



## FREEDOM OF INFORMATION ACT (FOIA) REQUEST

October 17, 2011

Office of Science and Technology, John Holdren, Director

Old Executive Office Building

Attn: FOIA Officer (Barbara Ann Ferguson)

Old Executive Office Building, Room 431

Washington, DC 20502

BY ELECTRONIC MAIL– [ostpfoia@ostp.eop.gov](mailto:ostpfoia@ostp.eop.gov)

RE: Freedom of Information Act Request

Dear OSTP FOIA Staff,

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552 et seq., please provide me within twenty (20) working days copies of all records as described below, taking into account the information also provided in this Request to assist OSTP's search and production.

### Records Requested

We seek all records, documents, internal and external communications and other relevant covered material produced, sent or received by, or made available on an outside electronic forum to, Sherburne "Shere" B. Abbott, OSTP Associate Director for Environment, who departed OSTP on July 1, 2011 but in 2009 assumed the position of head of the U.S. delegation to the UN IPCC:

- 1) discussing the idea, prospect, development or implementation of a practice of using a closed electronic discussion forum for IPCC-related work (see discussion, below); or
- 2) produced, posted or otherwise communicated through or held on an outside (other than OSTP) electronic forum for IPCC-related work accessible by Ms. Abbott, by any author and to any recipient.

This Request thereby seeks two types of records: those possessed directly by OSTP on its own assets, such as email accounts, computers, flash drives, discs and servers, and those held on as-sets (such as an internet forum) that during Ms. Abbott's service was accessible to her, relating to the Intergovernmental Panel on Climate Change (UN IPCC or IPCC). This includes but is not limited to any record providing Ms. Abbott a user name and password for such electronic fora.

Therefore, regarding the "internet fora", responsive records also include but are not limited to re-cords posted or held on any electronic or internet fora hosted, established or used for IPCC pur-poses, because such records are intended for and received by an employee of the United States government granted access to the electronic fora as part of her official service as a government representative to the IPCC.

These include all records on any such site or server barring a specific indication, present at the time of the record's posting or publication, that a record is not intended for Ms. Abbott to view.

The public record as described below is clear that the electronic fora at issue in this Request were established to supplant official governmental email accounts -- but still accessed using govern-ment computers, on government time, as official communications in pursuit of official duties -- to perform official duties while evading national transparency laws, including FOIA, as well as the Presidential Records Act of 1978 (PRA).

For this and other reasons, including but not limited to those below, the records are agency and White House records subject to PRA, and to FOIA barring any specific, applicable exception.

#### Scope of Request: Offices and Period Covered

Responsive records will have been produced, sent or received by Sherbure B. Abbott (including on "outside" electronic fora), from April 1, 2009 through July 1, 2011, inclusive.

#### Subject Matter Background to Assist OSTP's Search and Production

In order to properly frame this Request and assist OSTP in identifying responsive records, please consider the following background.

Various U.S. government officials, including Ms. Abbott, have been appointed to serve as repres-entatives of the United States government to the IPCC as part of their official duties.

In mid-2010, the IPCC's website posted the following:

#### E. Security and confidentiality

E1. The issues of security and confidentiality in the work of preparing the next IPCC Assessment Report require urgent attention in order to meet the challenges of modern methods of working and communication and given the experiences during and since AR4.

While IPCC is an institution that is open and transparent, the process of producing the reports (e.g., approval meetings, the deliberations by [lead authors, or] LAs within their Chapters, during LA meetings, and in related electronic communications) are pre-decisional processes which are not open to the public. In order to facilitate exchange, closed electronic discussion fora could be established when needed. The WG TSUs are already actively considering these issues.<sup>1</sup>

The IPCC here alludes to past experience with, and a number of ongoing, requests to national government agencies for IPCC-related records under national freedom of information laws.

IPCC then followed up on this intention, communicating its effort to, e.g., Working Group I (WGI) participants (though all Working Groups instituted the practice), as shown on its website:

Lead Author Meetings are important steps towards the preparation and finalization of the assessment documents. They are therefore considered to be specific closed fora for pre-decisional discussions. As such, these discussions remain confidential and related documents including emails and preliminary versions of text or figures are not public; they should not be cited, quoted or distributed.

In order to enhance communication among the chapter authors between the meetings, chapter-specific internet fora will be available which are only accessible to the members of the chapter teams and confidentiality is protected by user-specific [sic] passwords. Additional information on the chapter forum, as well as other electronic resources provided by the TSU in support of the writing process, will be presented during the First Lead Author Meeting.

For direct conversations among two or several chapter authors, telephone conference facilities such as Skype are recommended. The TSU is looking into the possibility of offering WebEx via the IPCC Secretariat.<sup>2</sup>

“[T]hey are therefore considered to be specific closed fora for predecisional documents” possibly is stated in the passive voice to convey or imply more authority than is available for an IPCC declaration. This IPCC invocation of a commonly used FOIA exemption (“predecisional”, or “ex-

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1 [http://www.ipcc.ch/meetings/session32/inf04\\_p32\\_review\\_ipcc\\_proc\\_proced\\_notes\\_informal\\_task\\_group.pdf](http://www.ipcc.ch/meetings/session32/inf04_p32_review_ipcc_proc_proced_notes_informal_task_group.pdf), Busan, October 11-14, 2010, document viewed and captured on October 12, 2011.

2 [https://www.ipcc-wg1.unibe.ch/guidancepaper/WG1\\_GuidanceNote\\_Confidentiality.pdf](https://www.ipcc-wg1.unibe.ch/guidancepaper/WG1_GuidanceNote_Confidentiality.pdf), document viewed and captured on October 12, 2011. We cite this as an example of a practice apparently now running throughout all IPCC Working Groups including WGIII on which Ms. Abbott serves in addition to being the head of the US delegation. See, e.g., re: WGII at [http://ipcc-wg2.gov/organization/procedures/WG2\\_Confidentiality\\_FINAL.pdf](http://ipcc-wg2.gov/organization/procedures/WG2_Confidentiality_FINAL.pdf), and WGIII at [http://www.ipcc-wg3.de/login\\_form](http://www.ipcc-wg3.de/login_form).

emption 5”) is seemingly intended to influence application of the United States’ FOIA. It is, however, unlikely to have any bearing on the application of United States law.

FOIA covers agencies of the United States federal government. The ‘pre-decisional’ exemption 5 under FOIA applies to work produced, sent or received by covered agencies reflecting the deliberative process for official products of covered agencies.

Although the IPCC does enjoy substantial direct and indirect underwriting by the U.S. taxpayer, the IPCC is “an intergovernmental body [that] is open to all member countries of the United Nations (UN) and [World Meteorological Organization, or WMO]”, “established by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO)”,<sup>3</sup> headquartered in Switzerland and with no regulatory authority.

There is no legitimate argument that the IPCC is a covered agency subject to, or which can claim exemptions under, the U.S. FOIA statute; or its reports are products of any covered agency; or that it is an agency whose deliberative process, with numerous national government and pressure group representatives as well as other parties, is per se protected under FOIA.

However, records produced, sent or received by U.S. government employees as part of their IPCC-related work are agency records covered by FOIA. This is well-established on several levels as noted, *infra*. For example, we know that U.S. government employees participating in IPCC activities are not officially detailed, delegated or seconded to the IPCC but remain U.S. government employees, including White House employees -- and records produced, sent or received by them are produced, sent or received by U.S. government employees.<sup>4</sup>

And so, by its own acknowledgement, the IPCC has now created electronic fora to avoid application of national FOI laws, if without change to the legal considerations making these records subject to FOIA or the Presidential Records Act. As such, IPCC also seeks OSTP participation in effecting an unofficial channel for official communications for the express purpose of evading transparency and related laws.

Specifically, the IPCC (and any cooperating national government employees) has enlisted U.S. government agencies and their employees to “create non-governmental accounts for official business”, a dead-drop site of sorts, “using the nongovernmental accounts specifically to avoid creating a record of the communications” as the practice was described in a recent analogous situation involving lobbyist Jack Abramoff.<sup>5</sup>

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3 <http://www.ipcc.ch/organization/organization.shtml> .

4 “[Examination of issues related to internet posting of emails from Climatic Research Unit](#)”, herein “OIG Report”, February 18, 2011, pp. 15-16.

5 <http://oversight-archive.waxman.house.gov/documents/20070326110802-38974.pdf>. For exemplars of the concern such practices can generate, see, also e.g., Committee Directs RNC to Preserve White House E-mails <http://oversight-archive.waxman.house.gov/story.asp?ID=1225>; Committee Requests White House E-mails Stored at RNC <http://oversight-archive.waxman.house.gov/story.asp?ID=1247>; Committee to Consider Subpoena for RNC Documents Related to White House E-mails <http://oversight-archive.waxman.house.gov/story.asp?ID=1259>.

The records at issue in the instant Request include communications by and as part of an employee's official duties, which remain their official communications, continuously available to them and under their control as government employees for any relevant purposes. As such they remain records of the United States government.

We are therefore also mindful, as should be the IPCC, that erasing such records held in non-governmental locations, whether in response to learning of taxpayer interest in the records or otherwise, is inadvisable.

As an office participating and at high levels with the IPCC, OSTP should recall the United States Code's definition of "records" for purposes of maintenance and destruction, which "includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them."<sup>6</sup>

#### Transparent Effort to Evade and Subvert FOIA, PRA by Shielding Covered Records

In short, national freedom of information laws were causing discomfort for an entity, records relating to which entity, having been produced, sent or received by national representatives, are covered by national FOI laws. As we demonstrate herein citing the IPCC's own words, its response has been to seek to circumvent national FOI laws. However, declaring that records of discussions created by national government representatives are exempt from those countries' FOI laws is not within the IPCC's powers, and does not alter application of U.S. law.

The IPCC has assumed for itself, with no apparent or cited legal basis, to "clarify" coverage of "IPCC activities...in relation to requests under national Freedom of Information legislation".<sup>7</sup> In a nod to this reality, the IPCC instructed participants, "You are encouraged to consult with the

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<sup>6</sup> 44 U.S.C. § 3301. We also note 44 U.S.C. § 3101. Records management by agency heads; general duties. The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities; § 3105. Safeguards. The head of each Federal agency shall establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Archivist. Safeguards shall include making it known to officials and employees of the agency--(1) that records in the custody of the agency are not to be alienated or destroyed except in accordance with sections 3301-3314 of this title, and (2) the penalties provided by law for the unlawful removal or destruction of records; and § 3106. Unlawful removal, destruction of records.

<sup>7</sup> [http://www.ipcc.ch/meetings/session32/inf04\\_p32\\_review\\_ipcc\\_proc\\_proced\\_notes\\_informal\\_task\\_group.pdf](http://www.ipcc.ch/meetings/session32/inf04_p32_review_ipcc_proc_proced_notes_informal_task_group.pdf), Busan, October 11-14, 2010, document viewed and captured on October 12, 2011, para. E2.

legal advisors of your institution as to whether this is compatible with prior and local regulations”.

By its admitted objective (“In order to facilitate exchange, closed electronic discussion fora could be established when needed”), the IPCC has deliberately moved correspondence off-line to shield its operation -- which inherently means the operation of U.S. government employees. This is the result of emails being the typical target of FOIA requests plainly vexing and in key respects exposing aspects and operations of this secretive ward of the taxpayer.<sup>8</sup>

We also remind OSTP that NOAA has stated regarding such IPCC-related records, “there is no question that these documents are NOAA documents” (email re: Solomon IPCC-related records from NOAA FOIA officer Marie Covard to Christopher Horner, June 2, 2010). This remains true.

Coverage under FOIA and PRA are “strings” that go along with taking such support. If the IPCC wishes to avoid coverage and restrictions under U.S. FOIA and PRA for records produced, sent or received by U.S. government employees participating in the IPCC process, it can cease participation by U.S. government representatives as part of their official duties. Until then, records produced, sent or received by covered agencies as part of their official participation are agency records.

Legal deficiencies of the IPCC’s effort are not OSTP’s problem, although we believe that an agency allowing itself to be enlisted in the effort would be of concern. Nor is it OSTP’s argument to make that the IPCC is an agency of the federal government covered by FOIA and/or protected by exemptions to FOIA, any more than it is the IPCC’s position to claim that records produced by, for, or for consideration and comment by covered agency personnel are exempt from U.S. transparency or other laws. We simply elaborate upon these facts to avoid possible delay.

#### Details re: OSTP’s Response

Please identify and inform us of all responsive or potentially responsive documents within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive document(s) such objection applies.

Further, please inform us of the basis of any partial denials or redactions. Specifically, if your office takes the position that any portion of the requested records is exempt from disclosure, we request that you provide us with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA” pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and “describ[ing]

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<sup>8</sup> Further affirming this intent and that it is well-known, we note the following comment made at a widely attended (>100) public forum hosted on October 5, 2011 by NOAA in Boulder, CO, for William H. Brune of Pennsylvania State University. Although in keeping with this new IPCC line Brune requested no electronic recoding of his remarks, we refer OSTP to contemporaneous notes posted by Dave Bufalo, P.E., reporting that “Bruen [sic] stated that the IPCC has directed all of its principal authors and reviewers to NOT use email in communicating among themselves.” (emphasis in notetaker’s original)

each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information.” King v. Department of Justice, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

In the event that 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 and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. Mead Data Central v. Department of the Air Force, 455 F.2d 242, 261 (D.C. Cir. 1977). Claims of non-segregability must be made with the same detail as required for claims of exemption in a Vaughn index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release. Satisfying this Request contemplates providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable. By this we mean that no delay should be incurred on the basis that the records are held in a particular format and must be transferred as we seek them as held in whatever medium or bearing whatever physical characteristics may be the case.

Please provide responsive documents in complete form, with any appendices or attachments as the case may be.

#### Request for Fee Waiver

We request your office(s) waive any fees associated with this request. As explained below, this FOIA Request satisfies the factors listed in OSTP's governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute - that "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).

CEI is a nonprofit, tax-exempt public interest organization, with formal research, educational and publication functions as part of its mission, and release of these records will serve the public interest by contributing significantly to the public's understanding of the controversial topics of environmental and science-related policy and specifically the ongoing debate over the transparency and credibility of taxpayer-funded science, greenhouse gas policies or regulations proposed to flow therefrom, and the activities of taxpayer-funded scientists, and because such a release is not primarily in our organization's commercial interest.

CEI has no commercial interest in obtaining the requested information. Instead, CEI intends to use the requested information to inform the public, so the public can meaningfully assess claims made by government agencies and participate in the policymaking process related to climate with complete, relevant information. Neither CEI nor any foreseeable party will derive economic benefit from the requested material. No “specialized use” of the documents is anticipated outside of that described herein.

If our fee waiver request is denied we are willing to pay up to \$150.00, and in the event of any appeal as appropriate and regardless of that outcome or your response to this fee waiver request we request the search and document production proceed in the interim.

CEI has spent years promoting the public interest advocating sensible policies to protect human health and the environment, and has routinely received fee waivers under FOIA.

1. The subject matter of the requested records must specifically concern identifiable operations or activities of the government. A request for access to records for their informational content alone does not satisfy this factor.

The requested records relate to OSTP's process, assessments and determinations regarding climate science. This process, these determinations and the policies and procedures on which they are based are unquestionably "identifiable operations or activities of the government." The Department of Justice Freedom of Information Act Guide expressly concedes that "in most cases records possessed by federal agency will meet this threshold" of identifiable operations or activities of the government. There can be no question that this is such a case.

2. For the disclosure to be "likely to contribute" to an understanding of specific government operations or activities, the releasable material must be meaningfully informative in relation to the subject matter of the request.

The disclosure of the requested documents must have an informative value and be "likely to contribute to an understanding of Federal government operations or activities." The Freedom of Information Act Guide makes it clear that, in the Department of Justice's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise in the public domain and are not accessible other than through a FOIA request.

Given the anticipated economic impact to flow from the relevant government policies that would be impacted by the activities at issue here, it is important for information relating to government operations or activities involving the matter to be made available to the public. This information will facilitate meaningful public participation in the decision-making process, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of your agency's decision-making process with regard to the high hazard sites.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons. One's status as a representative of the news media alone is not enough.

Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is ex-



amined. As described in our initial Request, above and below, CEI has a longstanding interest and expertise in the subject of taxpayer-funded science and the related regulatory policies.

More importantly, CEI unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the "public-at-large."

CEI professionals appear regularly on radio and television shows to discuss issues on which they work, and similarly write in newspapers and for numerous other publications with broad readership including the National Review, Daily Caller, Pajamas Media, Big Government, and American Spectator websites.

CEI intends to disseminate the information it receives through FOIA regarding these government operations and activities in a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and mailing, posting on the organizations' websites, emailing and list-serve distribution to members.

There has been no related or relevant issue of greater public interest, to judge by internet and media attention, than the issue at the core of this FOIA Request, and thereby the request for fee waiver: proclamations, particularly from IPCC, on man-made climate change. To deny this would be *prima facie* capricious.

4. The disclosure must contribute "significantly" to public understanding of government operations or activities.

The records requested will contribute to the public understanding of the government's compliance with policies and practices governing permissible activities for its employees. There is currently no information publicly available regarding the requested information. Absent disclosure of the records requested, the public's understanding will be shaped only by what is disclosed by the private interests involved.

Information in the public record raises serious questions about the compliance by OSTP with FOIA on the issues presented in the immediate Request, and the effort to shield the records, as described in the above-cited OIG report, begs disclosure of what has been denied the public in contravention of the law in recent years. The record is incomplete, a request to correct which circumstance NOAA has not corrected despite being effectively reprimanded by the OIG findings, as well as its continued withholding of records under CEI's above-cited FOIA, originally denied, verbally, on the same specious grounds.

Absent disclosure of the requested records to reveal OSTP's IPCC-related correspondence, these important questions remain begged, and the public's understanding of this issue and particularly of OSTP's IPCC involvement in the IPCC project which has drawn such scrutiny and controversy for unsupported claims made therein will also remain incomplete.

The records requested will contribute to the public understanding of the government's role, or their "operations and activities" associated with this critically important information. The disclosure of the requested records is also essential to public understanding of the OSTP's decision making process and those relating to U.S. participation in critical "climate science" efforts including but not limited to the "IPCC" process. After disclosure of these records, the public's understanding of this process will be significantly enhanced. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

5. The extent to which disclosure will serve the requester's commercial interest, if any.

As already stated CEI has no commercial interest in the information sought or otherwise in the requested records. Nor does CEI have any intention to use these records in any manner that "furthers a commercial, trade, or profit interest" as those terms are commonly understood. CEI is a tax-exempt organization under sections 501(c)(3) and with related operations under 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of CEI's mission to inform the public on matters of vital importance to the regulatory process and policies relating to energy, the environment and public health.

6. The extent to which the identified public interest in the disclosure outweighs the requester's commercial interest.

See initial Request and answer to "5" above. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the "public interest" in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required. As noted above, CEI has no commercial interest in the requested records.

As such, the identified public interest in the disclosure outweighs the requester's (non-existent) commercial interest. When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the "public interest" in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required. As noted above, CEI has no commercial interest in the requested records.

We respectfully request, because the public will be the primary beneficiary of this requested information, that OSTP waive processing and copying fees pursuant to 5 U.S.C. §552(a)(4)(A). In the event that your agency denies a fee waiver, please send a written explanation for the denial. Also, please continue to produce the records as expeditiously as possible, but in any event no later than the applicable FOIA deadlines.

If you have any questions please do not hesitate to contact me.

Sincerely,

Christopher C. Horner, Esq.

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