chief Information Officer

Phone (b)(6)

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**"Talent wins games, but teamwork and intelligence wins championship"**

On Wed, Mar 22, 2017 at 1:52 PM, Mark Graff - NOAA Federal <[mark.graff@noaa.gov](mailto:mark.graff@noaa.gov)> wrote:

Hi Maria,

(b)(5)  
[Redacted text block]

Ruth Ann (b)(5) [REDACTED] ?

Mark H. Graff

FOIA Officer/Bureau Chief Privacy Officer (BCPO)

National Oceanic and Atmospheric Administration

[\(301\) 628-5658](tel:(301)628-5658) (O)

(b)(6) [REDACTED] (C)

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On Wed, Mar 22, 2017 at 1:46 PM, Maria Williams - NOAA Federal <[maria.williams@noaa.gov](mailto:maria.williams@noaa.gov)> wrote:

Ruth Ann and Mark,

I want to make sure I follow all required instructions on this. (b)(5) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ?

*Respectfully,*

*Maria S. Williams*

*Property|NESDIS FOIA Liaison |Admin Officer|FAC-COR II*

National Oceanic and Atmospheric Administration

Satellite and Information Service

Office of the Assistant Chief Information Officer

*Phone* (b)(6)

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**"Talent wins games, but teamwork and intelligence wins championship"**

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(b)(6)

FOIA - DOC/NOAA-2016-001270

(b)(6)

MP

(b)(6)

Please indicate the type of products you provide to NOAA.

Services Only \_\_\_ Goods Only \_\_\_ Goods/Services

ADDRESS: Individual/Business/Organization's sales address and point of contact

Name SCOTT Doyle  
Address line 1 8 WISTERIA CT  
Address line 2 \_\_\_\_\_  
City Tinton Falls  
State NJ ZIP 07712 Country USA  
Phone 908-309-3875 Fax \_\_\_\_\_  
Internet E-mail address SCOTTDoyle137@aol.com

If payment remit address is different than the sales address, please provide it below

Name \_\_\_\_\_  
Address line 1 \_\_\_\_\_  
Address line 2 \_\_\_\_\_  
City \_\_\_\_\_  
State \_\_\_\_\_ ZIP \_\_\_\_\_ Country \_\_\_\_\_  
Phone \_\_\_\_\_ Fax \_\_\_\_\_  
Internet E-mail address \_\_\_\_\_

**ELECTRONIC FUNDS TRANSFER (EFT):**

The Debt Collection Improvement Act of 1996 mandates the use of EFT for all Federal payments to recipients who become eligible to receive such payments 90 days after enactment, which was July 26, 1996. Federal agencies may grant waivers for this mandate to recipients who certify in writing and send to the Finance office stating that they do not have an account with a financial institution. Please select one of the following payment methods:

- 1.  EFT (Automated Clearing House Payments (ACH))
- 2. \_\_\_ Check (**MUST SUBMIT REQUEST FOR WAIVER IN WRITING ALONG WITH THIS FORM**)
- 3. \_\_\_ OPAC (Federal Agencies only)

If line 1 was checked above, please provide the following financial information for EFT payments.  
(The ACH Coordinator at your financial institution can supply you with this information)

Financial Institution Name The Provident Bank  
Address 2077 STREET  
City BAYUNNE State NJ Zip 07305  
ACH Coordinator Name \_\_\_\_\_ Phone \_\_\_\_\_  
Nine Digit Routing/Transit Number (ABA#) 221272303  
Account Title \_\_\_\_\_

Type of Account: (select one)  
 Checking Account Number 6023-4189-1  
 Savings Account Number \_\_\_\_\_  
 Lockbox Account Number \_\_\_\_\_

I certify that the information which I have provided on this form is correct.  
Name (type or print) SCOTT Doyle Title \_\_\_\_\_ Phone# 908-309-3875  
Signature [Signature] Date 10/17/16



### VENDOR PROFILE INFORMATION

The purpose of this form is to provide mandatory award and payment information for NOAA. This information is required as set forth in FAR 52.232-33, *Mandatory Information for Electronic Funds Transfer Payment*, the Debt Collection Improvement Act of 1996, and the Taxpayer Relief Act of 1997. NOAA will use the information only for the purposes stated in the references cited above and will restrict access to the data to authorized personnel who will use it only for the specified purposes. Until this information is received, our payment office will not make any payments.

Please check one:  NEW  CHANGE (please complete bolded areas only, along with your changes)

NAME: Legal Name SCOTT DOYLE

Parent Company Name (if applicable) \_\_\_\_\_

Division/subunit \_\_\_\_\_

Acronym or shortened name \_\_\_\_\_ (8 characters/digits or less)

What type of Vendor are you (select one):

- Small Disadvantaged Business
- Other Small Business
- Large Business
- JWOD Non-Profit Agency
- Non-Profit Educational Organization
- Non-Profit Hospital
- Federal Government
- Other Non-Profit Organization
- State/Local Government - Educational
- Individual
- State/Local Government - Hospital
- Other State/Local Government
- Foreign Contractor
- Domestic Contractor Performing Outside US
- Tribal Government
  - HBC/U or Mi
  - Private University

DOC/NOAA customer account number \_\_\_\_\_ (if any)

Foreign Corporation Yes \_\_\_ No \_\_\_

Minority Owned and Operated Business Yes \_\_\_ No \_\_\_

Women Owned and Operated Business Yes \_\_\_ No \_\_\_

Taxpayer Identification Number (TIN)\*

SSN (individual/sole proprietorship) 136-60-2787

EIN (Corporation/partnership/sole proprietorship with one or more employees)

# of parent company \_\_\_\_\_

# of Division/subunit \_\_\_\_\_

DUNS # (commercial vendors only) \_\_\_\_\_

\* The Taxpayer Identification Number (TIN) is required by law. If you fail to provide us with this information, your payments may be subject to income tax withholding.

Type of Entity/Account applicable to the TIN. (See Form W-9 Request for Taxpayer Identification Number & Certification, Specific Instructions Section). Select One:

- 9 Broker or Registered Nominee
- 9 Partnership
- 9 Revocable Savings Trust
- 9 Association, Club, Religious, Charitable, Educational, or other tax exempt organization
- 9 Corporation
- 9 Sole Proprietorship
- 9 Custodian Account of a minor
- 9 Account with the Dept of Agriculture in the name of a public entity (such as State/Local Government, School District, or Prison)
- 9 Individual
- 9 Federal Government
- 9 Valid Trust, Estate, Pension Trust
- 9 Joint Account (Two/more Individuals)

Do you require payment in foreign currency? Yes \_\_\_ No  Type of currency?



---

**From:** Lola Stith - NOAA Affiliate <lola.m.stith@noaa.gov>  
**Sent:** Wednesday, November 2, 2016 4:50 PM  
**To:** Mark Graff - NOAA Affiliate  
**Subject:** October FOIA Monthly Report (DRAFT FOR YOUR REVIEW)  
**Attachments:** Backlog 102016.xls; Closed 102016.xls; Incoming 1022016.xls; FOIA Monthly Status Report 10-31-2016.xlsx

Hi Mark - Please find the draft FOIA monthly report for Oct and supporting documents attached for your review/approval.

Let me know if changes are needed.

R/

--

Lola Stith  
Contractor - The Ambit Group, LLC  
NOAA Office of the Chief Information Officer (OCIO)  
(c (b)(6) [REDACTED])  
[lola.m.stith@noaa.gov](mailto:lola.m.stith@noaa.gov)

Tracking Number	Type	Requester	Submitted	Assigned To
DOC-NOAA-2016-001703	Request	Trevor T. Davis	08/29/2016	AGO
DOC-NOAA-2016-001241	Request	Shomari B. Wade	05/18/2016	AGO
DOC-NOAA-2015-001484	Request	Richard Knudsen	06/29/2015	AGO
DOC-NOAA-2015-001485	Request	Richard Knudsen	06/29/2015	AGO
DOC-NOAA-2015-001487	Request	Richard Knudsen	06/29/2015	AGO
DOC-NOAA-2016-001656	Request	Kellea Landeene	08/09/2016	CAO
DOC-NOAA-2016-000822	Referral	Alison Cooke	03/21/2016	NESDIS
DOC-NOAA-2016-000351	Request	Bill Marshall	10/30/2015	NESDIS
DOC-NOAA-2016-001751	Request	Thomas Knudson	09/14/2016	NMFS
DOC-NOAA-2016-001760	Request	Thomas Knudson	09/14/2016	NMFS
DOC-NOAA-2016-001826	Request	Courtney S. Vail	09/20/2016	NMFS
DOC-NOAA-2016-001763	Request	Thomas Knudson	09/14/2016	NMFS
DOC-NOAA-2016-001764	Request	Dwayne Meadows	09/15/2016	NMFS
DOC-NOAA-2016-001701	Request	Margaret Townsend	09/01/2016	NMFS
DOC-NOAA-2016-001665	Request	Eileen L. Morrison	08/24/2016	NMFS
DOC-NOAA-2016-001390	Request	Jennie Frost	07/05/2016	NMFS
DOC-NOAA-2016-001521	Request	Christine Haughney	07/26/2016	NMFS
DOC-NOAA-2016-001596	Request	Lee van der Voo	08/11/2016	NMFS
DOC-NOAA-2016-001603	Request	Jim Weber	08/12/2016	NMFS
DOC-NOAA-2016-001560	Request	Marjorie F. Ziegler	08/03/2016	NMFS
DOC-NOAA-2016-001479	Request	Christopher Hudak	07/20/2016	NMFS
DOC-NOAA-2016-001537	Request	Emily Yehle	07/28/2016	NMFS
DOC-NOAA-2016-001453	Request	Stephen S. Schwartz	07/14/2016	NMFS
DOC-NOAA-2016-001533	Request	J W August	07/27/2016	NMFS
DOC-NOAA-2016-001419	Request	James J. Tuthton	07/11/2016	NMFS
DOC-NOAA-2016-001270	Request	scott A. doyle	06/08/2016	NMFS
DOC-NOAA-2016-001245	Request	Thomas Knudson	06/03/2016	NMFS
DOC-NOAA-2016-001182	Request	Patricia Weisselberg	05/19/2016	NMFS
DOC-NOAA-2016-001326	Request	Thomas Knudson	06/21/2016	NMFS
DOC-NOAA-2016-001321	Request	Brendan Borrell	05/26/2016	NMFS
DOC-NOAA-2016-001214	Request	bruce weyhrauch	05/27/2016	NMFS
DOC-NOAA-2016-001215	Request	Cassie Burdyshaw	05/27/2016	NMFS
DOC-NOAA-2016-001299	Request	Thomas Knudson	06/15/2016	NMFS
DOC-NOAA-2016-001212	Request	Douglas A. Ruley	05/19/2016	NMFS
DOC-NOAA-2016-001080	Request	Jeff Ruch	04/29/2016	NMFS
DOC-NOAA-2016-001186	Request	Patricia Weisselberg	05/20/2016	NMFS
DOC-NOAA-2016-001194	Request	Elizabeth A. Mitchell	05/23/2016	NMFS
DOC-NOAA-2016-001168	Request	Thomas Knudson	05/17/2016	NMFS
DOC-NOAA-2016-001053	Request	Thomas Knudson	04/26/2016	NMFS
DOC-NOAA-2016-000959	Request	Office Administrator	04/12/2016	NMFS
DOC-NOAA-2016-000423	Request	Ryan P. Mulvey	12/21/2015	NMFS
DOC-NOAA-2016-000807	Request	Basil Scott	03/16/2016	NMFS
DOC-NOAA-2015-001860	Request	Delcianna Winders	09/04/2015	NMFS
DOC-NOAA-2016-000967	Request	Office Administrator	04/13/2016	NMFS
DOC-NOAA-2016-000775	Request	Jason Domark	03/08/2016	NMFS
DOC-NOAA-2016-000605	Request	Margaret Townsend	02/10/2016	NMFS
DOC-NOAA-2016-000603	Request	Margaret Townsend	02/10/2016	NMFS
DOC-NOAA-2016-000604	Request	Margaret Townsend	02/10/2016	NMFS
DOC-NOAA-2015-001898	Request	Emily Posner	09/10/2015	NMFS
DOC-NOAA-2016-000439	Request	Alan Stein	01/10/2016	NMFS
DOC-NOAA-2016-000094	Request	Josh Schopf	10/14/2015	NMFS

DOC-NOAA-2015-001376	Request Marc R. Greenberg	06/08/2015	NMFS
DOC-NOAA-2015-000295	Request Office Administrator	11/21/2014	NMFS
DOC-NOAA-2015-000190	Request Miyo Sakashita	11/02/2014	NMFS
DOC-NOAA-2013-000567	Request Doug Karpa	02/15/2013	NMFS
DOC-NOAA-2016-001743	Request John Greenewald	09/12/2016	NOAA FOIA
DOC-NOAA-2016-001675	Request Jeffrey T. Smith	08/26/2016	NOS
DOC-NOAA-2016-001697	Request Imre Berty	08/22/2016	NOS
DOC-NOAA-2016-001531	Request Stacy Hernandez	07/27/2016	NOS
DOC-NOAA-2016-001319	Request Michelle Burt	06/20/2016	NOS
DOC-NOAA-2016-001230	Request Sam Cohen	05/16/2016	NOS
DOC-NOAA-2016-001082	Request Cameron Cole	04/25/2016	NOS
DOC-NOAA-2016-000794	Request David C. Weber	03/11/2016	NOS
DOC-NOAA-2016-000789	Request Jay Willis	03/02/2016	NOS
DOC-NOAA-2016-000192	Request John Ferro	11/03/2015	NOS
DOC-NOAA-2015-000706	Request Megan R. Wilson	02/18/2015	NOS
DOC-NOAA-2016-001816	Request Ben Briscoe	09/20/2016	NWS
DOC-NOAA-2016-001704	Request Steven Fraser	09/02/2016	NWS
DOC-NOAA-2016-001713	Request Bob Hepler	09/06/2016	NWS
DOC-NOAA-2016-001742	Request John Greenewald	09/12/2016	NWS
DOC-NOAA-2016-001403	Request Ivria Fried	07/07/2016	NWS
DOC-NOAA-2015-000905	Request Alan David	03/14/2015	OAR
DOC-NOAA-2016-001747	Request Daniel Britton	09/13/2016	OGC
DOC-NOAA-2016-001472	Request A. Marques Pitre	07/20/2016	WFMO
DOC-NOAA-2016-001346	Request Tammy Murphy	06/10/2016	WFMO
DOC-NOAA-2016-001240	Request David Novak	05/19/2016	WFMO
DOC-NOAA-2016-001094	Request Anthony Arguez	05/02/2016	WFMO
DOC-NOAA-2016-001043	Request Steven McIntosh	04/24/2016	WFMO
DOC-NOAA-2016-000444	Request Nelsie A. Ramos	01/12/2016	WFMO

<b>Due</b>	<b>Days Backlogged</b>
10/03/2016	4
06/30/2016	85
08/11/2015	308
08/11/2015	308
07/31/2015	315
10/06/2016	17
10/31/2016	116
12/15/2015	222
10/28/2016	2
10/28/2016	2
10/28/2016	2
10/27/2016	3
10/27/2016	3
10/03/2016	12
10/13/2016	13
10/14/2016	22
09/30/2016	22
09/29/2016	22
11/04/2016	22
09/26/2016	24
09/22/2016	27
09/13/2016	34
08/30/2016	43
08/29/2016	44
08/12/2016	55
08/03/2016	62
08/02/2016	63
10/31/2016	68
07/26/2016	68
07/25/2016	69
10/31/2016	71
07/20/2016	72
07/20/2016	72
06/24/2016	76
06/08/2016	82
08/12/2016	82
06/24/2016	90
06/22/2016	91
06/10/2016	97
05/25/2016	103
02/04/2016	104
05/04/2016	112
10/23/2015	116
05/16/2016	116
04/06/2016	120
03/15/2016	145
03/15/2016	154
03/15/2016	156
10/27/2015	160
02/24/2016	163
02/18/2016	188

07/14/2015	328
12/24/2014	458
12/05/2014	471
04/12/2013	881
10/13/2016	13
10/11/2016	15
09/30/2016	21
08/29/2016	44
07/20/2016	72
06/28/2016	87
06/03/2016	103
04/12/2016	140
04/11/2016	141
12/04/2015	229
10/13/2015	409
10/27/2016	3
10/13/2016	13
10/13/2016	13
10/13/2016	13
08/12/2016	55
04/17/2015	388
10/13/2016	13
08/31/2016	42
07/25/2016	69
07/01/2016	84
06/15/2016	96
06/02/2016	104
02/17/2016	179

Tracking Number	Type	Requester	Requester Organization
DOC-NOAA-2016-001811	Request	Deborah E. Baker	Glacier Water District
DOC-NOAA-2016-001691	Request	Tim Bergen	McAllister & Quinn
DOC-NOAA-2016-001332	Request	Mark Bogetich	MB Public Affairs, Inc.
DOC-NOAA-2016-001333	Request	Mark Bogetich	MB Public Affairs, Inc.
DOC-NOAA-2016-000359	Request	Tyler Lykins	DNC
DOC-NOAA-2016-001778	Request	Sarah B. Brady	Delaware Riverkeeper Network
DOC-NOAA-2016-001772	Request	matthew s. cline	
DOC-NOAA-2016-001714	Request	Thomas Knudson	Center for Investigative Reporting
DOC-NOAA-2016-001646	Request	Tonya Wiley	Haven Worth Consulting
DOC-NOAA-2016-001581	Request	Lydia Mulvany	
DOC-NOAA-2016-001574	Request	Douglas Karlberg	Yukon River Gold LLC
DOC-NOAA-2016-001563	Request	Oliver Stiefel	
DOC-NOAA-2016-001617	Request	Robert Jones	
DOC-NOAA-2016-001408	Request	James J. Tutchton	Defenders of Wildlife
DOC-NOAA-2016-001260	Request	Jennie Frost	Trustees for Alaska
DOC-NOAA-2016-001246	Request	Thomas Knudson	Center for Investigative Reporting
DOC-NOAA-2017-000069	Request	Christopher T. Clack	
DOC-NOAA-2017-000060	Request	Christopher T. Clack	
DOC-NOAA-2017-000059	Request	Christopher T. Clack	
DOC-NOAA-2017-000043	Request	Matthew J. Novak	Gizmodo / Univision
DOC-NOAA-2017-000027	Request	Colt Szczygiel	
DOC-NOAA-2016-001794	Request	Sophie Cocke	Honolulu Star-Advertiser
DOC-NOAA-2016-001616	Request	Ron Alber	Global Marine Exploration
DOC-NOAA-2016-001471	Request	Reginald Hall	Raccoon Hogg
DOC-NOAA-2016-001477	Request	Steven F. DiMarco, Professor	Texas A&M University
DOC-NOAA-2016-001827	Request	Paul Muniz	Donovan Hatem LLP
DOC-NOAA-2016-001758	Request	Thomas Knudson	Center for Investigative Reporting

Submitted	Assigned To	Perfected?	Due	Closed Date	Status
09/24/2016	AGO	Yes	11/08/2016	10/20/2016	Closed
08/31/2016	AGO	Yes	10/13/2016	10/11/2016	Closed
06/13/2016	AGO	Yes	07/22/2016	10/14/2016	Closed
06/13/2016	LA	Yes	07/25/2016	10/31/2016	Closed
12/16/2015	LA	Yes	01/19/2016	10/26/2016	Closed
09/19/2016	NMFS	Yes	11/01/2016	10/27/2016	Closed
09/16/2016	NMFS	Yes	10/31/2016	10/27/2016	Closed
09/06/2016	NMFS	Yes	10/13/2016	10/31/2016	Closed
08/22/2016	NMFS	Yes	10/13/2016	10/27/2016	Closed
08/09/2016	NMFS	Yes	09/29/2016	10/20/2016	Closed
08/09/2016	NMFS	Yes	09/19/2016	10/18/2016	Closed
08/05/2016	NMFS	Yes	10/07/2016	10/07/2016	Closed
08/04/2016	NMFS	Yes	10/21/2016	10/20/2016	Closed
07/08/2016	NMFS	Yes	08/26/2016	10/17/2016	Closed
06/07/2016	NMFS	Yes	09/30/2016	10/18/2016	Closed
06/03/2016	NMFS	Yes	07/07/2016	10/18/2016	Closed
10/14/2016	NOAA FOIA	No	TBD	10/26/2016	Closed
10/13/2016	NOAA FOIA	No	TBD	10/26/2016	Closed
10/13/2016	NOAA FOIA	No	TBD	10/26/2016	Closed
10/11/2016	NOAA FOIA	No	11/25/2016	10/26/2016	Closed
10/07/2016	NOAA FOIA	No	11/22/2016	10/19/2016	Closed
09/21/2016	NOAA FOIA	No	11/03/2016	10/05/2016	Closed
08/16/2016	NOAA FOIA	Yes	09/29/2016	10/03/2016	Closed
07/15/2016	NOS	Yes	08/17/2016	10/07/2016	Closed
07/20/2016	OAR	Yes	08/17/2016	10/03/2016	Closed
09/16/2016	OGC	Yes	10/27/2016	10/27/2016	Closed
09/14/2016	OGC	Yes	10/27/2016	10/27/2016	Closed

## Dispositions

Request withdrawn  
Partial grant/partial denial  
No records  
No records  
No records  
Full grant  
Partial grant/partial denial  
No records  
Full grant  
Request withdrawn  
Partial grant/partial denial  
Partial grant/partial denial  
Partial grant/partial denial  
Partial grant/partial denial  
Partial grant/partial denial  
Full denial based on exemptions  
Other - Aggregate cases  
Other - Aggregate cases  
Other - Aggregate cases  
Other - Aggregate cases  
Improper FOIA request for other reason  
Other - Aggregate cases  
Full grant  
Full grant  
Partial grant/partial denial  
No records  
Partial grant/partial denial



## Detail

Grant list of all awards to recipients in Whatcom County, Washington (state) including start-end dates, amount, and I am requesting two full applications with all attachments for the 2015 Community-based marine debris removal grant.

1. Copies of the following documents pertaining to Coastal Construction Group of South Florida and any of its employees.

1. Copies of all electronic and written correspondence sent to/received from Congressman Patrick E. Murphy (D/FL).

CORRESPONDENCE LOG REQUEST - Any and all records of communication (including but not limited to letters, memos, etc.)

Any and all requests for technical assistance for projects or initiatives that would impact the Atlantic sturgeon in the Chesapeake Bay.

I am looking for the original vessel buy back agreement for the vessel Cathy G . At the time of the buy back the vessel was used for research.

A digital copy of all recorded audio from the NOAA/NMFS 8th International Fisheries Observer & Monitoring Conference.

Please provide for Fiscal Years 2000 through 2016 the National Marine Fisheries Service line item budgets, as appropriate.

8/19 Revised Description: The requester confirmed that she is seeking records/documents from NOAA, not DOC.

Mr. J. Kirk Essmyer produced two reports on the handling of Fisheries Disaster monies on the Yukon River. Mr. Essmyer is currently on leave.

Request for all records related to preparation of the following Biological Opinion: Biological Opinion resulting from Final Review of the Biological Opinion for the proposed project on the Yukon River.

Clarification Received 8/25 - Therefore I would like to narrow the scope of the FOIA to the emails between Dr. Ponir and Mr. Essmyer.

All records considered by the National Marine Fisheries Service in connection with its rejection of Defenders of Wildlife's request for information regarding the Yukon River.

This request is submitted on behalf of Katherine Strong. We request all records analyzing, evaluating, reviewing, and responding to the request.

1. Copies of all emails and hard-copy correspondence received by Jane DiCosimo, coordinator of the NMFS National Marine Fisheries Service.

Emails (and attachments) that have been received by or sent by the following NOAA employees (since September 2000):

Under the Freedom of Information Act (5 U.S.C. Section 552), I am requesting the following documents: Emails sent to or from the following NOAA employees (since September 2000):

Under the Freedom of Information Act (5 U.S.C. Section 552), I am requesting the following documents: Emails sent to or from the following NOAA employees (since September 2000):

I request all budget documents for Christmas parties (more often known as "holiday parties") funded in any way by NOAA.

I found GSA vehicles belonging to NOAA on my private property with no one around on 2016 June 10. I'd like to know who they belong to.

Please provide me with a list of the Hawaii longline fishing permit transfers executed over the past year, beginning with the first transfer in 2015.

We would like to request under the Freedom of Information Act all emails of Jackie Rolleri, with the email address rolleri@noaa.gov.

All Sapelo Island funding paperwork for marsh research and intrusion of federally protected marshland. This request is submitted on behalf of the Sapelo Island Foundation.

Request the reviews and other evaluation materials in response to research proposal from proposal submitted to NOAA.

This as a FOIA request for an electronic copy of any email, including attachments, forwarding a condensed version of the email.

A copy of the Notice of Violation and Assessment of Penalty (NOVA) for observer harassment - case number AK15-001.

[REDACTED]

d official project title/description. I'm researching watershed projects that have been completed and still ant. I request: 1. The Louisiana Department of Wildlife and Fisheries application and attachments. 2. Cle  
loyees, agents, representatives, or vessels for the period January 1, 2010 to present: (a) Permits (b) Co  
lorida) and any of the employees, agents, or representatives from his office for the period January 1, 20  
written requests, reports, telephone records, electronic communication, complaints, investigations, viol  
; Delaware River; Any and all requests for informal consultation for projects or initiatives that would impa  
ssel was owned by dick [Richard ] nyhus . The vessel was used in the shrimp fishery out of Westport W:  
rence 2016 held in San Diego, California from August 29 to September 2. For more information, contact  
ropriated by Congress, for • Mammals • Sea turtles • Atlantic salmon • Pacific salmon • Other Protectec  
All correspondence and documents from Jan. 1, 2010 to present that mention the companies YZ Mari  
smyer works for the National Appeals Office of NOAA Fisheries Service. (Dept. of Commerce) These tv  
Reinitiation of the Endangered Species Act Consultation for the Timberline Downhill Bike Park, Still Cree  
with and Dr. Williams concerning red snapper and golden tilefish stock assessments. Pursuant to the F  
dlife's Petition to list the Smooth Hammerhead Shark under the Endangered Species Act, 81 Fed. Reg.  
summarizing, and/or discussing potential impacts of the proposed Chuitna coal strip mine and fish and/o  
ial Observer Program, pertaining to Keith Davis, an American fisheries observer who disappeared in the  
1st to October 14th 2016); 1. Melinda Marquis [Melinda.Marquis@noaa.gov], 2. Kevin Kelleher [Kevin.k  
ails (and attachments) that have been received by or sent by the following NOAA employees (since Apr  
ails (and attachments) that have been received by or sent by the following NOAA employees (since Apr  
NOAA in December of 2015. I also request any edited videos funded by NOAA that were the product of  
w what they were doing there any why, along with why I wasn't at all notified or asked to use my propert  
September 1, 2015 to present - including the name of the person or company who holds the original pe  
of Jackie.rolleri@noaa.gov which are either to or from the following; to or from Dr. Tim Parsons Departn  
st would ask specifically for the dates between June of 2009 and April of 2016.  
JOAA Cooperative Institutes Program titled "Proposal for Gulf of Mexico Connectivity".  
1 of the Drinkwater transcript -- Drinkwater's deposition ( NE1305018).  
102634B - F/V Alliance in 2015. \$27,000.

[REDACTED]

underway, Year 2000 forward. I could simply get a list electronically in a sortable format like Excel.

can the Bay Rhode Island's application and attachments.

Contracts (c) Licenses (d) Certifications (e) Bids (f) Violations (g) Fines (h) Enforcement actions (i) Incidents 13 to present.

ation and memos) between your department (and all divisions and agencies under your jurisdiction) and  
to protect the Atlantic sturgeon in the Delaware River; NMFS/NOAA responses to requests for informal consultation  
Washington .

by: Dennis Hansford, NOAA National Marine Fisheries Service.

1. Species, Fish, Crustaceans, Molluscs • Species Recovery Grants • General Protected Species. And a  
American Fisheries Inc., American Fisheries Inc., Tai Foong International \* All correspondence and documents from Jan.  
Two reports were produced in 2015 in response to a referral to a complaint that I had filed concerning a ci  
Cook, Sand Canyon, Glade and West for Salmon River Sub-Watersheds (HUCs 170800010201, 17080010  
Freedom of Information Act, 5 U.S.C. § 552, we seek access to and copies of all emails and similar  
41934, as detailed in the attached FOIA Request.

for fish habitat, and/or Cook Inlet beluga whales. In responding to this request, please include relevant c  
of the Pacific Ocean last year, along with Ms. DiCosimo's replies, for the time period Sept. 10, 2015 to presen  
Kevin.Kelleher@noaa.gov], 3. Jennifer Mahoney [Jennifer.Mahoney@noaa.gov], that pertain to the following su  
of 2016); 1. Melinda Marquis [Melinda.Marquis@noaa.gov], 2. Kevin Kelleher [Kevin.Kelleher@noaa.g  
of 2016); 1. Melinda Marquis [Melinda.Marquis@noaa.gov], 2. Kevin Kelleher [Kevin.Kelleher@noaa.g  
of such parties.

y. The GSA tag on one of the vehicles is G43 0170S. It was a Ford Super Duty in Silver color. Attached  
permit and the person or entity to which the permit was transferred/leased. Please include the name of the  
Department of Historical Resources, Florida or anyone in the Department of Historical Resources, Florida. Also

[REDACTED]

t reports (j) Vessel registrations (k) Purchase orders (l) Payments 2. Copies of all electronic and written

the following individual: John Kasich -2011-Present, when Kasich was Governor of Ohio -2001-2010, w  
ation for projects or initiatives that would impact the Atlantic sturgeon in the Delaware River; Any and all

list of the species funded under each of the above line items, and the budgeted allocations for each spe  
1, 2010 to present regarding imported shrimp suspected of containing antibiotic residues, and/or suspe  
vil rights violation with the Dept. of Justice. I would like a copy of both reports.

202, 170800010101), Mount Hood National Forest, Clackamas County, Oregon (WCR-2016-4259)  
communication on NOAA computers from August 1, 2014 up to and including August 1, 2016 to or from:

documents that are in the possession of any office of NOAA Fisheries. Please see attached letter for furl  
it. (Please include all attachments.) 2. Copies of all emails received by Ms. DiCosimo from representativ  
ibjects; 1. The reasons behind the cancellation of the NEWS (National Energy with Weather System) pr  
ov], 3. Jennifer Mahoney [Jennifer.Mahoney@noaa.gov], 4. Other NOAA email accounts related to the s  
ov], 3. Jennifer Mahoney [Jennifer.Mahoney@noaa.gov], 4. Other NOAA email accounts related to the s

are pictures of the vehicles, as well as the public road connection to our private road.

vessel and the date of transfer. (This request refers to Hawaii longline fishing permits issued and overs  
any emails to or from the Secretary of State of Florida, Ken Detzner. Emails regarding: Ribault French F

correspondence sent to/received from Coastal Construction Group of South Florida and any of its empl

hen Kasich was a member of the private sector. This includes, but is not limited to his positions as a: Ca  
requests for formal consultation for projects or initiatives that would impact the Atlantic sturgeon in the C

icies each fiscal year 2000 through 2016. Do the figures provided include employee salary? If so, pleas  
cted of being transshipped ("The Records"). This request is ongoing, seeking copies of (or a

Dr. Eric H. Williams, Chief, Sustainable Fisheries Branch, erik.williams@noaa.gov and to or from Dr. Br

ther information.

res of the Inter-American Tropical Tuna Commission (IATTC), along with Ms. DiCosimo's replies, for the  
object, 2. The decision making process of the cancellation of NEWS, 3. The actors who made the decisio  
subjects below, that pertain to the following subjects; 1. The NIM (non-hydrostatic Icosahedral Model) fut  
subjects below, that pertain to the following subjects; 1. The NIM (non-hydrostatic Icosahedral Model) fut

een by NOAA/NMFS.) Please don't hesitate to contact me if you have any questions at 808-341-5950. N  
Fleet or Robert Pritchett or Gary Pritchett or Global Marine Expeditions or Global Marine Exploration. Th

[REDACTED]

employees, agents, or representatives for the period January 1, 2010 to present. Note that this request includes

candidate for OH Governor Managing Director at Lehman Brothers; Managing Director at Barclays Capital Delaware River; NMFS/NOAA responses to requests for formal consultation for projects or initiatives that

do you provide allocations outside of salaries?

access to) all Records as they are filed with the Dept. of Commerce. I am further requesting that the Rec

Bonnie Ponwith, Director of Southeast Fisheries Science Center, [Bonnie.Ponwith@noaa.gov](mailto:Bonnie.Ponwith@noaa.gov) .

for time period Jan. 1, 2013 to present. (Please include all attachments.)

in to cancel NEWS. The documents include any correspondence between the three staff members from  
1. License, 2. Licensing the model to Spire Global, 3. Evidence that Spire Global has the NIM suite, 4. The bus  
1. License, 2. Licensing the model to Spire Global, 3. The NEWS (national energy with weather system) licens

Many thanks, Sophie Cocke, Reporter Honolulu Star-Advertiser  
This request is under the Freedom of Information Act.

[REDACTED]

le emails sent to/received from any email address using the handle @coastalconstruction.com.

I; Contributor/Host on Fox News; Presidential fellow at Ohio State University; Board Member at Invacare  
: would impact the Atlantic sturgeon in the Delaware River; Biological opinions issued by NMFS/NOAA fo

ords be provided to me on computer files or, if not maintained on computer files, in the same format as

NOAA enumerated above, but of particular interest are to/from specific sources, for example, 1. Craig I  
iness plan of Spire and Dr MacDonald, in particular, in Spire. The documents include any corresponde  
ing. The documents include any correspondence between the four staff members from NOAA enumerat


[REDACTED]

Corporation; Board Member at Norvax Inc.; Board Member at Worthington Industries; Associate at Sch  
or projects or initiatives that would impact the Atlantic sturgeon in the Delaware River; All reports receive

they are currently maintained at the Dept. of Commerce. Please see attached letter for full request


McLean [craig.mclean@noaa.gov], 2. Gary Matlock CEO [gary.c.matlock@noaa.gov], 3. Other NOAA ei  
ce between the four staff members from NOAA enumerated above and received from specific sources,  
ted above and received from specific sources, for example, 1. John Zakrasek [john.zakrasek@q.com], 2





rottenstein Property Group -1983-2001, when Kasich was a member of the U.S. House of Representatives  
d by NMFS of Atlantic sturgeon takes, kills, or injuries within the Delaware River system; and Any and al

mail addresses that contain the matching description above. See further details within the supporting file  
for example, 1. Alexander E MacDonald [alexander.e.macdonald@noaa.gov and alexander.macdonald  
2. Molly Markley [molly.markley@cu.edu], 3. Other CU email addresses related to the NIM or NEWS lice



res, OH-12 -1978-1983, when Kasich was a member of the Ohio State Senate • Any and all freedom of  
I NMFS/NOAA comments on environmental assessment

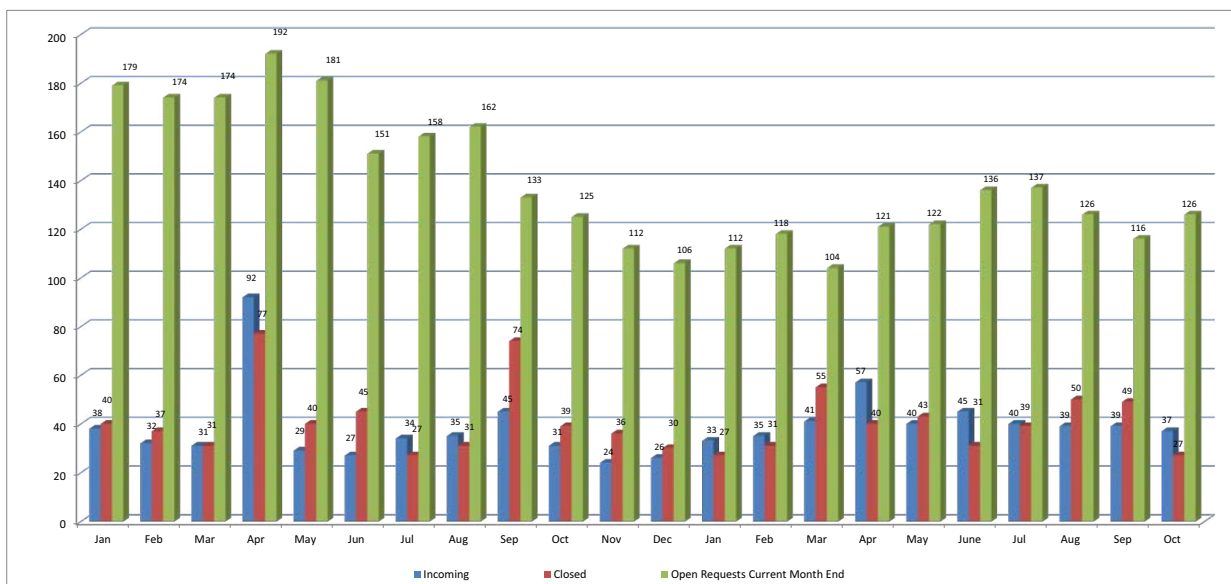
as it explains more reasoning for the FOIA and the actions being taken.  
@spire.com], 2. Peter Platzer, Spire CEO [Peter.Platzer@spire.com], 3. Other Spire email addresses re  
nsing. More detailed explanation is found in the supporting file.

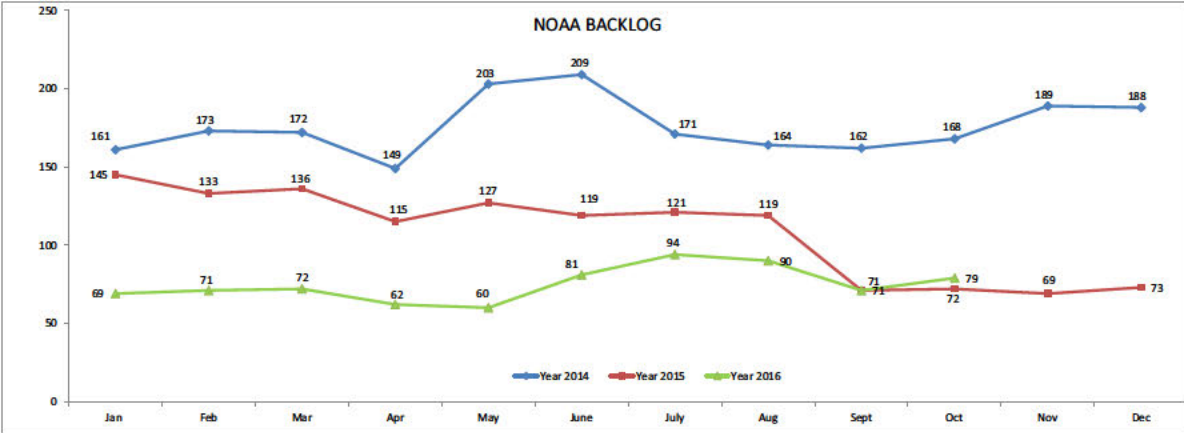
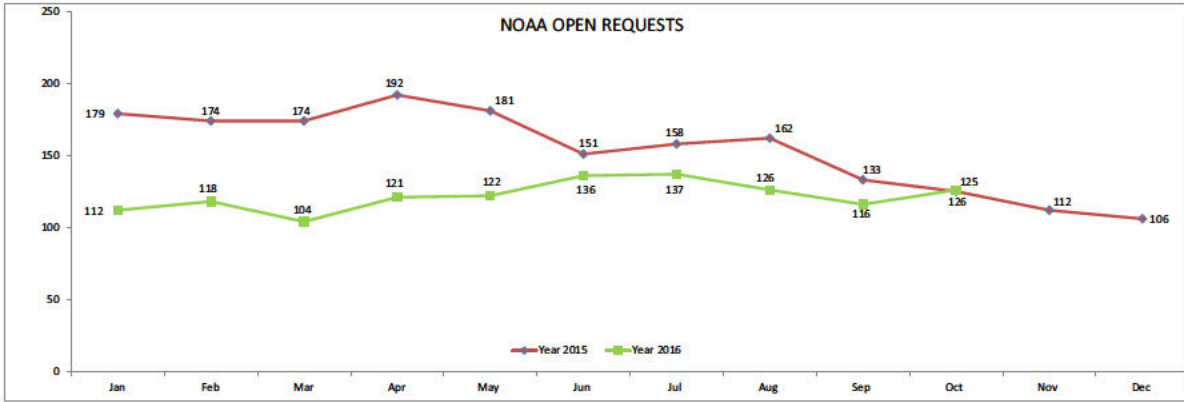


information re

lated to the di

Organization	Open Requests Previous Month End	Incoming Requests	Closed Requests	Open Requests Current Month End	Backlog 21-120 days	Backlog 121-364 days	Backlog 365 or more days	Total Backlog
AGO	6	2	3	5	2	3	0	5
CAO	1	0	0	1	1	0	0	1
CFO	0	0	0	0	0	0	0	0
CIO	1	0	0	1	0	0	0	0
CIO/FOIA	16	7	7	16	1	0	0	1
GC	6	0	2	4	1	0	0	1
IA	0	0	0	0	0	0	0	0
LA	2	0	2	0	0	0	0	0
NESDIS	3	1	0	4	1	1	0	2
NMFS	50	15	11	54	37	7	3	47
NOS	16	3	1	18	6	3	1	10
NWS	6	4	0	10	5	0	0	5
OAR	3	2	1	4	0	0	1	1
OMAO	0	0	0	0	0	0	0	0
OC	0	0	0	0	0	0	0	0
PPI	0	0	0	0	0	0	0	0
USAO	1	0	0	1	0	0	0	0
WFMO	5	3	0	8	5	1	0	6
<b>NOAA Totals</b>	<b>116</b>	<b>37</b>	<b>27</b>	<b>126</b>	<b>59</b>	<b>15</b>	<b>5</b>	<b>79</b>





Tracking Number	Type	Requester	Requester Organization
DOC-NOAA-2017-000121	Request	Lauree Valverde	
DOC-NOAA-2017-000112	Request	Rose Santos	FOIA GROUP INC
DOC-NOAA-2017-000055	Request	Nicholas Lewis	
DOC-NOAA-2017-000115	Request	Nicholas Patton	Delaware Riverkeeper Network
DOC-NOAA-2017-000109	Request	Tim Hamilton	Twin Harbors Fish & Wildlife Advocacy
DOC-NOAA-2017-000110	Request	Kristin Ruether	Western Watersheds Project
DOC-NOAA-2017-000113	Request	Catherine Kilduff	Center for Biological Diversity
DOC-NOAA-2017-000095	Request	Elizabeth A. Mitchell	Association for Professional Observers
DOC-NOAA-2017-000087	Request	Christopher Hudak	Environmental Advocates
DOC-NOAA-2017-000076	Request	Richard Condit	Smithsonian Institution
DOC-NOAA-2017-000073	Request	Margaret Townsend	
DOC-NOAA-2017-000063	Request	Giovanni j. Galarza	Evergreen State College
DOC-NOAA-2017-000057	Request	Darlene P. Bennett	Sustainable Fisheries
DOC-NOAA-2017-000050	Request	Marie A. Alailima	
DOC-NOAA-2017-000023	Request	Nina Bell	Northwest Environmental Advocates
DOC-NOAA-2017-000056	Request	Shane McCoin	ELLISON, SCHNEIDER & HARRIS L.L
DOC-NOAA-2017-000006	Request	Lee van der Voo	InvestigateWest
DOC-NOAA-2017-000085	Request	Margaret Townsend	
DOC-NOAA-2017-000098	Request	Michael Davidson	
DOC-NOAA-2017-000069	Request	Christopher T. Clack	
DOC-NOAA-2017-000060	Request	Christopher T. Clack	
DOC-NOAA-2017-000059	Request	Christopher T. Clack	
DOC-NOAA-2017-000043	Request	Matthew J. Novak	Gizmodo / Univision
DOC-NOAA-2017-000027	Request	Colt Szczygiel	
DOC-NOAA-2017-000033	Request	Sylvia Costelloe	Arent Fox LLP
DOC-NOAA-2017-000118	Request	Michael L. Brown	Waltzer, Wiygul & Garside LLC
DOC-NOAA-2017-000111	Request	Lara Kolinchak	Claremont Graduate University
DOC-NOAA-2017-000052	Request	Jane Reifert	Incredible Adventures / IA Worldwide, Inc.
DOC-NOAA-2017-000107	Request	Elizabeth Nowicki	
DOC-NOAA-2017-000075	Request	John Greenewald	The Black Vault
DOC-NOAA-2017-000072	Request	Richard Hirn	National Weather Service Employees
DOC-NOAA-2017-000062	Request	Elizabeth Nowicki	
DOC-NOAA-2017-000058	Request	Christopher T. Clack	
DOC-NOAA-2017-000034	Request	Christopher T. Clack	
DOC-NOAA-2017-000119	Request	Ryan P. Martin	
DOC-NOAA-2017-000096	Request	Elizabeth Groeller	
DOC-NOAA-2017-000018	Request	Steven McIntosh	

Submitted	Assigned To	Perfected?	Due	Closed Date	Status
10/28/2016	AGO	Yes	12/02/2016	TBD	Assignment Determination
10/27/2016	AGO	Yes	12/02/2016	TBD	Assignment Determination
10/12/2016	NESDIS	Yes	11/28/2016	TBD	Assignment Determination
10/27/2016	NMFS	Yes	12/02/2016	TBD	Assignment Determination
10/26/2016	NMFS	Yes	12/02/2016	TBD	Assignment Determination
10/26/2016	NMFS	Yes	12/02/2016	TBD	Assignment Determination
10/24/2016	NMFS	Yes	12/02/2016	TBD	Assignment Determination
10/23/2016	NMFS	Yes	12/02/2016	TBD	Assignment Determination
10/19/2016	NMFS	Yes	12/02/2016	TBD	Assignment Determination
10/18/2016	NMFS	Yes	12/01/2016	TBD	Assignment Determination
10/17/2016	NMFS	Yes	11/25/2016	TBD	Final Preparation of Response
10/13/2016	NMFS	Yes	11/28/2016	TBD	Assignment Determination
10/13/2016	NMFS	Yes	11/28/2016	TBD	Assignment Determination
10/12/2016	NMFS	Yes	11/09/2016	TBD	Assignment Determination
10/06/2016	NMFS	Yes	11/09/2016	TBD	Research Records
10/04/2016	NMFS	Yes	11/10/2016	TBD	Assignment Determination
10/03/2016	NMFS	Yes	11/23/2016	TBD	Evaluation of Records
10/03/2016	NMFS	Yes	11/16/2016	TBD	Assignment Determination
10/24/2016	NOAA FOIA	No	TBD	TBD	Initial Evaluation
10/14/2016	NOAA FOIA	No	TBD	10/26/2016	Closed
10/13/2016	NOAA FOIA	No	TBD	10/26/2016	Closed
10/13/2016	NOAA FOIA	No	TBD	10/26/2016	Closed
10/11/2016	NOAA FOIA	No	11/25/2016	10/26/2016	Closed
10/07/2016	NOAA FOIA	No	11/22/2016	10/19/2016	Closed
10/07/2016	NOAA FOIA	Yes	11/09/2016	TBD	Assignment Determination
10/27/2016	NOS	Yes	12/02/2016	TBD	Assignment Determination
10/13/2016	NOS	Yes	11/25/2016	TBD	Assignment Determination
10/12/2016	NOS	Yes	11/09/2016	TBD	Assignment Determination
10/19/2016	NWS	Yes	12/02/2016	TBD	Assignment Determination
10/18/2016	NWS	Yes	12/01/2016	TBD	Assignment Determination
10/17/2016	NWS	Yes	11/15/2016	TBD	Assignment Determination
10/13/2016	NWS	Yes	11/10/2016	TBD	Evaluation of Records
10/13/2016	OAR	Yes	11/25/2016	TBD	Assignment Determination
10/11/2016	OAR	Yes	11/09/2016	TBD	Assignment Determination
10/27/2016	WFMO	Yes	12/02/2016	TBD	Assignment Determination
10/24/2016	WFMO	Yes	12/02/2016	TBD	Assignment Determination
10/05/2016	WFMO	Yes	11/09/2016	TBD	Assignment Determination

## Detail

Under FOIA, we are requesting information about the following; Science and Technology Corporation, Riverside Te [Reference FGI# 16- 50885] Relevant to DOCEA133E08CQ0020 we seek a copy of the proposal submitted by inci To whom it may concern, My name is Nic, I'm an engineering student at Cal Poly San Luis Obispo. I'm currently w Please provide any Reports of Impingement (or entrainment) of shortnose sturgeon at the Salem Nuclear Generat The purpose of the FOIA is to allow the Advocacy to review the role of NOAA in the process referred to as North o Diversions in Upper Salmon River and Lemhi River Watersheds. This request concerns the Salmon-Challis Nation Please email me the reinitiation package for the U.S. WCPO purse seine fishery. I copied below part of the FR not I request the comments and documentation of fishery observers in the Hawaii Longline and American Samoa Long 1. Any reports, memoranda, correspondence, or other documents (including electronic mail messages) concerning I would like to get a copy of the reports for the following NOAA research permit for protected species: File Number The Center requests all records that include communications with the State of Oregon and/or its component(s) or a Marine Mammal Inventory; Detailed records of all deceased Short Fin Pilot Whales, False Killer Whales, Pacific W Under the Freedom of Information Act, 5 U.S.C. § 552, I am requesting 1 copy of the Report of the inquiry/inve On September 8, 2016 I attended a public scoping meeting for a proposed Aquaculture Management Program for Please provide all documents regarding ESA §7 consultation (including formal, informal, and national) between NM 1. Correspondence, communications, and documents exchanged or transmitted from December 19, 2013 through I would like a copy of the investigative case file and any enforcement proceedings associated with the case in which The Center requests from the National Oceanic and Atmospheric Administration ("NOAA") all records that referenc The Utah Attorney General's office represents the Utah State University Research Foundation ("USURF"). USURF Emails (and attachments) that have been received by or sent by the following NOAA employees (since September Under the Freedom of Information Act (5 U.S.C. Section 552), I am requesting the following documents: Em Under the Freedom of Information Act (5 U.S.C. Section 552), I am requesting the following documents: Em I request all budget documents for Christmas parties (more often known as "holiday parties") funded in any way by I found GSA vehicles belonging to NOAA on my private property with no one around on 2016 June 10. I'd like to kno All FOIA requests filed with the National Marine Fisheries Service by the Institute for Fisheries Resources, Pacific ( Any records relating to the Bay Long/Chenier Ronquille, Louisiana oil spill that was reported on or about Septembe I am seeking information and supporting documentation regarding the percentage of the budget for the Office of N I would like to go ahead and request a copy of the decision memo under the Freedom of Information Act. We've re Pursuant to FOIA for all e-mails, text messages, "pings," or SMS that NOAA employee John "Bre Resubmitted 9/12/16, and stipulated a time frame: I respectfully request a copy of records, electronic or otherwise, Request a copy of any document which reveals the amount of unobligated or "carry over" appropriated Seeking a May 19, 2015, e-mail from Mr. Wachter, with NWS in Albuquerque, to Mr. Mike Dudley, U.S. Forest Ser UPDATED DESCRIPTION 10/26/16: All emails (and attachments) that have been received by or sent by the follow Emails (and attachments) that have been received by or sent by the following NOAA employees (over the course o I wish to retain all performance evaluations and any disciplinary actions while employed at NOAA Office for Law En I request all documentation (agency forms, copies of emails, etc.) relating to my voluntary resignation/separation o I applied to NOAA Enforcement Officer announcement NMFS OLE 2016-0001 ZA-1801-2 (MAP). I was given a ter



Technology, Inc, Global Science & Technology, Inc, Earth Resources Technology, Inc. and I.M. System  
umbent DIVERSIFIED GLOBAL PARTNERS

Working with other engineering students on a theoretical design for a search and rescue satellite constellation  
ing Station (located in Salem, New Jersey) received by NMFS since January 2015 to present. I am attached  
f Falcon (NOF) wherein fishing seasons were adopted by the Washington Department of Fish & Wildlife  
al Forest's implementation of the 2012 Biological Opinions ("Biops") from National Marine Fisheries Service  
ice that said NMFS is developing the biological assessment. <https://s3.amazonaws.com/public-inspection>  
gline Observer Programs, including observations written in their Documentation notebook or field journal  
any Endangered Species Act ("ESA") section 7 consultations (16 U.S.C. § 1536) that have been initiated  
: 0486-1506 (PR1 Permit #0486-1506 scientific research). Brent Stewart at Hubbs SeaWorld was the appropriate  
agency/agencies regarding impacts to Oregon Coast coho salmon from logging activities.

White Sided Dolphins (cause of death, age at death, time spent in captivity, etc.) for undergraduate student  
estigation conducted by Mr. Kirk Essmyer at the direction of Mr. Paul Doremus regarding reported allegations  
American Samoa which arose out of the Western Pacific Regional Fisheries Management Council inter-agency  
NMFS and the EPA as they relate to the following amendments to California's water quality standards: 1. A  
the present between NOAA Fisheries West Coast Region staff in the Arcata and Yreka, California office  
h the "Spanish company Albacora S.A., owner of the Albacora Uno, was charged June 2, 2010 with 67 violations  
the assessments required in paragraphs 1D and 1F of the terms and conditions in the August 21, 2010  
is a defendant in the action GeoMetWatch Corp. v. Alan Hall, et al., currently pending in the Federal District  
1st to October 14th 2016); 1. Melinda Marquis [Melinda.Marquis@noaa.gov], 2. Kevin Kelleher [Kevin.Kelleher@noaa.gov]  
ails (and attachments) that have been received by or sent by the following NOAA employees (since April  
ails (and attachments) that have been received by or sent by the following NOAA employees (since April  
NOAA in December of 2015. I also request any edited videos funded by NOAA that were the product of  
what they were doing there any why, along with why I wasn't at all notified or asked to use my property  
Coast Federation of Fishermen's Associations, Golden Gate Salmon Association, Kennebec Reborn, Forest  
r 5, 2016, by Harvest Pipeline Company. Please construe this request to include information relevant to  
ational Marine Sanctuary which is relegated to the National Marine Sanctuary of American Samoa.

Requested an amendment that will significantly increase white shark education while reducing the potential  
nt" Wachter sent or received regarding the Yarnell Hill Fire (aka Yarnell, aka Yarnell Fire, aka YHF)  
pertaining to the risks of geomagnetic storms. Please only include reports and responsive documents, and  
funds for the National Weather Service for fiscal year 2016, per PPA

vice, related to an abstract written by Elizabeth Nowicki regarding the 2013 Yarnell Hill Fire incident.  
ing NOAA employees since April of 2016 to the present: 1. Melinda Marquis [Melinda.Marquis@noaa.gov]  
f 2016); 1. Melinda Marquis [Melinda.marquis@noaa.gov], 2. Kevin Kelleher [Kevin.Kelleher@noaa.gov]  
forcement.

on September 22, 2016, including the dates of September 22 to the current date, 2016 and also include,  
tentative offer. As part of the process, I was required to undergo a medical exam and psychological exam.



[REDACTED]  
requirement for scientific and technical support services under the SCIENTIFIC AND TECHNICAL SUP

om our satellite system and after a bit of searching discovered that the COSPAS SARSAT system has 3

ational salmon fishing seasons in the Straights of Juan de Fuca, Puget Sound and their tributaries in 20  
: 2004/01982) and for Diversions located on the Salmon-Challis National Forest in the Lemhi River Wat  
CPO purse seine fishery in anticipation of reinitiating ESA Section 7 consultation for one or more other s  
pertaining to vessel conditions on board the Hawaii-based and American Samoa-based longline vessel:  
ing to the following Letters of Map Change (with Product ID Number and Effective Date) issued for prop

formed grade levels and uploaded a clean copy of fraudulent & CIO Violation file to the Recruitmer  
an (ASFEP) to include, for the first time ever, an aquaculture management program for American Samo  
jeles and Ventura Counties which updated the ammonia water quality objectives and implementation pr  
ig Craig Tucker, Russell "Buster" Attebery, Bill Tripp, Toz Soto, Konrad Fisher, Larry Lestelle, Gabriel R  
an without a valid U.S permit over two years. The Notice of Violation and Assessment, known as a NOV  
DGN") Fishery.1 Paragraphs 1D and 1F are copied here for ease of reference: 1 D. NMFS shall evaluat  
je part under a contract USURF had with NASA, which was designated NASA Contract NAS1-00071 (th  
bjects; 1. The reasons behind the cancellation of the NEWS (National Energy with Weather System) pr  
ov], 3. Jennifer Mahoney [Jennifer.Mahoney@noaa.gov], 4. Other NOAA email accounts related to the s  
ov], 3. Jennifer Mahoney [Jennifer.Mahoney@noaa.gov], 4. Other NOAA email accounts related to the s

are pictures of the vehicles, as well as the public road connection to our private road.  
Friends of the Earth, Food and Water Watch, The Quinault Indian Nation, or Center for Food Safety see  
is spill. Please also include any records that, prior to the date of the above-referenced spill, identified oil

1, 12 total dates next year and no more than 20 total dates the following year, insuring a less-than-signifi

Stanley Benjamin [Stan.Benjamin@noaa.gov] That pertains to the following subjects: 1. The reasons  
/S [National Energy with Weather Systems] project, 2. The future direction of the NEWS project, 3. Plan:

, Mission Support, and Paul Pegnato, Deputy Chief Administrative Officer, NESDIS, SMC Building 1 in S  
documentation, interviews, or results that were used by the NOAA Office of Law Enforcement to rescind

PORT SERVICES (SCITECH) IDIQ since Oct 2010. We would like a copy of each of the task order solic

31 MCC's that they utilize. I was wondering if you could provide a rough estimate of the data rates the C

16. All communication, including any attachment that accompanied the communication, and documents  
ershed (NMFS No: 2005/00061). Pursuant to the FOIA, please send WWP copies of the following recor  
species, as may be warranted, based on raw observer data recently obtained from the Pacific Islands Ec  
s and the fishing crew on board these vessels. I also request associated phone logs maintained by obse  
erties in Monterey County, California by the Federal Emergency Management Agency ("FEMA") through

nt Analysis Database (RADs). I am a current FTE employee of the Department of Commerce/NOAA/Nat  
a waters just beyond 3 miles. The proposed program contemplates future federal permitting and regulat  
cedures for inland surface waters, enclosed bays, and estuaries which are characteristic of freshwater  
ossi, and Scott McBain, related to Montague Water Conservation District's Conservation and Habitat En  
A, included a possible \$7.4 million civil penalty" which Albacora SA settled for \$5 million to go into the W  
e the need and/or feasibility of modifying the existing observer coverage targets or implementing additio  
ie "Contract";). The Contract was concerning the development of next generation weather sa  
ject, 2. The decision making process of the cancellation of NEWS, 3. The actors who made the decisio  
subjects below, that pertain to the following subjects; 1. The NIM (non-hydrostatic Icosahedral Model) fut  
subjects below, that pertain to the following subjects; 1. The NIM (non-hydrostatic Icosahedral Model) fut

eking National Marine Fisheries Service documents regarding AquaBounty Technologies' AquAdvantage  
pipelines in the area of the Chenier Ronquille barrier island restoration project overseen by NOAA. I pre

cant impact on sharks, while increasing the potential for educational sightings.

s behind the cancellation of the NEWS (National Energy with Weather System) project 2. The decision  
s of the NEWS project after October 1, 2016, 4. CIRES employee Christopher T M Clack, 5. Budget infc

ilver Spring, MD 29010 and their Branch and Division employees as assigned.  
d my tentative offer.

[REDACTED]  
citations issued to the IDIQ holders of this contract vehicle. We do not want a copy of the awarded task c

DSPAS SARSAT system's LEOLUTs and GEOLUTs typically can handle? Also, do your MCC's have ca

s that were created, transmitted, received or reviewed by NOAA from January 1, 2015 to present includi  
ds: 1. All documents regarding implementation and enforcement of those Biops (including their Incidenta  
rum Fisheries Agency (FFA), located in Honiara, Solomon Islands.”

river program staff, e-mails and other communications with these observers, and with other agencies, re  
the National Flood Insurance Program (“NFIP”) 2. Any reports, memoranda, correspondence, or other c

tional Marine Fisheries Service/Office of Sustainable Fisheries employee. The dates of the investigation  
ory control of aquaculture activities in these marine waters which were ceded to the U.S. and over which  
and support aquatic life, adopted by the Los Angeles Regional Water Quality Control Board on April 25,  
hancement and Restoration Project (CHERP); 2. Correspondence, communications, and documents ex  
/estern Pacific Sustainable Fisheries Fund.

nal measures in the DGN fishery to produce more reliable estimates of protected species interactions th  
tellite technology. With respect to the Contract, we are requesting the following types of documents: - Al  
in to cancel NEWS. The documents include any correspondence between the three staff members from  
ure, 2. Licensing the model to Spire Global, 3. Evidence that Spire Global has the NIM suite, 4. The bus  
ure, 2. Licensing the model to Spire Global, 3. The NEWS (national energy with weather system) licens

;&reg; Salmon and/or the National Marine Fisheries Service's involvement in or communications with the  
fer documents in native, digital form, and you may deliver them to my email address.

n making process of the cancellation of NEWS 3. The NEWS (national energy with weather system) I  
ormation on the Wind Boundary Layer [WBL] or Atmospheric Science for Renewable Energy [ASRE] anc

[REDACTED]  
orders rather than the task order procurement documents issued to each of the IDIQ contract holders.

ability for system control such as satellite attitude adjustment?

ing those transmitted internally within NOAA or between NOAA and a third party. The Advocacy requests  
al Take Statements, Terms and Conditions, Reasonable and Prudent Alternatives, and Reasonable and

regarding these observations reported by observers. These observations and documentation may include  
documents (including electronic mail messages) concerning any ESA section 7 consultations (16 U.S.C.

start or completion are unknown. If there are any fees for searching or copying the records, please let n  
the U.S. has a reciprocal obligation to protect it for the inhabitants of the islands at the time of treaty ex  
2002 (Regional Board Resolution No. 2002-011), as corrected by the Regional Board Executive Officer  
changed or transmitted from December 19, 2013 through the present between NOAA Fisheries West C

that are scientifically defensible. This assessment should focus on the precision and uncertainty of existin  
l internal email regarding the Contract which were written from January 1, 2004 to the present. - All inter  
NOAA enumerated above, but of particular interest are to/from specific sources, for example, 1. Craig I  
business plan of Spire and Dr MacDonal, in particular, in Spire. The documents include any corresponde  
ing. The documents include any correspondence between the four staff members from NOAA enumerat

3 Food and Drug Administration regarding FDA's review of the New Animal Drug Application for AquAdv

licensing 4. The actors who made the decision to cancel NEWS 5. Any correspondence between th  
l where the funds from the NEWS project were allocated. The documents include any correspondence t



[REDACTED]

ndings for 2016 seasons resulting in the agreed upon seasons contained in the attached agreement between  
diversion structures, their operation, and/or associated stream conditions; authorization of diversions (inclu-  
ding facilities 4. Hygiene 5. Bedbug and cockroach infestation 6. Pesticide use 7. Drug use 8. Firearms po-  
ssession informal consultations, pertaining to the implementation of the NFIP in Monterey County, California date

fees do not exceed \$20.00, which I agree to pay.] If you deny all or any part of this request, please cite  
the facts that transpired at the public scoping hearing held on September 8, 2016 (which maybe faulty as to wh-  
ich Region for the coastal watersheds of Los Angeles and Ventura Counties which updates ammonia wa-  
ter quality or their representatives and/or their consultants, including Craig Tucker, Russell "Buster" Attebery, Bill

benefits and short comings of other observer coverage levels. This assessment shall be completed by May  
of the present. - All drafts of any documents regarding the Contract written from January 1, 2004 to prese-  
nt email addresses that contain the matching description above. See further details within the supporting file  
for example, 1. Alexander E MacDonald [alexander.e.macdonald@noaa.gov and alexander.macdonald@noaa.gov]  
2. Molly Markley [molly.markley@cu.edu], 3. Other CU email addresses related to the NIM or NEWS lice-

of those requests. This request does not apply to any documents or portions thereof contained in these fi-

ces, Craig McLean [craig.mclean@noaa.gov], 2. Gary Matlock CEO [gary.c.matlock@noaa.gov] 6. C  
for example, 1. Kristen Averyt [kristen.averyt@colorado.edu], 2. Waleed Abdalati [waleed.abdalati@color



veen tribal and state co-managers titled "2016-17 Co- Managers List Of Agreed Fisheries (May 1, 2016-  
uding special use permits and easements); records regarding installation of headgates, measuring devic

ssession and use 9. Crew working hours 10. Crew discipline by the captain and other managers 11. Cr  
d from January 1, 2000 to December 31, 2008 3. Any reports, memoranda, correspondence, or other dc

each specific exemption you think justifies your withholding of information. Notify me of app  
at was said due to delayed memory recall and only intended here as a general synopsis), I am following  
ter quality objectives and implementation procedures applicable to inland surface waters not characteris  
Tripp, Toz Soto, Konrad Fisher, Larry Lestelle, Gabriel Rossi, and Scott McBain, related to anadromous

1, 2014. SFD will confer with PRO on the results of this assessment and shall initiate im  
nt. We have a protective order in place in this case which may facilitate production of any sensit  
as it explains more reasoning for the FOIA and the actions being taken.  
@spire.com], 2. Peter Platzer, Spire CEO [Peter.Platzer@spire.com], 3. Other Spire email addresses re  
nsing. More detailed explanation is found in the supporting file.

les that are Confidential Business Information.

Other NOAA correspondence that contain the matching description of or related to NEWS (National Ener  
ado.edu], 3. Paula Robinson [paula.robinson@colorado.edu], 4. Kathleen Human [Kathleen.human@co



April 30,  
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gy wit  
lorado.edu].

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**From:** FOIA Office - NOAA Service Account <foia@noaa.gov>  
**Sent:** Thursday, November 3, 2016 10:09 AM  
**To:** Mark Graff - NOAA Federal  
**Subject:** Fwd: Fee Waiver Supplemental Information Needed  
**Attachments:** NMFS CA WQS 2016 fee waiver letter.pdf

I have already uploaded the attachment into the FO request.

Lola

----- Forwarded message -----

**From:** **Nina Bell** <[nbell@advocates-nwea.org](mailto:nbell@advocates-nwea.org)>  
**Date:** Tue, Nov 1, 2016 at 3:37 PM  
**Subject:** RE: Fee Waiver Supplemental Information Needed  
**To:** [foia@noaa.gov](mailto:foia@noaa.gov)

Mr. Graff,

Please see attached letter. Please acknowledge receipt of this letter.

Nina Bell, J.D., Executive Director

Northwest Environmental Advocates

P.O. Box 12187

Portland, OR 97212-0187

[www.NorthwestEnvironmentalAdvocates.org](http://www.NorthwestEnvironmentalAdvocates.org)

[nbell@advocates-nwea.org](mailto:nbell@advocates-nwea.org)

[503/295-0490](tel:5032950490)

**From:** [foia@noaa.gov](mailto:foia@noaa.gov) [mailto:[foia@noaa.gov](mailto:foia@noaa.gov)]  
**Sent:** Wednesday, October 19, 2016 4:39 AM  
**To:** [nbell@advocates-nwea.org](mailto:nbell@advocates-nwea.org)  
**Subject:** Fee Waiver Supplemental Information Needed

10/19/2016 07:22 AM  
FOIA Request: DOC-NOAA-2017-000023

Good Morning,

In follow up to the request you submitted on October 6, 2016, additional information is necessary to adjudicate your request for a full waiver of fees. Specifically, you have indicated that the information "would allow NWEA to remain informed and continue to provide meaningful input in state and federal agency actions." Although NWEA is a non-profit organization, that status is not determinative of the commercial interest of the requester. In order to qualify for a fee waiver, a significant increase in the interested segment of the public's understanding of the subject of the request is required, as opposed to the informing of the requester individually, or to solely advance the requester's organization's mission and objectives, even for a non-profit organization.

Additionally, you have indicated that you propose to use this information to ensure that government agencies comply with legislation in taking action on water quality standards. However, later you indicate that the purpose of the information is to be used in "newsletters, public meetings, brochures, educational sessions, websites, and to the media."

The request highlights the requester's ability to advocate on behalf of clean water issues, and indicates the general intent to disseminate the records. However, the request does not sufficiently explain the requester's ability to extract and analyze the records to produce a unique work that will be disseminated to a segment of interested individuals aside from NWEA's advocacy work. Additionally, the request does not identify who the segment of interested individuals are that will receive this unique work to be produced by NWEA.

In reviewing the requester's website, a document library is available, which contains various records pertinent to NWEA activities. There also are news links outlining NWEA's activities. Please include as much information as possible on the intent and ability of NWEA to disseminate a proposed unique work, as well as the segment of interested individuals to whom it would be directed.

Please provide this additional information necessary to adjudicate your fee waiver request. Your request will remain on hold pending receipt of this information.

Mark Graff

NOAA FOIA Officer.

# NORTHWEST ENVIRONMENTAL ADVOCATES



November 1, 2016

Mark Graff, FOIA Officer  
National Oceanic and Atmospheric Administration  
U.S. Department of Commerce  
1315 East-West Highway (SSMC3)  
Room 9719  
Silver Spring, Maryland 20910

*Submitted via email: foia@noaa.gov*

Re: **FOIA Request DOC-NOAA-2017-000023 Fee Waiver Clarification**

Dear Mr. Graff:

In an email received on October 19, 2016, you requested additional information from Northwest Environmental Advocates (NWEA) before processing the fee waiver request accompanying our October 6, 2016 Freedom of Information Act (FOIA) Request (DOC-NOAA-2017-000023). NWEA's request seeks records related to consultations between the National Marine Fisheries Service (NMFS) and the U.S. Environmental Protection Agency (EPA) that were undertaken pursuant to Section 7 of the Endangered Species Act (ESA) for EPA's conditional approvals of certain state water quality standards.

In that request for records, NWEA also requested fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). By regulation, the National Oceanic and Atmospheric Administration (NOAA) must consider four factors in deciding whether a fee waiver is warranted: (1) the request concerns the operations or activities of the government; (2) the disclosure will have value to the public and will likely contribute to public understanding of government operations or activities; (3) the disclosure will contribute significantly to public understanding; and (4) the disclosure is not primarily in the requester's commercial interest. *See* 15 C.F.R. § 4.11(l). NWEA addressed these factors in its October 6, 2016 request, demonstrating that a fee waiver is appropriate.

This conclusion is consistent with prior agency action, as NOAA and the National Marine Fisheries Service (NMFS) have granted fee waivers to NWEA for many previous FOIA requests, including but not limited to requests related to ESA consultation for Idaho and Washington water quality standards as well as the national cyanide consultation. *See, e.g.*, FOIA Nos. 2009-00396 (NMFS), 2011-00391 (NOAA OCRM), 2013-001153 (NMFS), 2013-001430 (NOAA OCRM), DOC-NOAA-2015-001451 (NOAA OCRM), DOC-NOAA-2015-001530 (NMFS), DOC-NOAA-2016-000937 (NMFS). Nevertheless, you appear to seek additional or more specific information about NWEA and the methods that NWEA will use to disseminate the specific records requested, the audience to which the records will be disseminated, and how dissemination will increase the audience's understanding of the subject matter.

As an initial matter, you appear to misconceive NWEA's request when you request evidence of

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[www.NorthwestEnvironmentalAdvocates.org](http://www.NorthwestEnvironmentalAdvocates.org)

P.O. Box 12187, Portland, OR 97212-0187 Phone (503) 295-0490 Fax Upon Request

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NWEA's ability "to disseminate a proposed unique work, as well as the segment of interested individuals to whom [the unique work] would be directed." Your request appears to derive from the "distinct work" definition of news media organizations under FOIA. 5 U.S.C. 552. Since NWEA is not claiming to be a news media organization in its fee waiver request, your request for a showing of "unique work" is entirely misplaced.

The other information you request is not required by FOIA because we have already made the necessary showing that NWEA is entitled to a fee waiver here.<sup>1</sup> Any effort to add requirements or levels of scrutiny to fee waiver requests run counter to the letter and spirit of the law itself. In enacting FOIA, "Congress incorporated fee waivers and reductions into FOIA so that fees would not be used as an obstacle to disclosure of requested information." *Long v. Sec. of Homeland Sec.*, 2015 U.S. Dist. LEXIS 83835 (D.D.C. 2015) (citing *Eudey v. Central Intelligence Agency*, 478 F. Supp. 1175, 1177 (D.D.C. 1979)). In the Freedom of Information Reform Act of 1986, Congress reaffirmed its intent that "fee waivers play a substantial role in the effective use of the FOIA, and they should be liberally granted to all requesters other than those who are commercial users." 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy). It therefore expanded the fee waiver provision to facilitate access to agency records by non-profit groups, functioning in oversight roles such as NWEA, when they utilize FOIA to monitor governmental activities. See *Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 89 (D.C. Cir 1986) (fee waiver intended to benefit public interest oversight); *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 649 (D.C. Cir. 1987) (same). Indeed, the 1986 amendment's primary purpose was "to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA" to the news media and public interest users of the FOIA. 132 Cong. Rec. S16496 (daily ed. Oct. 15, 1986) (statement of Sen. Leahy).

Moreover, President Obama has committed to furthering transparency and open government and has directed federal agencies to "adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government." Memorandum from President Barack Obama on The Freedom of Information Act to Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 26, 2009). The President further stressed that "agencies should take affirmative steps to make information public." *Id.* In this light, NOAA should broadly interpret the FOIA's fee waiver provision, and should follow this administration's policy concerning transparency, as well as the Department of Justice's reaffirmation of the policy through transparency initiatives and the development and promotion of FOIA best practices in government. See Government Transparency, The Department of Justice, <http://www.justice.gov/oip/government-transparency> (last visited Oct. 27, 2016).

At the outset, please note that this request pertains to subject matter that may enter litigation. Courts have consistently recognized that Congress intended the fee waiver provisions to "be liberally construed in favor of waivers for noncommercial requesters." See, e.g., *Forest*

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<sup>1</sup> On October 25, 2016, the U.S. Fish and Wildlife Service (FWS) granted NWEA a fee waiver for its FOIA request for the same type of information about the agency's Section 7 consultations with EPA about EPA's conditional approvals of water quality standards for California. NWEA's request for a fee waiver from the FWS was identical to the fee waiver request that you call into question.

*Guardians v. Department of Interior*, 416 F.3d 1173, 1177-78 (10th Cir. 2005); *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). One court stated:

Finally, I note that strong policy considerations support a fee waiver in this case. The legislative history discussed in *McClellan, supra* [cites omitted], and other cases demonstrates that Congress intended independent researchers, journalists and public interest watchdog groups to have inexpensive access to government records in order [t]o provide the type of public disclosure believed essential to our society. Moreover, in the 1986 amendments to FOIA, Congress ensured that when such requesters demonstrated a minimal showing of their legitimate intention to use the requested information in a way that contributes to public understanding of the operations of government agencies, no fee attaches to their request.

*Institute for Wildlife Protection v. U.S. Fish and Wildlife Service*, 290 F. Supp. 2d 1226, 1232 (2003). Accordingly, both the U.S. Court of Appeals for the Ninth Circuit and the U.S. Court of Appeals for the D.C. Circuit have stated that the main purpose of the fee-waiver is “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” *Judicial Watch, Inc.*, 326 F.3d at 1311; *see also McClellan Ecological Seepage Situation*, 835 F.2d at 1284.

In addition to the “minimal showing” needed to obtain a fee waiver, NWEA is involved in litigation regarding related water quality standards. Use of information sought through FOIA is a recognized public use and benefit under FOIA’s fee waiver standard. Courts have long recognized that the use of such laws to further the public interest through challenges to agency action may actually represent some of the highest and best application of public access laws. For example, the Ninth Circuit has ruled that a FOIA requester established a *prima facie* justification for a fee waiver when “[i]n particular, they made it clear to [the agency] that they meant to challenge publicly the scientific basis for the western pond turtle listing denial.” *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d. 53, 55 (9th Cir.1997); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10 (1975) (evidence of prior litigation interest does not decrease right of access under FOIA). Indeed, almost 30 years ago, the federal court for the District of Columbia, citing Supreme Court precedent, ruled that “[l]itigation to seek redress of violation of law is a right established by the first amendment . . . and restrictions thereupon are subject to strict scrutiny.” *Idaho Wildlife Fed'n v. U.S. Forest Serv.*, Civ. No. 82-1206 (D.D.C. July 21, 1983) (citing *NAACP v. Button*, 371 U.S. 415 (1962)), slip op. at 7. In that case, the court rejected the Forest Service’s denial of a fee waiver request because it relied on a regulation that proscribed such waivers whenever the information was “sought for use in litigation against the federal government.” *Id.* at 3. The court ruled that such a proposition is “untenable” because:

The concept of the “private attorney general” is well-established, and certainly had its genesis in the environmental field. Indeed, when private litigation against a government agency vindicates a significant public policy and creates widespread benefit, policy encourages such litigation by awarding the plaintiff attorney’s fees and costs.

*Id.* at 8 (citation omitted). The court noted that the Idaho Wildlife Federation “is a non-profit

organization which states that its purpose in litigation against the Forest Service is to ensure compliance with environmental laws” and that “such activity would appear to be of the type generally considered to be public interest.” *Id.* Because policy-based disputes with agencies, as well as administrative challenges, “cannot be done completely without the ability to seek judicial review,” the court enjoined the Forest Service’s broad-brush rejection of fee waiver requests simply because they might interfere with an agency’s unfettered pursuit of its agenda. *Id.* at 8-9. Indeed, litigation to enforce federal laws is an essential function of organizations, such as and including NWEA, which act in a watchdog capacity over the activities and inactivities of the federal government and its executive agencies.

**A. Whether the subject of the requested records concerns “the operations or activities of the government.”**

This request concerns activities of the government with respect to specific water quality standards. Water quality standards are the foundation of the water quality-based regulatory programs under the Clean Water Act (CWA). States, or EPA when states fail, issue lists of impaired waters (i.e., those waters that fail to meet water quality standards) pursuant to CWA Section 303(d). States or EPA issue NPDES permits that allow discharges of pollution consistent with a requirement to not cause or contribute to the impairment of water quality standards. Under Section 319 of the CWA and Section 6217 of the Coastal Zone Act Reauthorization Amendments ( CZARA), states issue plans and practices to control nonpoint sources sufficient to meet water quality standards. States and EPA issue Total Maximum Daily Loads (TMDL) when waters fail to meet water quality standards in order to establish the pollution controls needed to restore waters to those standards. States, EPA, and other agencies conduct various regular and special monitoring and data collection activities to ensure that waters are meeting water quality standards or are making progress towards attaining standards when they are impaired. Finally, the antidegradation policy contained within state water quality standards sets, *inter alia*, a requirement that waters protect those uses that were in existence on or subsequent to November 28, 1975. These key activities that involve the benchmarks or measuring sticks by which water quality is monitored, evaluated, restored, and regulated are all dependent upon state water quality standards. Pursuant to CWA Section 303(c), EPA takes action on all new and revised water quality standards submitted to it by states. Such standards to the extent they implicate impacts to threatened and endangered species are also subject to consultation under Section 7 of the Endangered Species Act (ESA) by NMFS.

Here, this FOIA request involves California water quality standards approved by EPA that EPA may or may not have discussed consulting on, under the ESA, with NMFS. This request concerns the “the operations or activities of the government” because it concerns EPA’s and NMFS’s discussion about a mandatory action under a federal statute. Therefore, this fee waiver requests involve records that are readily identifiable as limited to “the operations or activities of the government,” specifically in this instance the operations and activities of NMFS.

**B. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.**

When NMFS has completed a consultation and produced a biological opinion, it makes the document available on its website. When it has not completed a consultation, for whatever reason, there is no information pertaining to the activities of the government agencies involved. The requested records will provide an explanation as to whether EPA and NMFS decided to



engage in the mandatory consultation on EPA's action to approve certain of California's water quality standards and therefore are likely to contribute to a public understanding of NMFS's actions, as well as EPA's. Similarly, the records will help NWEA and others in the public understand how EPA ensures that water quality standards protect threatened and endangered species. For this reason, reviewing records of NMFS's interactions with EPA will be "meaningfully informative" and therefore likely to contribute to an understanding of both NMFS's and EPA's position on the the protectiveness of California's water quality standards and the benefits of following federal laws. They may shed light on both agencies' interpretation of section 303(c)(3) of the Clean Water Act and EPA obligations under the ESA. Having such information is "meaningfully informative" in that it ensures NWEA does not engage in frivolous or unfounded litigation, that NWEA can help the public understand what is or is not happening to ensure that California water quality standards are sufficiently protective of ESA-listed species, and to understand NMFS and EPA policies insofar as they may apply to other states across the country.

**C. Whether disclosure of the requested information will contribute to "public understanding."**

Disclosure of the requested records to NWEA will contribute to public understanding because NWEA has expertise in this subject area of the records, an intention to use and disseminate the information obtained, and the connections with organizations and individuals across the country who are most likely to use the information contained within the records. NWEA has a track record of working with people as far away from Oregon as the State of Florida to assist them by conveying our understanding of NMFS and EPA policies. NWEA is known for being generous with its time and information, despite its extremely limited resources. At a minimum, the audience for the information that NWEA has requested is environmental, fishing, tribal, and health organizations across the country which are interested in ensuring that water quality standards are sufficiently protective of threatened and endangered aquatic species. In addition, NWEA has shared similar information with state agencies, federal employees, tribal governments, as well as representatives of municipal and industrial dischargers. NWEA will continue to share records as well as information analyzed from records with this same list of interest holders. There are many individuals and organizations representing the broad public interest in protecting species and ensuring clean water across this country interested in EPA policies and decisions with regard to threatened and endangered species and who will use information on EPA policies and decisions, and NMFS's interactions with them, to inform their own participation in the development of protective water quality standards which, after all, occur on a more or less ongoing basis in each state. In addition, NWEA conducts numerous, unpaid, private consultations with staff and attorneys involved in a range of regulatory activities that involve ESA-listed species and water quality standards.

In addition to using its relationships and networks with environmental organizations and environmental attorneys across the country, NWEA will also disseminate the records and/or its analysis of the records through the following means: in litigation, through the internet from its website which contains much substantive information, through commentary to the press, through public forums in which NWEA participates, in its newsletters, through emails to networks of organizations, and through formal public comments and other formal documents prepared for agencies. This latter approach is a one way in which NWEA can summarize its findings on EPA and NMFS policy in a manner that is useful for many people while also accomplishing a task of providing public comment or otherwise communicating with agencies.

NWEA's investigation and evaluation of the records will be made available to many other parties after it has been completed. NWEA will use the records requested to evaluate the quality of NMFS and EPA decision-making and to better facilitate public participation in state and EPA processes during triennial reviews that occur regularly across the country when they potentially involve standards that affect threatened and endangered species. NWEA's dissemination of the records and of its own evaluation of the records will educate the public and advance public understanding of EPA's and NMFS's decisions on water quality standards now and in the future. Thus, the release of these records will significantly contribute to the public's understanding and oversight of EPA's decision-making under the Clean Water Act and its obligations under the ESA, as well as NMFS's decision-making under the ESA.

NWEA has both the ability to interpret and to disseminate the records and/or information from this request because of NWEA's extensive participation in litigation and administrative advocacy for protective water quality standards. For example, EPA did not timely act on Oregon's July 8, 2004 submission of water quality standards as required by 33 U.S.C. § 1313(c)(3), and so in 2006 NWEA filed a lawsuit against EPA, seeking immediate injunctive relief to compel EPA action to approve or disapprove Oregon's July 8, 2004 submission of new and revised water quality standards. *Nw. Env'tl. Advocates v. U.S. EPA*, No. 06-cv-479-HA (D. Or. filed Apr. 7, 2006). On May 29, 2008, the court entered a consent decree in Case No. 06-479-HA; that consent decree required EPA to take action on Oregon's July 8, 2004 aquatic life toxics criteria upon completion of biological opinions. NWEA was forced to file suit once again in order to obtain timely completion of the opinion by NMFS. *Nw. Env'tl. Advocates v. NMFS*, No. 10-cv-907-BR (D. Or. filed Aug. 2, 2010). On August 18, 2010, pursuant to a stipulated dismissal in that case, NMFS agreed to complete the required opinion for Oregon's July 8, 2004 new and revised aquatic life toxics criteria. By letter dated January 31, 2013, EPA finally took action on Oregon's July 8, 2004 revised water quality aquatic life criteria for toxics. On April 20, 2015, NWEA filed suit against EPA for its failure to prepare or publish proposed regulations setting forth revised or new water quality criteria for aluminum, ammonia, copper, or cadmium for the protection of aquatic life in Oregon that EPA had disapproved in the wake of a jeopardy opinion issued by NMFS pursuant to our litigation. *Nw. Env'tl. Advocates v. EPA*, Case No. 3:15-cv-00663-BR (consent decree entered June 9, 2016 in which EPA agreed to promulgate copper, cadmium, and aluminum criteria). As a result of this consent decree, EPA has revised its national CWA 304(a) recommended criteria for cadmium and aluminum. Likewise, NWEA is also involved in litigation on Idaho's toxic criteria for the protection of aquatic life. In *Nw. Env'tl. Advocates v. NMFS*, Case No. 1:13-cv-00263-EJL, on April 15, 2015, NMFS signed a Stipulated Order of Dismissal of All Claims in a case filed on September 14, 2013 alleging that NMFS had failed to complete its consultation with EPA on Idaho toxic criteria. As a result of the litigation, NMFS completed its biological opinion. NWEA is currently in litigation on Washington's and Idaho's water quality standards and on October 26, 2016, sent a notice of intent to sue EPA Region I for failing to consult on water quality standards in New Hampshire, Vermont, Maine, and Connecticut. See [http://www.biologicaldiversity.org/news/press\\_releases/2016/water-quality-standards-10-26-2016.html](http://www.biologicaldiversity.org/news/press_releases/2016/water-quality-standards-10-26-2016.html); <http://insideepa.com/news-briefs/epa-faces-lawsuit-threat-over-state-water-standard-approvals>. The record of NWEA's work shows that NWEA has the expertise to interpret the documents and to extract and analyze the information.

In your email of October 19, you imply that our proposed use of the information requested to comply with federal statutes is incompatible with our intent to also use the information in newsletters, our website, and with the media, for example. There is no such conflict. When

NWEA carries out litigation to ensure that the federal agencies comply with federal law we also provide information on our analysis with the public, both directly and indirectly through the news media. Water quality is of significant concern to the people of California and to the people who review the information that NWEA provides to the public. Specific audiences include the many organizations that NWEA works with in California on water quality and fisheries issues. This request seeks documents pertaining to water quality standards for ammonia, mercury, cyanide, and other toxic and conventional pollutants, all of which affect aquatic life and wildlife including threatened and endangered species.

NWEA has the expertise to evaluate the requested information, as demonstrated by its decades-long involvement with administrative advocacy with water quality standards and with litigation on the same subject. Further, NWEA is able to disseminate the information from the records, or the records themselves, directly and indirectly with public interest organizations involved in state water quality standards reviews in these states through emails, phone calls, meetings, list serves specifically devoted to communications between public interest organizations, and through its website. NWEA's analysis is not only used for litigation and to inform specific interested parties and the general public but it is also used to support the preparation of information conveyed through, for example, public comments submitted to agencies and to federal courts. For example, in a brief filed in *Nw. Env'tl. Advocates v. EPA*, Case No. 3:12-cv-01751-AC, NWEA discussed the U.S. Fish and Wildlife's recommendations pertaining to mercury in California's Clear Lake Mercury TMDL. *See id.*, Plaintiff's Opening Brief at 31, n. 23 (Nov. 25, 2014). Likewise, the California Toxics Rule and the biological opinion issued by NMFS and U.S. Fish and Wildlife Service on the EPA rule were interpreted and discussed at some length in NWEA comments on Oregon's proposed changes to toxic criteria for the protection of aquatic life. *See* [http://www.northwestenvironmentaladvocates.org/blog/wp-content/uploads/2011/03/dt\\_intfc4d86844e01a23\\_4d86c46e8370a.pdf](http://www.northwestenvironmentaladvocates.org/blog/wp-content/uploads/2011/03/dt_intfc4d86844e01a23_4d86c46e8370a.pdf).

You have expressed a keen interest in NWEA's website. It is currently being completely redesigned and its document database being updated due in part to aging computer programs. Even so, the document database reveals that numerous members of the public have downloaded recently posted documents. For example, as of today there have been 80 downloads of the Oregon toxic water quality standards settlement and approximately 30 of settlement documents pertaining to arsenic water quality standards in Idaho. Your request that we "include as much information as possible on the intent and ability of NWEA to disseminate a proposed unique work, as well as the segment of interested individuals to whom it would be directed," borders on the extreme. We are not required to submit a work plan in order to support our fee waiver request. It is sufficient that we have demonstrated NWEA's expertise and its ability to disseminate extracted information as well as an assertion of our intent to disseminate the information. Our new website will also be capable of providing more direct access to the public of documents obtained through FOIA, when their value in their original form exceeds any analysis or summaries we can prepare. *See, e.g.*, <http://www.northwestenvironmentaladvocates.org/resources/NPDESPermitProgramAuthorizationLetters.htm> (NWEA posting of EPA FOIA results pertaining to federal authorization of state permitting programs).

**D. Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.**

Courts have held that the factor of whether the disclosure will contribute "significantly" to the public understanding is satisfied where the information requested is new, would supplement

information currently available to the public, or add to the public oversight of the government's activities. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9<sup>th</sup> Cir. 1987); *Judicial Watch of Florida v. U.S. Justice Dept.*, 1998 U.S. Dist. LEXIS 23441, at \*8 (D.D.C. 1998). The requested information has not, to the best of NWEA's knowledge, been released to the public and, therefore, qualifies as new. *Oregon Natural Desert Ass'n v. U.S. Dept. of Interior*, 24 F. Supp. 2d 1088, 1095 (D. Ore. 1998) (finding that information supporting a Bureau of Land Management NEPA analysis, but which had not been released publicly, was new for the purposes of FOIA fee waiver).

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, a court held that the group had met the dissemination prong of the public interest test:

Other courts have found requestors' statements of intent to disseminate requested information through newsletters, popular news outlets and presentations to the public interest groups, government agencies and the general public sufficient to entitle an organization to a fee waiver . . . . Therefore, in light of [Western Watersheds Project's] statements, the Court finds that WWP adequately detailed its ability and intent to publicize the disclosed information to more than just a narrow segment of the public. Moreover, the Court finds that if it adopted the BLM's position [that WWP would only disseminate information to a narrow audience], it would set the bar for fee waivers impermissibly high, especially in light of Congress' intent to have the fee waiver liberally construed.

*Western Watersheds Project v. BLM*, 318 F. Supp. 2d 1036 (2004). Moreover, courts have held that if it is a "close call" as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non commercial entity should be given the benefit of the doubt and be granted the fee waiver. *Forest Guardians v. Dept. of the Interior*, 416 F. 3d 1173 (10<sup>th</sup> Cir. 2005). Likewise, the court in *Southern Utah Wilderness Alliance v. BLM*, 402 F. Supp 82 (2005) held that an organization's statements describing how it has commented on similar issues in federal proceedings and issued a report on a similar matter was sufficient to show it had the expertise and ability to disseminate the requested information. And, where, as here, the records concern agency inaction, a court has found that a requestor's statements concerning the agency's failure to meet statutory requirements and how the requested records would shed light on those failures was sufficient to demonstrate that the request would make a significant contribution to the public understanding. *Physicians Committee for Responsible Medicine v. Dept. of Health and Human Services*, 2007 U.S. Dist. LEXIS 20855.

Release of the records requested will contribute to the ability of nonprofit public interest oversight organizations such as but not limited to NWEA to oversee the activities of the EPA and NMFS. In general, such organizations need to understand how and why a government has adopted various policies, whether formally or informally, or has chosen not to adopt a consistent policy, in order to review, comment on, and question the application of those policies in its actions and inactions. As discussed above, NWEA and other public interest organizations that are interested in the disclosed records, participate in state rulemaking, in EPA review of state rulemaking, and in litigation challenging EPA actions and inactions in reviewing state submissions, and NMFS's actions and inactions in reviewing EPA's proposed actions.

Mark Graff  
November 1, 2016  
Page 9

This request seeks records concerning EPA's actions to approve California water quality standards. Those EPA actions and inactions may have been influenced by NMFS's policies or visa versa. Obtaining the requested records will allow NWEA to understand EPA's approach to ensuring that protective water quality standards are in place in California and to take appropriate action to ensure the requirements of the Endangered Species Act are met in other states. Only by understanding the EPA's and NMFS's decisions and inactions can NWEA meaningfully participate in its public oversight watchdog function. NWEA will also disseminate the information to organizations it works with across the country through listserves, its website, meetings, memoranda, and direct sharing of the records. Records of national or regional importance will be posted on NWEA's website. This issue is likely to be of interest to journalists with whom NWEA has excellent relationships.

**E. Commercial interests.**

Where a court has found the request to be primarily in the requestor's commercial interest, there has been specific and clear evidence of that interest. *See, e.g., VoteHemp, Inc. V. DEA*, 237 F. Supp 55 (2002)(VoteHemp's website contained links to commercial interests and the requestor's mission included business promotion). There is no such concern here. NWEA has no commercial interest in the requested records. It has no mechanism to obtain funds from the use of the records, it does not promote the records as a commercial concern, and its website contains no links to commercial interests. Rather, NWEA is a non-profit public interest environmental advocacy organization working to protect public health and the environment in the Northwest and across the country. Therefore, the considerations of 40 C.F.R. 2.107(l)(1) with regard to the possible commercial interests of the requestor do not apply because NWEA has no commercial interest and will realize no commercial benefit from the release of the requested information or as a result of any subsequent analysis that we may perform on the records sought.

In conclusion, for the reasons set forth above and in the additional materials filed herewith, Northwest Environmental Advocates is clearly entitled to receive a public interest fee waiver for this FOIA request.

Sincerely,



Nina Bell  
Executive Director

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**From:** Chua, Alvin (Federal) <achua@doc.gov>  
**Sent:** Thursday, November 3, 2016 10:52 AM  
**To:** Graff, Mark (Federal); Almeida, John (Federal)  
**Cc:** McKenna, Alice (Federal)  
**Subject:** RE: NOAA Fisheries News Clips -- November 3, 2016  
**Attachments:** 01-Complaint.pdf; 01-ex 1.pdf; 01-ex 2.pdf; 01-ex 3.pdf; 01-ex 4.pdf; 01-ex 5.pdf; 01-ex 6.pdf; 01-ex 7.pdf

Please see attached, I just pulled it off of Pacer. Once we have had a chance to take a look we should discuss. Thanks.

**From:** Mark Graff - NOAA Federal [mailto:mark.graff@noaa.gov]  
**Sent:** Thursday, November 03, 2016 10:49 AM  
**To:** Almeida, John (Federal) <John.Almeida@noaa.gov>  
**Cc:** McKenna, Alice (Federal) <aMcKenna@doc.gov>; Chua, Alvin (Federal) <achua@doc.gov>  
**Subject:** Re: NOAA Fisheries News Clips -- November 3, 2016

I have not yet--I'll see if I can pull it on PACER.

Mark H. Graff  
FOIA Officer/Chief Privacy Officer (BCPO)  
National Oceanic and Atmospheric Administration  
(301) 628-5658 (O)  
(b)(6) (C)

On Thu, Nov 3, 2016 at 10:15 AM, John Almeida - NOAA Federal <[john.almeida@noaa.gov](mailto:john.almeida@noaa.gov)> wrote:

It sounds like Cause of Action has filed a lawsuit challenging redactions for 2016-001453. Has anyone seen the complaint?

----- Forwarded message -----

**From:** Alan Risenhoover - NOAA Federal <[alan.risenhoover@noaa.gov](mailto:alan.risenhoover@noaa.gov)>  
**Date:** Thu, Nov 3, 2016 at 9:44 AM  
**Subject:** Fwd: NOAA Fisheries News Clips -- November 3, 2016  
**To:** Brian Fredieu <[brian.fredieu@noaa.gov](mailto:brian.fredieu@noaa.gov)>, Jenni Wallace - NOAA Federal <[jenni.wallace@noaa.gov](mailto:jenni.wallace@noaa.gov)>, Tracey Thompson - NOAA Federal <[tracey.thompson@noaa.gov](mailto:tracey.thompson@noaa.gov)>, Kelly Denit <[kelly.denit@noaa.gov](mailto:kelly.denit@noaa.gov)>, Emily Menashes <[Emily.Menashes@noaa.gov](mailto:Emily.Menashes@noaa.gov)>, Caroline Park <[Caroline.Park@noaa.gov](mailto:Caroline.Park@noaa.gov)>, Adam Issenberg <[adam.issenberg@noaa.gov](mailto:adam.issenberg@noaa.gov)>

Just want to point out one article specifically:

**Courthouse News Service**- November 2, 2016  
Information Demanded on U.S. Fishery Council

<http://www.courthousenews.com/2016/11/03/information-demanded-on-u-s-fishery-council.htm>

Has anyone seen an actual lawsuit? Seems to talk a bit more about FOIA.

Thanks

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

CAUSE OF ACTION INSTITUTE	)	
1875 Eye Street, N.W., Suite 800	)	
Washington, D.C. 20006,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 16-2178
	)	
NATIONAL OCEANIC & ATMOSPHERIC	)	
ADMIN.	)	
United States Department of Commerce	)	
1401 Constitution Avenue, N.W., Room 5128	)	
Washington, D.C. 20230,	)	
	)	
Defendants.	)	

**COMPLAINT**

This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking access to records requested by Plaintiff Cause of Action Institute (“CoA Institute”) and improperly withheld by Defendant National Oceanic and Atmospheric Administration (“NOAA”). The records at issue concern potential abuses in determining the membership of the New England Fishery Management Council (“NEFMC”), a regulatory body created by the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.*

**NATURE OF THE ACTION**

1. The Magnuson-Stevens Fishery Conservation and Management Act (“MSA”) establishes the basis for the federal management of domestic fisheries in the United States. 16 U.S.C. §§ 1801(a)(6), (b)(1), (b)(3). The MSA provides for eight Fishery Management Councils (“FMCs”), each charged with regulating a region of the national coastal waters. The NEFMC is