

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SOUTHEASTERN LEGAL)	
FOUNDATION, INC.)	
)	
Plaintiff,)	CIVIL ACTION
)	
v.)	FILE NO. _____
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY)	
)	
Defendant.)	

COMPLAINT

Plaintiff Southeastern Legal Foundation, Inc. (SLF), for its Complaint against the United States Environmental Protection Agency (EPA or the Agency) states as follows:

INTRODUCTION

1. The Freedom of Information Act (the FOIA), 5 U.S.C. § 552, enacted in 1966, provides the public with a right of access to federal agency records.

2. The people must know what the government is doing. “Open government has been recognized as the best insurance that government is being conducted in the public interest.” Our Founding Fathers commitment to open government and the public’s right to information can be seen in the First

Amendment which “protects not only the right of citizens to speak and publish, but also to receive information.” The FOIA is “an affirmative congressional effort to give meaningful content to constitutional freedom of expression.” *See* S. Rep. No. 93-854, at 153-54 (May 16, 1974).

3. This is an action brought pursuant to the FOIA to compel EPA to produce records responsive to three outstanding FOIA requests submitted to the Agency in December 2009, April 2010 and November 2013, respectively.

4. In its FOIA requests, SLF sought public records relating to environmental energy policy and how policymakers use public resources. Upon receipt of the records, SLF intended to analyze, interpret and disseminate the information to the public in an effort to enhance the public’s understanding of the Agency generally and particular findings issued by the Agency.

5. For over six years, EPA stonewalled SLF’s attempts to obtain agency records by employing a myriad of delay tactics including, but not limited to, improper denial of fee waiver requests, improper denial of requests for expedited processing, failure to meet any and all statutory deadlines, threats of administrative closure, production of records containing redactions that render the records incomprehensible, and general periods of refusal to communicate with SLF spanning over 15 months.

6. Accordingly, SLF files this lawsuit to compel EPA to comply with the FOIA.

THE PARTIES

7. Plaintiff Southeastern Legal Foundation is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government and free enterprise in the courts of law and public opinion. SLF is dedicated to advancing responsible regulation and to challenging regulations based on flawed science and political agendas. SLF's programs include analysis, publication and a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources.

8. Defendant EPA is a federal agency headquartered in Washington, DC whose stated mission is to "protect human health and the environment."

JURISDICTION AND VENUE

9. SLF brings this lawsuit pursuant to the FOIA. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), because this action is brought in the district in which SLF has its principal place of business, and 28 U.S.C. § 1331, because the resolution of disputes under the FOIA presents a federal question.

10. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B), because this action is brought in the district in which SLF has its principal place of business, and 28 U.S.C. § 1391(e), because a substantial part of the events or omissions giving rise to the claim occurred in the Northern District of Georgia.

FACTUAL BACKGROUND

SLF's FOIA Request No. HQ-FOI-00469-10

The Agency Issues its Endangerment and Cause or Contribute Findings.

11. On April 17, 2009, the EPA Administrator signed proposed endangerment and cause or contribute findings for greenhouse gases under Section 202(a) of the Clean Air Act.

12. EPA held a 60-day public comment period, which ended on June 23, 2009, during which EPA received over 380,000 public comments.

13. On December 7, 2009, the EPA Administrator signed two distinct findings regarding greenhouse gases under Section 202(a) of the Clean Air Act – the Endangerment Finding and the Cause or Contribute Finding.

14. On December 15, 2009, the Endangerment and Cause or Contribute Findings were published in the Federal Register under Docket ID No. EPA-HQ-OAR-2009-0171 (74 F.R. 66496, Dec. 15, 2009). The final rules were effective January 14, 2010.

15. In the Endangerment Finding, the Administrator found that the current and projected concentrations of the six key well-mixed greenhouse gases – carbon dioxide, methane, nitrous oxide, hydroflouorocarbons, perfluorocarbons, and sulfur hexafluoride – in the atmosphere threaten the public health and welfare of current and future generations.

16. In the Cause or Contribute Finding, the Administrator found that the combined emissions of these well-mixed greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution which threatens public health and welfare.

17. On December 7, 2009 through December 19, 2009, the United Nations Framework Convention on Climate Change held its 15th session of the Conference of the Parties in Copenhagen, Denmark.

18. On December 18, 2009, President Obama addressed the summit making reference to “comprehensive legislation to transform to a clean energy economy” – presumably referring, at least in part, to the recently published Endangerment and Cause or Contribute Findings. *Remarks by the President at the Morning Plenary Session of the United Nations Climate Change Conference*, <http://www.whitehouse.gov/the-press-office/remarks-president-morning-plenary-session-united-nations-climate-change-conference> (last visited February 4, 2015).

19. On December 23, 2009 through March 25, 2010, SLF filed a Petition for Reconsideration of Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act and subsequent Amendments on behalf 15 United States Representatives and 16 organizations (referred to hereinafter as SLF's Petition).

20. SLF's Petition sought reconsideration based on, among other things, a series of international scientific and scientific process revelations that undermined the credibility of the "scientific" information on which the Agency relied in issuing the Endangerment and Cause or Contribute Findings.

21. More specifically, the purportedly "scientific" information on which the Agency relied was the subject of a number of systematic manipulations, including collusions to withhold scientific information, deletion of emails and raw data to prevent discovery of key facts, manipulation of data and computer code to create false impressions, and concerted efforts to boycott key journals to excluded disagreement.

22. Nine other organizations also filed petitions for reconsideration of the Endangerment and Cause or Contribute Findings.

23. On July 29, 2010, EPA denied all 10 petitions for reconsideration.

SLF Submits a FOIA Request to EPA Regarding the Endangerment and Cause or Contribute Findings.

24. On December 18, 2009, SLF submitted a FOIA request by certified mail to EPA's Headquarters FOIA office (Request No. HQ-FOI-00469-10). A true and correct copy of Request No. HQ-FOI-00469-10 is attached as Exhibit A-1, and incorporated herein by reference.

25. In Request No. HQ-FOI-00469-10, SLF sought the following records:

a. Records discussing the timing of the Endangerment and Cause or Contribute Findings.

b. Records discussing the public comments (excluding the public comments themselves) made before, and related to, the Endangerment and Cause or Contribute Findings. This inquiry was meant to cover, but was not limited to, any reports or analysis produced or ordered by EPA in response to any public comment related to the Endangerment and Cause or Contribute Findings.

c. Records discussing or analyzing the financial implications or consequences of the Endangerment and Cause or Contribute Findings. This inquiry was meant to cover, but was not limited to, any reports or analysis produced for EPA by any other federal agency or subdivision of the United States federal government and the financial implications

of the Endangerment and Cause or Contribute Findings on the following: (i) the private sector in the United States or any particular industry; (ii) the United States government or any agency or political subdivision thereof; or (iii) on state and local governments.

26. SLF sought a waiver of search, review and reproduction fees pursuant to the FOIA (5 U.S.C. § 552(a)(4)(A)(iii)) and EPA regulations (40 CFR 2.107) because the information sought was in the public interest, was likely to contribute to public understanding of the operations and activities of government, and because SLF had no commercial interest in requesting the information. (See Exhibit A-1.)

27. By letter dated December 22, 2009, EPA acknowledged receipt of SLF's FOIA request and assigned it tracking number HQ-FOI-00469-10. A true and correct copy of the letter is attached hereto as Exhibit A-2.

28. By separate letter dated December 22, 2009, EPA set forth six factors that it considers when reviewing a fee waiver request and stated that if SLF wished to receive a fee waiver it "must address, in sufficient detail, these six factors" and that if SLF did not respond within seven days from the date of the letter, EPA would automatically deny SLF's fee waiver request. A true and correct copy of the letter is attached hereto as Exhibit A-3.

29. In a letter delivered by electronic mail on December 28, 2009, SLF responded to EPA's December 22, 2009 letter and, as requested, SLF provided detailed justification for each of the six factors outlined by EPA. A true and correct copy of the letter is attached hereto as Exhibit A-4.

30. Despite SLF's timely and detailed response, in a letter dated January 4, 2010, EPA denied SLF's fee waiver request. The Agency disputed SLF's asserted intention to broadly disseminate responsive records and stated in pertinent part, "[Y]ou have not expressed a specific intent to publish or disseminate the information to the general public." A true and correct copy of the letter is attached hereto as Exhibit A-5.

31. Notably, neither the FOIA, nor the EPA regulations, nor the EPA's December 22, 2009 letter required SLF to express a specific intent to publish or disseminate the requested information to the public. Rather, the third factor published in the Code of Federal Regulations only requires that "[t]he disclosure 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." *See* 40 CFR 2.107(1)(2)(iii) (Nov. 5, 2002) (emphasis added).

32. In a letter dated January 11, 2010, SLF responded to EPA's concerns and explained: "SLF shall undertake all necessary effort to ensure we disseminate,

analyze and interpret the information in the Request to the largest audience possible. SLF shall accomplish this goal in a variety of ways including: (i.) displayed on our publicly available website; (ii.) incorporated into various publications and mailers we produce throughout the year; (iii.) any publicly available court documents arising out of potential litigation related to the Endangerment Findings released by the US EPA on December 7, 2009.” A true and correct copy of the letter is attached hereto as Exhibit A-6.

33. EPA never responded to SLF’s January 11, 2010 letter.

34. On January 22, 2010, SLF administratively appealed EPA’s denial of SLF’s fee waiver request, elaborating on its already expressed intention and ability to interpret, analyze, publish and disseminate the requested information. SLF’s administrative appeal further explained that EPA employed an inaccurate standard in evaluating the third and fourth factors as outlined by EPA in its letter and published in the Code of Federal Regulations, that EPA’s denial employed an incorrect interpretive method in evaluating the six factors utilized by EPA treating the factors as requirements rather than considerations, and that relevant case law and public policy both strongly favor SLF’s request for a fee waiver. True and correct copies of the letter and enclosures are attached hereto as Exhibit A-7.

35. In a letter dated February 3, 2010, EPA notified SLF that its appeal was granted and that SLF was entitled to a fee waiver. Specifically, EPA informed SLF, “you demonstrated that you meet the requirements to receive a fee waiver for your *narrowly tailored request*.” A true and correct copy of the letter is attached hereto as Exhibit A-8 (emphasis added).

36. On March 9, 2010, nearly four months after SLF submitted its request, EPA made its first inquiry into the scope of Request No. HQ-FOI-00469-10. Specifically, SLF spoke with EPA FOIA Officer, Tina Murphy, and understood from that discussion that the Agency was processing the request.

37. Based on the Agency’s grant of SLF’s fee waiver request and on SLF’s telephone conversation with Ms. Murphy, SLF believed that EPA was making reasonable efforts to search for the requested records and make the records promptly available to SLF.

38. However, by way of a July 6, 2010 email from EPA employee Dana Hyland, SLF learned that to date, EPA had failed to conduct any searches or fulfill its statutory and regulatory obligations in any way. She stated: “I am writing to ask whether you are still interested in pursuing this request. Please contact me by July 9, 2010, *if you believe that this matter remains open*. If I do not hear by then that you still need documents pursuant to this request, we will consider this matter

closed.” (emphasis added). A true and correct copy of the email is attached hereto as Exhibit A-9.

39. Nearly seven months had passed since SLF submitted Request No. HQ-FOI-00469-10 and the Agency had taken no steps whatsoever to search for the requested records or make the requested records available to SLF.

40. On July 7, 2010, SLF responded to Ms. Hyland’s email, stating that SLF “was under the assumption EPA was actively processing this request.” A true and correct copy of the email is attached hereto at Exhibit A-10.

41. On July 16, 2010, during a telephone call with Dina Kruger, Director of EPA’s Climate Change Division, SLF agreed to receive EPA’s response to FOIA Request No. HQ-FOI-00469-10 on a rolling basis.

42. Despite EPA’s previous acknowledgement that Request No. HQ-FOI-00469-10 was a “narrowly tailored request,” (see Exhibit A-8) Ms. Kruger asked SLF to modify or narrow its request. Because SLF sought to analyze, interpret and disseminate all of the requested records, SLF declined to narrow its request.

43. Later that same day, EPA made its first rolling production which consisted of only four records – three Outlook meeting invitations and one email. A true and correct copy of the cover letter is attached hereto at Exhibit A-11. To facilitate organized analysis, interpretation and dissemination of the responsive

records, SLF assigned each page produced by EPA a Bates number. A true and correct copy of the Bates labeled production (EPA-EF-000001-5) is attached hereto at Exhibit A-12.

44. After its first production, the Agency went silent. Over 15 months went by (467 days) without any communication from EPA regarding Request No. HQ-FOI-00469-10.

45. On October 25, 2011, SLF emailed Ms. Hyland requesting an update on the status of EPA's processing of Request No. HQ-FOI-00469-10. A true and correct copy of the email is attached hereto at Exhibit A-13.

46. On October 27, 2011, Ms. Hyland responded and informed SLF that EPA anticipated completing its response to Request No. HQ-FOIA-00469-10 by February 2012, and anticipated providing its next rolling production by the end of November 2011. SLF responded seeking clarification of the deadline and requested that EPA release any records that are ready for production. In her response, Ms. Hyland confirmed that no records were ready for release. True and correct copies of the emails are attached hereto at Exhibit A-13.

47. On November 29, 2011, almost two years after SLF submitted Request No. HQ-FOI-00469-10 and 16 months after EPA made its first production of four records, EPA made a second rolling production of responsive records by

way of electronic mail. True and correct copies of the transmittal email and cover letter are attached hereto at Exhibit A-14. To facilitate organized analysis, interpretation and dissemination of the responsive records, SLF assigned each page produced by EPA a Bates number. A true and correct copy of the Bates labeled production (EPA-EF-000006-256) is attached hereto at Exhibit A-15.

48. EPA's second rolling production consisted of approximately 130 records (251 pages) dated primarily between the end of April 2009 and the middle of July 2009.

49. EPA significantly and improperly redacted 127 of the 130 records produced as part of its second rolling production. The Agency claimed that the redacted information was protected under Exemption 5 of the FOIA (5 U.S.C. § 552(b)(5)), Exemption 6 of the FOIA (5 U.S.C. § 552(b)(6)), attorney-client privilege and/or attorney work product, or was publicly available on public websites.

50. The only three records produced without any redactions were merely Outlook meeting invitations. (See EPA-EF-000010; 102, 119.)

51. On January 26, 2012, EPA made its third rolling production of responsive records by way of electronic mail. True and correct copies of the transmittal email and cover letter are attached hereto at Exhibit A-16. To facilitate

organized analysis, interpretation and dissemination of the responsive records, SLF assigned each page produced by EPA a Bates number. A true and correct copy of the Bates labeled production (EPA-EF-000257-546) is attached hereto at Exhibit A-17.

52. EPA's third rolling production consisted of approximately 143 records (290 pages) dated primarily between the middle of July 2009 and early August 2009.

53. EPA significantly and improperly redacted 138 of the 143 records produced as part of its third rolling production. The Agency claimed that the redacted information was protected under Exemption 5 of the FOIA (5 U.S.C. § 552(b)(5)), Exemption 6 of the FOIA (5 U.S.C. § 552(b)(6)), attorney-client privilege and/or attorney work product, or was publicly available on public websites.

54. On January 31, 2012, EPA made its fourth rolling production of responsive records by way of electronic mail. True and correct copies of the transmittal email and cover letter are attached hereto at Exhibit A-18. To facilitate organized analysis, interpretation and dissemination of the responsive records, SLF assigned each page produced by EPA a Bates number. A true and correct copy of

the Bates labeled production (EPA-EF-000547-844) is attached hereto at Exhibit A-19.

55. EPA's fourth rolling production consisted of approximately 206 records (298 pages) dated primarily between early August 2009 and early September 2009.

56. EPA significantly and improperly redacted 203 of the 206 records produced as part of its fourth rolling production. The Agency claimed that the redacted information was protected under Exemption 5 of the FOIA (5 U.S.C. § 552(b)(5)), Exemption 6 of the FOIA (5 U.S.C. § 552(b)(6)), attorney-client privilege and/or attorney work product, or was publicly available on public websites.

57. On February 29, 2012, EPA made its fifth and final rolling production of responsive records by way of electronic mail. A true and correct copy of the transmittal email is attached hereto at Exhibit A-20. To facilitate organized analysis, interpretation and dissemination of the responsive records, SLF assigned each page produced by EPA a Bates number. A true and correct copy of the Bates labeled production (EPA-EF-000845-5828) is attached hereto at Exhibit A-21.

58. EPA's fifth rolling production consisted of approximately 2,725 records (4,984 pages) dated primarily between early September 2009 and early December 2009.

59. EPA significantly redacted 2,615 of the 2,725 records produced as part of its fifth rolling production. The Agency claimed that the redacted information was protected under Exemption 5 of the FOIA (5 U.S.C. § 552(b)(5)), Exemption 6 of the FOIA (5 U.S.C. § 552(b)(6)), attorney-client privilege and/or attorney work product, or was publicly available on public websites.

60. On March 29, 2012, SLF administratively appealed EPA's failure to disclose in their entirety existing records responsive to Request No. HQ-FOI-00469-10. True and correct copies of the letter and enclosures are attached at Exhibit A-22.

61. By letter dated March 30, 2012, EPA acknowledged receipt of SLF's administrative appeal. A true and correct copy of the letter is attached hereto as Exhibit A-23.

62. In a letter dated May 1, 2012, EPA responded to SLF's administrative appeal and provided its final determination in response to Request No. HQ-FOI-00469-10. The Agency stated that it granted SLF's appeal with respect to the redaction or withholding of 25 records and produced the respective responsive

records; however, EPA only produced 11 records and all of them contained redactions. The Agency denied SLF's appeal of EPA's improper withholding and redaction of records with respect to all other records. In its final determination letter, EPA stated that "there is no other reasonably segregable nonexempt information" and informed SLF that it has the right to seek judicial review of its final determination. A true and correct copy of the letter is attached hereto at Exhibit A-24. To facilitate organized analysis, interpretation and dissemination of the responsive records, SLF assigned each page produced by EPA a Bates number. A true and correct copy of the Bates labeled production (EPA-EF-005829-5853) is attached hereto at Exhibit A-25.

SLF FOIA Request No. HQ-FOI-01115-10

SLF Submits a FOIA Request to EPA Regarding Grants Awarded for Research on Global Climate Change.

63. On April 12, 2010, SLF submitted a FOIA request by certified mail to EPA's Headquarters FOIA office (Request No. HQ-FOI-01115-10). A true and correct copy of Request No. HQ-FOI-01115-10 is attached hereto as Exhibit B-1, and incorporated herein by reference.

64. In Request No. HQ-FOI-01115-10, SLF sought the following records:
- a. Grant applications seeking federal funds for any and all research on global climate change, its causes and effects, methods of

measuring changes in climate, and responses to climate change, in any scientific discipline and for any purpose;

b. Awards, grants, or funding notifications made pursuant to applications seeking federal funds for research on global climate change, its causes and effects, methods of measuring changes in climate, and responses to climate change, in any scientific discipline and for any purpose;

c. Accompanying and subsequent correspondence between your agency and grant applicants or recipients, including but not limited to supplemental, tailoring agreements, revisions or amendments, compliance instructions, and completeness, eligibility, or substantive review documents;

d. Denial or deferral of awards, grants, or funding made in response to applications seeking federal funds for research on global climate change, its causes and effects, methods of measuring changes in climate, and responses to climate change, in any scientific discipline and for any purpose;

e. Any and all documents referencing, describing, or creating: contracts for labor, consulting, or employment; purchases of capital or

material; transfers or purchases of real property; and any other agreements entered by the funding grantee or its principal investigator in furtherance of or in conjunction with federally funded research on global climate change, its causes and effects, methods of measuring changes in climate, and responses to climate change, in any scientific discipline and for any purpose.

65. SLF sought a waiver of search, review and reproduction fees pursuant to the FOIA (5 U.S.C. § 552(a)(4)(A)(iii)) and EPA regulations (40 CFR 2.107) because the information sought was in the public interest, was likely to contribute to public understanding of the operations and activities of government, and because SLF had no commercial interest in the information. (See Exhibit B-1.)

66. SLF also requested expedited processing of its request because SLF's purpose in submitting its request was the dissemination of information to the public regarding the allocation of federal funds for scientific research. (*See id.*)

67. By letter dated April 20, 2010, EPA acknowledged receipt of SLF's FOIA request and assigned it tracking number HQ-FOI-01115-10. A true and correct copy of the letter is attached hereto as Exhibit B-2.

68. By separate letter dated April 20, 2010, EPA informed SLF that its "request does not contain the proper justification for expedited processing as set

out in [the FOIA]” and set forth six factors that it considers when reviewing a fee waiver request and stated that if SLF wished to receive a fee waiver it “must address, in sufficient detail, these six factors, and that if SLF did not respond within seven days from the date of the letter, EPA would automatically deny SLF’s requests for expedited processing and a fee waiver. A true and correct copy of the letter is attached hereto as Exhibit B-3.

69. In a letter dated April 27, 2010, delivered by certified mail and electronic mail, SLF responded to EPA’s April 20, 2010 letter and, as requested, SLF provided detailed justification for its requests for expedited processing and fee waiver. True and correct copies of the letter and enclosures are attached hereto as Exhibit B-4.

70. In its letter, SLF referenced the grant of fee waiver (which was received only after SLF was forced to administratively appeal the original denial) for Request No. HQ-FOI-00469-10. SLF explained that while it understands that EPA FOIA officers grant or deny fee waiver requests on a case-by-case basis, Request Nos. HQ-FOI-00469-10 and HQ-FOI-01115-10 both seek information regarding different aspects of the same issue: EPA determinations and decision-making processes involving anthropogenic global warming or climate change. To address the concerns communicated in EPA’s original denial of SLF’s request for a

fee waiver for Request HQ-FOI-00469-10, SLF explained in detail how it would disseminate the information produced by EPA. (See Exhibit B-4.)

71. Specifically, SLF stated: “SLF will disseminate the information gathered through the Request to the largest audience possible, we shall accomplish this task in a variety of ways including: (i.) through our publicly available website and ancillary websites created for specific litigation; (ii.) mailers and publications we produce throughout each year; and (iii.) any publically available court documents used as evidence in litigation. SLF takes seriously our chartered directive to research and litigate issues of public interest; the dissemination of our work to the general public is one of the most important components of that directive.” (See *id.*)

72. Despite SLF’s timely and detailed response, by letter dated May 4, 2010, EPA denied SLF’s requests for expedited processing and fee waiver. The Agency denied SLF’s request for expedited processing because it claimed that SLF had “not demonstrated that the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.” EPA failed to address SLF’s asserted basis for expedited processing. A true and correct copy of the letter is attached hereto as Exhibit B-5.

73. The Agency also denied SLF's fee waiver request, disputing SLF's asserted intention to broadly disseminate responsive records. Specifically, EPA stated in pertinent part, "[Y]ou have not expressed a specific intent to publish or disseminate the information to the general public." (See Exhibit B-5.)

74. Notably, neither the FOIA, nor EPA regulations, nor EPA's April 20, 2010 letter required SLF in its fee waiver request or subsequent justification to express a specific intent to publish or disseminate the requested information to the public. Rather, the third factor published in the Code of Federal Regulations only requires that "[t]he disclosure 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." 40 CFR 2.107(1)(2)(iii) (Nov. 5, 2002) (emphasis added).

75. On June 3, 2010, SLF administratively appealed EPA's denial of its requests for expedited processing and fee waiver. True and correct copies of the letter and enclosures are attached as Exhibit B-6.

76. With respect to the denial of its request for expedited processing, in its June 3, 2010 letter, SLF demonstrated that EPA applied the incorrect standard to its expedited processing denial. SLF further demonstrated that under the correct standard, expedited processing should have been granted because SLF's primary

mission is to disseminate information to the public and at the time, there was an urgency to inform the public about grant applications and other processes related to EPA's involvement with anthropogenic global warming or climate change research and how that research is then used by the Federal Government to support agency rulemaking such as the Endangerment and Cause or Contribute Findings – ten organizations had filed petitions for reconsideration of the Endangerment and Cause or Contribute Findings which if fully implemented have the potential to cripple the manufacturing and energy sectors of the American economy. (See Exhibit B-6.)

77. With respect to the denial of its request for fee waiver, in its June 3, 2010 letter, SLF elaborated on its already expressed intention and ability to interpret, analyze, publish and disseminate the requested records. SLF's administrative appeal further explained that EPA employed an inaccurate standard in evaluating the third and fourth factors as outlined by EPA in its letter and published in the Code of Federal Regulations, that EPA's denial employed an incorrect interpretive method in evaluating the six factors utilized by EPA treating the factors as requirements rather than considerations, and that relevant case law and public policy both strongly favor SLF's prayer for a fee waiver. (See *id.*)

78. By way of letter dated June 8, 2010, EPA acknowledged receipt of SLF's administrative appeal. A true and correct copy of the letter is attached hereto as Exhibit B-7.

79. Despite its June 8, 2010 acknowledgment letter, eight months went by without a telephone call, email, letter or any communication from EPA to SLF regarding the status of its response to Request No. HQ-FOI-01115-10 or to SLF's administrative appeal.

80. On February 2, 2011, SLF called EPA to inquire into the status of its response to Request No. HQ-FOI-01115-10. As memorialized in an email from Ms. Lois Riley on February 4, 2011, SLF agreed to extend the due date for EPA's response to Request No. HQ-FOI-01115-10 to February 28, 2011. A true and correct copy of the email is attached hereto as Exhibit B-8.

81. The Agency did not meet the agreed upon deadline for production of responsive records. As of February 28, 2011, SLF still had not received any records from EPA responsive to Request No. HQ-FOI-01115-10.

82. On March 11, 2011, SLF emailed Ms. Riley to again inquire into the status of EPA's response to Request No. HQ-FOI-01115-10. A true and correct copy of the email is attached hereto as Exhibit B-9.

83. On March 15, 2011, Ms. Riley responded to SLF's email informing SLF *for the first time* since EPA's receipt of Request No. HQ-FOI-01115-10, eleven months earlier, that "[d]uring our processing phase we determined that the request is more complex than initially perceived, and that the search, review and analysis of records would require more time and effort than originally planned." Ms. Riley further stated that "[o]ur records review procedure should be completed in about a week." A true and correct copy of the email is attached hereto as Exhibit B-10.

84. On that same day, SLF responded and requested that EPA produce responsive records in rolling productions, as to not further delay SLF's review, analysis and dissemination of responsive records any further. A true and correct copy of the email is attached hereto as Exhibit B-11.

85. On March 22, 2011, EPA agreed to produce responsive records in phases. In a document attached to the same email, EPA provided SLF with a website address where "[g]rant applications for successful applications that received awards are available." The Agency requested that SLF review the website and narrow the scope of Items 3 and 5 of Request No. HQ-FOI-01115-10. To date, the Agency had still not provided any response to the remaining portion of

Item 1 and Items 2 and 4 of the request. A true and correct copy of the email and attachment are attached hereto as Exhibit B-12.

86. At the time of receipt, SLF did not wish to narrow the scope of Request No. HQ-FOI-01115-10. However, on June 23, 2011, Ms. Riley notified SLF that if it failed to narrow the scope of the request, EPA would “need to begin to administratively close-out of your FOIA.” A true and correct copy of the email is attached hereto as Exhibit B-13.

87. In order for SLF to obtain all of the records it sought, SLF was forced to reevaluate its request and determine if it could narrow it in any way. In an email dated June 24, 2011, SLF responded to the Agency’s threat to administratively (and unilaterally) close SLF’s then 14 month old request and requested additional time “to respond and evaluate and provide, as necessary, the additional information being requested to fulfill this phase of [Request No. HQ-FOI-01115-10].” A true and correct copy of the email is attached hereto as Exhibit B-13.

88. On July 25, 2011, SLF emailed Ms. Riley and explained that before SLF can provide the requested clarification, it needed to know when the website that Ms. Riley referred to in her March 22, 2011 email went public. A true and correct copy of the email is attached hereto as Exhibit B-13.

89. Having received no response to SLF's July 25, 2011 inquiry, SLF followed-up with emails to Ms. Riley on August 5, 2011 and August 16, 2011, seeking the same information. True and correct copies of the emails are attached hereto as Exhibit B-14. Ms. Riley never responded to any of SLF's inquiries regarding the website.

90. On August 16, 2011, 14 months after SLF submitted its administrative appeal of EPA's denial of requests for expedited processing and fee waiver, EPA denied SLF's appeals. A true and correct copy of the letter is attached as Exhibit B-15.

91. The Agency denied SLF's request for a fee waiver for the following primary reasons: (1) "the denial or deferral of applications seeking federal funds for research on global climate change does not concern government operations or activities[;]" (2) "neither your request nor your appeal explained how the information you are seeking will increase public understanding[;]" and (3) "you failed to articulate how obtaining the information you requested . . . will 'ensure *all* citizens are fully informed on the[] implications' that result from the Findings" and "[y]ou have not explained how this information would inform citizens about the implications of the Findings." (See Exhibit B-15.)

92. The Agency denied SLF's request for expedited processing. Ignoring SLF's chartered directive, mission statement, and prior actions, the Agency claimed that SLF is not "primarily engaged in disseminating information to the public." The Agency further claimed that "there is no compelling need to inform the public" about the requested records – in other words, EPA claimed that there is no need for the public to know how the federal government spends hard-earned taxpayer dollars. (See *id.*)

93. Despite EPA's denial of SLF's administrative appeal, SLF believed that the Agency's standard processing of Request No. HQ-FOI-01115-10 was uninterrupted, based on the April 20, 2010 acknowledgement of receipt from EPA.

94. On September 26, 2011, SLF received an email from Lisa Doucet informing SLF that Ms. Doucet took over Ms. Riley's FOIA cases. In response, SLF inquired into the status of EPA's response to Request No. HQ-FOI-01115-10. A true and correct copy of the email is attached hereto as Exhibit B-16.

95. In an email dated October 3, 2011, Ms. Doucet informed SLF that the website referenced by Ms. Riley was posted in the spring of 2002. Ms. Doucet renewed EPA's request for further clarification of SLF's then 18 month old FOIA request and threatened that if SLF does not narrow Request No. HQ-FOI-01115-

10, the Agency would “begin administrative close out of this FOIA request.” A true and correct copy of the email is attached hereto as Exhibit B-16.

96. By letter dated October 14, 2011, SLF responded to Ms. Doucet’s threat to administratively close Request No. HQ-FOI-01115-10. In its letter, SLF explained that Ms. Riley’s March 22, 2011 response failed to fully satisfy any items of SLF’s request and again articulated the items requested originally in April 2010. In summary, SLF explained: (1) The website referred to in the March 22, 2011 email only appeared to archive “Extramural Research” conducted by graduate students and funded by EPA; however, SLF’s request was not limited to graduate research. Additionally, Item 1 was not limited to successful grants, but rather requested records regarding all grant applications – successful or not; (2) the Agency had not yet responded to Item 2 of SLF’s request in any manner; (3) the website referred to in the March 22, 2011 email did not fulfill EPA’s obligation to provide the correspondence and directives requested in Item 3 of SLF’s request; (4) the Agency had not yet responded to Item 4 of SLF’s request in any manner; and (5) the website referred to in the March 22, 2011 email contained no records responsive to Item 5 of SLF’s request. True and correct copies of the transmittal email and letter are attached hereto as Exhibit B-17.

97. Having received no response to its October 14, 2010 letter, on October 25, 2011, SLF emailed Ms. Doucet requesting a timeframe in which SLF could expect to receive EPA's first production of responsive records. A true and correct copy of the email is attached hereto as Exhibit B-16.

98. Several days later, on October 28, 2011, Ms. Doucet informed SLF that EPA would provide a cost and time frame estimate by November 21, 2011. In a response dated the same day, SLF acknowledged Ms. Doucet's email and requested clarification regarding the information EPA promised to provide by November 21. On October 31, 2011, Ms. Doucet responded and stated that EPA only intended to provide a cost and time frame estimate and would not be providing an initial determination by November 21. True and correct copies of the emails are attached hereto as Exhibit B-16.

99. It is unclear why, after 19 months, the Agency still could not provide SLF with either a cost estimate or a timeframe for production, or why the Agency still could not anticipate a date to provide its initial determination. However, because SLF still wanted to review, analyze and disseminate the requested records, its only choice was to wait for the Agency's response.

100. The Agency failed to meet its November 21, 2011 self-imposed deadline for providing a cost and time frame estimate to SLF. Accordingly, on

November 21, 2011, SLF emailed Ms. Doucet and inquired into the status of its response to Request No. HQ-FOI-01115-10. Ms. Doucet responded explaining that she hopes to have a cost estimate and timeframe for production by December 1, 2011. True and correct copies of the emails are attached hereto as Exhibit B-16.

101. As of December 2, 2011, the Agency still had not provided a cost estimate or time frame for production of responsive records. Accordingly, on December 2, 2011, SLF emailed Ms. Doucet and again, inquired into the status of its response to Request No. HQ-FOI-01115-10. A true and correct copy of the email is attached hereto as Exhibit B-16.

102. By way of an email dated December 7, 2011, Ms. Doucet provided EPA's initial response to Request No. HQ-FOI-01115-10 which was originally submitted to the Agency on April 12, 2010. Ms. Doucet's email stated in pertinent part: "We have identified 117 grants that may be applicable to your FOIA request. We estimate that the total cost for search and duplication, as appropriate, is \$2,000.00. It will take approximately eight months to retrieve and review the documents for relevancy and make a determination of releasability or non-releasability. Our estimated completion date is August 2012." A true and correct copy of the email is attached hereto as Exhibit B-18.

103. The following day, December 8, 2011, by electronic mail, SLF responded explaining that because EPA failed to provide SLF with an initial determination within 20 days as required by the FOIA (even applying the most liberal dates in the Agency's favor), the Agency may not assess search fees. *See* 5 U.S.C. § 552(a)(4)(A)(viii). Additionally, SLF requested that the Agency acknowledge its agreement and continue processing the 117 potentially responsive records or advise SLF immediately of its disagreement so that SLF may prepare a formal appeal of EPA's initial determination regarding its request. True and correct copies of the transmittal email and attached letter are attached hereto as Exhibit B-19.

104. As of January 30, 2012, the Agency had not responded to SLF's December 8, 2012 letter. Accordingly, on January 30, 2012, SLF emailed Ms. Doucet and again, requested that the Agency acknowledge its agreement and continue processing the 117 potentially responsive records or advise SLF immediately of its disagreement so that SLF may prepare a formal appeal of EPA's initial determination regarding its request. A true and correct copy of the email is attached hereto as Exhibit B-20.

105. As of February 8, 2012, the Agency still had not responded to SLF's December 8, 2012 letter. Accordingly, on February 8, 2012, SLF again emailed

Ms. Doucet and again, requested that the Agency acknowledge its agreement and continue processing the 117 potentially responsive records or advise SLF immediately of its disagreement so that SLF may prepare a formal appeal of EPA's initial determination regarding its request. A true and correct copy of the email is attached hereto as Exhibit B-21.

106. As of February 20, 2012, the Agency still had not responded to SLF's December 8, 2011 letter or its subsequent attempts to obtain a response. Accordingly, on February 20, 2012, SLF again emailed Ms. Doucet and again, requested that the Agency acknowledge its agreement and continue processing the 117 potentially responsive records or advise SLF immediately of its disagreement so that SLF may prepare a formal appeal of EPA's initial determination regarding its request. A true and correct copy of the email is attached hereto as Exhibit B-22.

107. On March 1, 2012, Ms. Doucet responded to SLF's December 8, 2011 letter and follow-up communications. In her email, Ms. Doucet informed SLF that she contacted EPA's Office of General Counsel and sought a determination from that office regarding "payment issues." She further informed SLF that "under FOIA rules, we are not allowed to proceed with processing any case where costs will exceed \$25 without an assurance of payment." She continued, "Once the payment issue is resolved, we can refocus on our proposed completion date, begin

retrieval and review of the documents for relevancy, and make determinations of releasability or non-releasability of the data.” A true and correct copy of the email is attached hereto as Exhibit B-23.

108. Later the same day, SLF responded to Ms. Doucet’s email and explained that while 40 CFR 2.107(e) (Nov. 5, 2002) provides that “[w]hen a requester has been notified that actual or estimated fees will amount to more than \$25.00, EPA will do no further work on the request until the requester agrees to pay the anticipated total fees[,]” the FOIA itself provides, and at least one district court has held, that “an agency shall not assess search fees if the agency fails to comply with any time limit” under the FOIA. Because EPA failed to meet the 20-day time limit to provide its initial determination, the FOIA prohibits the Agency from assessing search fees and from further delaying processing of Request No. HQ-FOI-01115-10. A true and correct copy of the email is attached hereto as Exhibit B-23.

109. Another 64 days passed with no communication from EPA regarding Request No. HQ-FOI-01115-10. On May 4, 2012, SLF emailed Ms. Doucet inquiring into the status of the Agency’s response and explained that if the EPA does not respond to SLF’s multiple inquiries into the status of EPA’s response, it

would be forced to resort to administrative or judicial review. A true and correct copy of the email is attached hereto as Exhibit B-24.

110. The EPA never responded to SLF's May 4, 2012 email.

111. On May 16, 2012, SLF submitted an administrative appeal for delay in processing Request No. HQ-FOI-01115-10. In its administrative appeal, SLF explained in detail that EPA violated the FOIA when it failed to provide an initial determination, that EPA still had not provided an estimated date of production, and that to date, the Agency still had not provided SLF with a decision regarding the search fee dispute. True and correct copies of the letter and enclosures are attached hereto as Exhibit B-25.

112. In a letter dated May 18, 2012, EPA acknowledged receipt of SLF's administrative appeal for delay in processing Request No. HQ-FOI-01115-10. A true and correct copy of the letter is attached hereto as Exhibit B-26.

113. In a letter dated June 21, 2012, EPA responded to SLF's May 16, 2012 administrative appeal. Specifically, the Agency stated that SLF was entitled to a fee waiver with respect to search costs and that the Agency would contact SLF by July 3, 2012, with an estimated processing date and an estimate of duplication costs. In the letter, the Agency acknowledged that because it failed to comply with the statutory time limit set forth under Paragraph 6 of the FOIA and failed to notify

SLF of any unusual circumstances, the Agency was precluded from assessing any search fees related to Request No. HQ-FOI-01115-10. A true and correct copy of the letter is attached hereto as Exhibit B-27.

114. In an email dated July 5, 2012, Ms. Doucet informed SLF that it would take EPA another five months to process Request No. HQ-FOI-01115-10 and that duplication would cost approximately \$1,125.00. A true and correct copy of the email is attached hereto as Exhibit B-28.

115. In an email dated August 27, 2012, Ms. Doucet asked that SLF confirm it would pay the \$1,125.00 in duplication costs. A true and correct copy of the email is attached hereto as Exhibit B-28.

116. On September 10, 2012, SLF responded to Ms. Doucet's email and explained that all duplication costs can be avoided by producing the documents electronically and requested that the Agency produce all responsive records in electronic format. A true and correct copy of the email is attached hereto as Exhibit B-28.

117. In an email dated September 18, 2012, Ms. Doucet informed SLF that EPA would be administratively closing Request No. HQ-FOI-01115-10 because SLF would not assure payment for duplication costs. Specifically, Ms. Doucet stated: "Without your assurance of payment we are not allowed to process the

case. We understand you have decided not to provide assurance, so we will proceed with administrative close-out of your request. Subsequently, if you are interested in receiving the data, you will have to file a new FOIA request.” A true and correct copy of the email is attached hereto as Exhibit B-28.

118. Notably, Ms. Doucet and the Agency never responded to, or even acknowledged, SLF’s request that EPA produce responsive records electronically to reduce duplication costs.

119. Instead, EPA administratively closed out Request No. HQ-FOI-01115-10, which had to date been outstanding for over 17 months.

SLF’s FOIA Request No. EPA-HQ-2014-001489

The FOIA Requires the Agency to Submit Annual FOIA Reports and to Make All Underlying Raw Data Available to the Public Upon Request.

120. The FOIA requires all agencies to submit to the Attorney General of the United States a report covering the preceding fiscal year that includes data regarding the agency’s processing of FOIA requests. *See* 5 U.S.C. § 552(e)(1) *et seq.* Reportable information includes, but is not limited to, the number of requests made, the number of requests responded to, the number of requests pending, the number of times the agency withheld records pursuant to each exemption, the number of fee waiver requests made and granted, the number of expedited

processing requests made and granted, and information regarding the status of administrative appeals. *Id.*

121. The FOIA requires all agencies to “make such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means.” 5 U.S.C. § 552(e)(3).

122. Further, and most relevant to this Complaint, the FOIA requires all agencies to “make the raw statistical data used in its reports available electronically to the public upon request.” *Id.*

123. The Agency’s Annual FOIA Reports containing the information detailed at 5 U.S.C. § 552(e)(1) for the years 2007 through 2013 are available on EPA’s website. Neither the Annual FOIA Reports or EPA’s website provide the raw statistical data referred to in 5 U.S.C. § 552(e)(3).

SLF Submits a FOIA Request Regarding EPA’s Annual FOIA Reports.

124. On November 22, 2013, SLF submitted a FOIA request by certified mail to EPA’s Headquarters FOIA office (Request No. EPA-HQ-2014-001489) seeking, in part, the raw statistical data referred to in 5 U.S.C. § 552(e)(3) that EPA used to create its Annual FOIA Reports. A true and correct copy of Request No.

EPA-HQ-2014-001489 is attached hereto as Exhibit C-1, and incorporated herein by reference.

125. In Request No. EPA-HQ-2014-001489, SLF sought the following records:

- a. Records that reflect the underlying data of, or used, created or compiled in the preparation of identified sections of the EPA's Annual FOIA Reports for fiscal years 2009 through 2012.
- b. Records reflecting any written and electronic correspondence, memoranda, data, or reports created by any employee, agent, or consultant of EPA that discusses EPA's Annual FOIA Reports for fiscal years 2009 through 2012.

126. SLF sought a fee waiver of search, review and reproduction fees pursuant to the FOIA (5 U.S.C. § 552(a)(4)(A)(iii)) and EPA regulations (40 CFR 2.107) because the information sought was in the public interest, was likely to contribute to public understanding of the operations and activities of government, and because SLF has no commercial interest in requesting the information. (See Exhibit C-1.)

127. By letter dated November 27, 2013, EPA acknowledged receipt of SLF's FOIA request and assigned it tracking number EPA-HQ-2014-001489. A true and correct copy of the letter is attached hereto as Exhibit C-2.

128. By separate letter dated November 27, 2013, EPA set forth six factors that it considers when reviewing a fee waiver request and stated that if SLF wished to receive a fee waiver it "must address, in sufficient detail, these six factors" and that if SLF did not respond within seven days from the date of the letter, EPA would automatically deny SLF's fee waiver request. A true and correct copy of the letter is attached hereto as Exhibit C-3.

129. In a letter delivered by U.S. Mail and electronic mail on December 9, 2013, SLF responded to EPA's December 9, 2013 letter and, as requested, SLF provided detailed justification for each of the six factors outlined by EPA. A true and correct copy of the letter is attached hereto as Exhibit C-4.

130. Despite SLF's timely and detailed response, by letter dated December 12, 2013, EPA denied SLF's fee waiver request, disputing SLF's asserted intention that the release of information requested significantly increased the public understanding of government operations or activities. A true and correct copy of the letter is attached hereto as Exhibit C-5.

131. On January 16, 2013, SLF spoke with EPA's National FOIA Officer, Mr. Larry Gottesman, regarding Request No. EPA-HQ-2014-001489. Mr. Gottesman informed SLF that it would be receiving a letter explaining that EPA does not have any responsive records because EPA used a third party, FOIAXpress, to track its FOIA requests for the years 2009 through 2012.

132. During the same telephone conversation Mr. Gottesman explained that even if EPA had tracked its own FOIA requests, the Agency destroys records after two years, so at best it would have had responsive records for the years 2011 and 2012.

133. In response, SLF informed Mr. Gottesman that SLF would still be appealing the denial of its fee waiver request and Mr. Gottesman responded that an appeal made sense since the requested information is in the public domain.

134. On January 10, 2014, SLF administratively appealed EPA's denial of SLF's fee waiver request, elaborating on its previous explanation of why a fee waiver is justified and specifically, why the requested records will contribute to the public understanding of how EPA processes FOIA requests. SLF's administrative appeal further explained that EPA employed an inaccurate interpretive method in evaluating the six factors considered by EPA. A true and correct copy of the letter is attached hereto at Exhibit C-6.

135. Even though Mr. Gottesman informed SLF via a telephone conversation that EPA intended to issue an adverse determination, the FOIA and EPA regulations require the Agency to notify SLF of its adverse determination and of SLF's right to appeal in writing. *See* 5 U.S.C. § (a)(6)(A)(i); 40 CFR 2.104(g) (Nov. 5, 2002). On January 13, 2014, SLF administratively appealed EPA's delay in processing Request No. EPA-HQ-2014-001489 because EPA failed to provide the required written adverse determination in a timely manner. In its administrative appeal, SLF explained that "EPA's inexplicable delay in providing SLF with the requisite written notification has caused SLF irreparable harm and undue delay because SLF cannot appeal the adverse determination until it has received EPA's written determination." A true and correct copy of the letter is attached hereto at Exhibit C-7.

136. By letter dated January 14, 2014, EPA acknowledged receipt of SLF's administrative appeal. A true and correct copy of the letter is attached hereto at Exhibit C-8.

137. Despite its acknowledgment of SLF's January 13, 2014 administrative appeal for delay in processing, EPA never responded with a determination regarding SLF's fee waiver request.

138. On March 6, 2014, EPA provided its final determination in response to Request No. EPA-HQ-2014-001489 (incorrectly identified as Request No. EPA-HQ-2014-001493 in its letter). The Agency stated that it was unable to produce any of the requested data for the following reasons: “EPA used FOIAXpress, as the tracking tool and to create EPA’s FOIA Annual Reports which are the subject of your request. FOIAXpress is a proprietary software tool that is no longer being used by EPA or being supported by the vendor. In the past when we received a similar request, the vendor had to run a special report, through the ‘back-end’, which we do not have access to.” A true and correct copy of the letter is attached hereto as Exhibit C-9.

139. On April 4, 2014, SLF administratively appealed EPA’s final determination. In its administrative appeal, SLF explained EPA failed to produce any records responsive to Items 2, 4, 6 and 8 as set forth in Request No. EPA-HQ-2014-001489, and neither acknowledged nor explained its failure to produce such records; thus, it was unclear if EPA even performed the requisite searches for responsive records. SLF further explained that EPA has a statutory obligation to produce the records because they did not lose their “agency record” status just because they were maintained by a government contractor. Finally, SLF explained that pursuant to 5 U.S.C. § 552(e)(3), all agencies are required to make the

records sought in Items 1, 3, 5 and 7 of the request available to the public upon request, regardless of who maintains them. A true and correct copy of the letter is attached hereto at Exhibit C-10.

140. EPA never responded to SLF's April 4, 2014 administrative appeal of the Agency's final determination.

141. In a letter dated June 30, 2014, EPA responded to SLF's January 10, 2014 administrative appeal of the Agency's fee waiver request denial. The Agency stated that because "no responsive records were located[,]” its denial of SLF's fee waiver request was moot. The Agency further stated that the letter constituted EPA's final determination on SLF's request for a fee waiver and that pursuant to 5 U.S.C. § 552(a)(4)(B), SLF may obtain judicial review of the determination. A true and correct copy of the letter is attached hereto at Exhibit C-11.

LEGAL ARGUMENTS

The Agency Arbitrarily and Capriciously Withheld Records and Redacted Produced Records in Response to SLF's FOIA Request No. HQ-FOI-00469-10 in Violation of the FOIA and EPA Regulations.

142. The records produced in response to Request No. HQ-FOI-00469-010 primarily, if not completely, relate to the administrative task of compiling, sorting, and responding to public comments related to the Endangerment and Cause or

Contribute Findings, to the exclusion of any other information sought in the original request.

143. It does not appear that EPA produced any records in response to SLF's request for records regarding the timing of release of the Endangerment and Cause or Contribute Findings, which was suspect given the temporal relationship to President Obama's speech in Copenhagen.

144. It does not appear that EPA produced any records discussing or analyzing the financial implications or consequences of the Endangerment and Cause or Contribute Findings. There is an apparent lack of any reports or analysis produced for EPA by any other federal agency or subdivision of the United States federal government and the financial implications of the Endangerment and Cause or Contribute Findings on the following: (i) the private sector in the United States or any particular industry; (ii) the United States government or any agency or political subdivision thereof; or (iii) on state and local governments.

145. The Agency's response to Request No. HQ-FOI-00469-010 can be summarized as essentially meaningless records that do nothing to grant access or increase the understanding of the general public regarding government functions and activity which have already occurred.

146. All that remains intact of the records produced by EPA is internal office banter, clerical conversations via email between EPA staff regarding task-setting and scheduling, and the full text of public comments received by EPA during the comment period related to the Endangerment and Cause or Contribute Findings. Most of the thousands of pages of text provided to SLF consist only of salutations followed by blocks of redacted material, wholly without context and impenetrably obscure. In short, only the truly “non-responsive” matter remains.

147. The Agency could have used its discretion to release information covered by the exemptions, in the interests of openness and accessibility. “Congress did not design the FOIA exemptions to be mandatory bars of disclosure.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979); *see also* *DOI v. Klamath Waters Users Protective Ass’n*, 532 U.S. 1, 7-8 (2001) (citations omitted) (“These limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act”).

148. Furthering the spirit of this statement, President Obama issued a directive that executive agencies should err on the side of disclosure when administering FOIA requests. This directive was reinforced by Attorney General Eric Holder. Mr. Holder explicitly said that “an agency should not withhold records merely because it can demonstrate, as a technical matter, that the records

fall within the scope of a FOIA exemption” and announced that the Department of Justice will defend an agency’s denial of a FOIA request under the exemptions *only if* (1) disclosure would harm an interest protected by the exemption, or (2) disclosure is prohibited by law. *See* Attorney General Eric Holder, “Memorandum for the Heads of Executive Agencies; Subject: Freedom of Information Act.” Daily Comp. Pres. Docs., 2009 DCPD No. 0009 (Jan. 21, 2009); Attorney General Eric Holder, “Memorandum for the Heads of Executive Departments and Agencies; Subject: Freedom of Information Act,” Mar. 19, 2009, available at <http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf> (last visited Feb. 4, 2015).

149. Given the nature of the correspondence deemed “responsive” to Request No. HQ-FOI-00469-010 and the fact that no deliberations regarding the Endangerment and Cause or Contribute Findings are still ongoing, SLF challenges the assertion of FOIA exemptions to deny its request, in part because disclosure in full of all records related to the items requested would not harm any interests protected by the exemptions, as to the great majority of redacted material.

150. Further, if Agency employees or agents used personal email addresses to communicate regarding Agency business, including the Endangerment and

Cause or Contribute Findings, those email addresses are not protected by Exemption 6 and the public is entitled access to those email addresses.

The Agency Arbitrarily and Capriciously Denied SLF's Fee Waiver Request and the Agency's Continued Refusal to Waive Duplication Costs for Request No. HQ-FOI-01115-10 Violated the FOIA and EPA Regulations.

151. In Request No. HQ-FOI-01115-10, SLF sought a fee waiver and in response, the Agency denied SLF's request and subsequent administrative appeal for a fee waiver.

152. The Agency's denial of SLF's request for a fee waiver with respect to Request No. HQ-FOI-01115-10 violated the FOIA and the EPA regulations implementing the FOIA.

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

154. The Agency's regulations at 40 CFR 2.107(l) (Nov. 5, 2002) provide the Agency's interpretation of the fee waiver provision in the FOIA. More specifically, in evaluating the first fee waiver requirement as set forth in the FOIA (whether "disclosure of the information is in the public interest because it is likely

to contribute significantly to public understanding of the operations or activities of the government”), the Agency will consider the following four factors: (1) whether the subject of the requested records concerns the operations or activities of the Federal government; (2) whether the disclosure is likely to contribute to an understanding of government operations or activities; (3) whether the disclosure is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter; and (4) whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. 40 CFR 2.107(1)(2) (Nov. 5, 2002)

155. Further, in evaluating the second fee waiver requirement as set forth in the FOIA (whether “disclosure of the requested information . . . is not primarily in the commercial interest of the requester”), the Agency will consider the following two factors: (1) whether the requester has a commercial interest that would be furthered by the requested documents; and (2) whether any such commercial interest outweighs the public interest in disclosure. 40 CFR 2.107(1)(3) (Nov. 5, 2002).

156. As SLF explained in its original request, subsequent justification and administrative appeal, disclosure of the requested records was and still is in the public interest because they are likely to contribute significantly to public

understanding of the operations or activities of the government. 40 CFR 2.107(l)(2)(i) (Nov. 5, 2002).

157. In Request No. HQ-FOI-01115-10, SLF sought a series of documents, including applications, awards, denials, and communications, related to grants and grant applications made seeking federal funds for research on global climate change, its causes and effects, methods of measuring changes in climate, and responses to climate change, in any scientific discipline and for any purpose. The requested records directly concern government operations or activities – specifically, how EPA allocated and spent hard-earned taxpayer dollars. The act of denying a grant application is, in itself, a government operation and activity, just as the act of granting a grant application is a government operation and activity. The Agency’s assertion that “the denial or deferral of applications seeking federal funds for research on global climate change does not concern government operations or activities” is not only incorrect, but it is disingenuous and insulting to all grant applicants and taxpayers. Thus, EPA’s finding that SLF “failed to make the required showing” that all of the requested records concern government operations or activities is incorrect.

158. As SLF explained in its original request, subsequent justification and administrative appeal, disclosure of the requested records was and is likely to

contribute to an understanding of government operations or activities. 40 CFR 2.107(l)(2)(ii) (Nov. 5, 2002).

159. In response, EPA stated that the records requested are already in the public domain, and thus, the requested records have no informative value.

160. The Agency's response is incorrect – the records sought were not and are not in the public domain. If the records were in the public domain, SLF would not have been forced to submit a FOIA request and spend nearly six years attempting to obtain the records.

161. As SLF explained in its original request, subsequent justification and administrative appeal, and as EPA acknowledged in its response to SLF's appeal, SLF "indicate[d] that the information will likely contribute to the understanding of 'a reasonably broad audience of persons interested in the subject.'" 40 CFR 2.107(l)(2)(iii) (Nov. 5, 2002).

162. As SLF explained in its original request, subsequent justification and administrative appeal, the records sought contribute significantly to the public's understanding of government operations or activities as compared to the level of understanding that existed prior to disclosure. 40 CFR. 2.107(l)(2)(iv) (Nov. 5, 2002).

163. In Request No. HQ-FOI-01115-10, SLF detailed its concerns about the policy and scientific bases for the Endangerment and Cause or Contribute Findings. In its communications to EPA, SLF also expressed concern regarding the constitutionality and costs of any regulatory scheme resulting from the Endangerment and Cause or Contribute Findings, explaining that EPA decisions based on the Endangerment and Cause or Contribute Findings will affect all U.S. citizens directly or indirectly. Thus, the reasoning and bases the Agency employed will “significantly” enhance the public’s understanding of the Endangerment and Cause or Contribute Findings implications.

164. As SLF explained in its administrative appeal, through Request No. HQ-FOI-01115-10, SLF sought records related to the Endangerment and Cause or Contribute Findings, or other ways EPA is involved in funding research into “anthropogenic global warming and climate change.” The potential effects of a carbon reduction regulatory scheme based on the Endangerment and Cause or Contribute Findings will have vast and numerous implications for the U.S. economy, and all of its citizens. SLF’s goal in requesting the records is to ensure *all* U.S. citizens are fully informed on these implications, and to investigate the constitutionality of any regulatory action promulgated by EPA based on the Endangerment and Cause or Contribute Findings.

165. Finally, SLF's status as a non-profit public interest law firm and dedication to analyzing, interpreting and disseminating the requested records establish that SLF has no commercial interest in the requested records. 40 CFR. 2.107(1)(3) (Nov. 5, 2002).

166. Consideration of all six factors set forth in the Agency's regulations weigh strongly in favor of granting SLF's fee waiver. Thus, EPA's denial of SLF's fee waiver request with respect to Request No. FOI-01115-10 was improper.

The Agency Violated the FOIA and EPA Regulations When it Arbitrarily and Capriciously Refused to Produce Records Responsive to Request No. HQ-FOI-01115-10 and Unilaterally Closed SLF's FOIA Request No. HQ-FOI-01115-10.

167. As previously established, twenty-six months after submitting FOIA Request No. HQ-FOI-01115-10, and after SLF submitted several administrative appeals, the Agency finally acknowledged that it failed to comply with the statutory time limits set forth under paragraph 6 of the FOIA and granted SLF's request for waiver of search and retrieval fees.

168. Even though EPA waived search and retrieval fees, it still sought to impose duplication fees on SLF in the amount of \$1,125.00.

169. The FOIA requires that [i]n making any record available to a person under paragraph, an agency shall provide the record in any form or format

requested by the person if the record is readily reproducible by the agency in that form or format.” 5 U.S.C. § 552(a)(3)(A)(B).

170. EPA regulations provide that when the Agency produces responsive documents in electronic form, it may charge the requester for the direct costs of production including the costs of the requested electronic medium on which the copy is to be made (e.g. flash drive or DVD) and the actual operator and computer resource usage required to produce the copy, to the extent they can be determined. *See* 40 CFR 2.107(2)(ii) (Nov. 5, 2002).

171. In response to EPA’s request for assurance of payment of the \$1,125.00 duplication charge, pursuant to 5 U.S.C. § 552(a)(3)(A)(B), SLF requested that the Agency transmit responsive documents electronically which would allow SLF to avoid duplication costs.

172. In response to SLF’s request that the Agency produce responsive records electronically, EPA unilaterally closed Request No. HQ-FOI-01115-10.

173. Notably, the Agency never acknowledged SLF’s request that it produce responsive documents electronically to avoid duplication costs.

174. The Agency’s arbitrary and capricious refusal to produce responsive documents electronically per SLF’s request and subsequent unilateral closing of Request No. HQ-FOI-00115-10 violated the FOIA and EPA regulations.

The Agency Violated the FOIA and EPA Regulations When it Arbitrarily and Capriciously Refused to Produce the Underlying Raw Statistical Data Supporting its Annual FOIA Reports for the Years 2009 Through 2012 and Related Communications.

175. The Agency violated the FOIA and EPA regulations when it failed to produce any documents responsive to Items 2, 4, 6 and 8 of Request No. EPA-HQ-2014-001489, and neither acknowledged nor explained its failure to produce such documents. Specifically, in these Items, SLF sought “[w]ritten and electronic correspondence, memoranda, data, or reports created by any employee, agent, or consultant of the EPA that discusses” the identified sections of the EPA’s Annual FOIA Reports for the years 2009 through 2012. To date, EPA has failed to provide any explanation for its failure to produce the requested communications.

176. The Agency violated the FOIA and EPA regulations when it failed to produce any documents responsive to Items 1, 2, 5 and 7 of Request No. EPA-HQ-2014-001489. Specifically, in these Items, SLF sought the underlying statistical data supporting the Agency’s Annual FOIA Reports for the years 2009 through 2012.

177. The Agency claimed that it could not produce the underlying raw statistical data supporting its Annual FOIA Reports for the years 2009 through 2012 because a third party maintained the requested records.

178. The Agency has a statutory obligation to make the requested agency records available. *See* 5 U.S.C. § 552(a)(3). The FOIA defines “record” as “any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.” 5 U.S.C. § 552(f)(2)(A). This includes any such information “maintained for an agency by an entity under Government contract, for the purposes of records management.” 5 U.S.C. § 552(f)(2)(B). Thus, a record does not lose its “agency record” status when physically maintained by a government contractor.

179. Applying these statutory definitions, the mere fact that the requested records are maintained by a third party that the Agency no longer has a relationship with does not strip the requested records of their “agency record” status. The Agency has an obligation to take all necessary steps to obtain and produce the requested records.

180. Further, even if the requested records did not satisfy the definition of a record as set forth in the FOIA, all agencies are required to make the raw statistical data used to compile the Annual FOIA Reports available to the public upon request, regardless of who maintains the data. *See* 5 U.S.C. § 552(e)(3).

181. Thus, even though the records sought in Request No. EPA-HQ-2014-001489 may have been maintained by FOIAXpress on behalf of EPA, the records are still subject to the FOIA and EPA is obligated to make them available.

PRAYER FOR RELIEF

182. Enter an immediate order directing EPA to preserve all records potentially responsive to Request Nos. HQ-FOI-00469-10, HQ-FOI-01115-10 and EPA-HQ-2014-001489, and prohibiting EPA, its employees, agents or representative from transporting, concealing, removing, destroying or in any way tampering with records potentially responsive to said requests;

183. Enter an order declaring that EPA:

- a. has wrongfully withheld records responsive to Request No. HQ-FOI-00469-10; and
- b. must process and produce immediately all records responsive to Request No. HQ-FOI-00469-10 in unredacted form;

184. Enter an order declaring that EPA:

- c. has wrongfully denied SLF's request for a fee waiver with respect to Request No. HQ-FOI-01115-10;
- d. must immediately conduct an expedited search for responsive records; and

e. must process and produce immediately all records responsive to Request No. HQ-FOI-01115-10;

185. Enter an order declaring that EPA:

f. has wrongfully denied SLF's request for a fee waiver with respect to Request No. EPA-HQ-2014-001489;

g. must immediately conduct an expected search for responsive records; and

h. must process and produce immediately all records responsive to Request No. EPA-HQ-2014-001489;

186. Award reasonable attorneys' fees, costs and expenses; and

187. Grant any and all other relief as this Court deems just and proper.

Respectfully submitted this 9th day of February 2015.

Southeastern Legal Foundation, Inc.

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