

March 16, 2012

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
E-mail: hq.foia@epa.gov

RE: FOIA Request—Communications between EPA and Various Parties regarding the Keystone XL pipeline

BY CERTIFIED MAIL

Dear FOIA Officer,

On behalf of the Institute of Energy Research, a not-for-profit policy organization in Washington, DC, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552 et seq. and the relevant Environmental Protection Agency implementing regulations, please consider the following request.

Please provide us within twenty working days copies of all correspondence and communications, including phone logs, between the individuals and entities listed below and the Environmental Protection Agency between July 14, 2011 and March 15, 2012 pertaining to the proposed Keystone XL pipeline:

- (a) The Executive Office of the President; if communications *to* the Executive Office of the President are covered by Exemption 5 of FOIA per *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108 (D.C. Circuit 2004), then we request all communications *from* the Executive Office of the President to the Environmental Protection Agency regarding the Keystone XL pipeline.
- (b) Department of State
- (c) U.S. Senator Mike Johanns (R-Neb.) and his staff
- (d) U.S. Senator Ben Nelson (D-Neb.) and his staff
- (e) Nebraska Governor Dave Heineman and his staff
- (f) Nebraska Department of Environmental Quality
- (g) Bold Nebraska

- (h) League of Conservation Voters
- (i) Natural Resources Defense Council
- (j) Sierra Club

Reason for the Request:

In 2008, Trans Canada filed an application with the State Department to build a pipeline from Canada to the United States. The State Department was charged with determining if a pipeline or other infrastructure project is in the “national interest.”¹ After more than three years of study, the State Department failed to decide whether or not the pipeline was in the national interest. After Congress imposed a deadline to make a decision, President Obama rejected the pipeline application on January 18, 2012, arguing that making a decision after more than three years of study was “rushed and arbitrary.”²

One troubling aspect of the President’s decision is that it appears to have been influenced by political factors and not whether the pipeline is in the national interest. In early November 2011, the White House, State Department, and EPA were the focal points of coordinated anti-pipeline demonstrations. A few days after the demonstrations, the State Department announced that after more than three years of study, including the study of 14 different routes, it was going to “undertake an in-depth assessment of potential alternative routes in Nebraska.”³ That decision effectively delayed the State Department decision on the pipeline until after President Obama stands for reelection in November 2012 and prompted Congress to impose a deadline for the President to make a decision.

The State Department’s decision to re-assess alternative routes for the claim was undertaken despite the State Department’s Environmental Impact Statement (EIS) which had already studied 14 “major route alternatives”⁴ for the pipeline. In the EIS, the department “did not find any of the major alternatives to be preferable to the proposed project.”⁵ Furthermore, the State Department’s EIS considered the concerns raised by EPA in its June 6, 2011 letter to the State Department concerning the pipeline.

¹ See e.g. Executive Order 13337; U.S. Department of State, *Fact Sheet: Final Environmental Impact Statement*, Aug. 26, 2011, <http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf/Fact%20Sheet.pdf?OpenFileResource>.

² Statement by the President on Keystone XL Pipeline, Jan. 18, 2012, <http://www.whitehouse.gov/the-press-office/2012/01/18/statement-president-keystone-xl-pipeline>.

³ U.S. Department of State, *Keystone XL Pipeline Project Review Process: Decision to Seek Additional Information*, Nov. 10, 2011, <http://www.state.gov/r/pa/prs/ps/2011/11/176964.htm>.

⁴ U.S. Department of State, *Executive Summary: Final Environmental Impact Statement for the Proposed Keystone XL Project*, p. ES-12, Aug. 26, 2011, http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf/03_KXL_FEIS_Executive_Summary.pdf?OpenFileResource.

⁵ *Id.* at ES-14.

The delay in November 2011 and eventual rejection of the pipeline in January 2012 was curious given the President's purported belief in building infrastructure projects to spur economic growth and his desire to create jobs. The pipeline would create thousands of construction jobs, as well as many more jobs refining the oil. The pipeline would also deliver 31.5 million gallons of oil to US consumers daily, greatly reducing imports from countries less friendly to U.S. interests than Canada.

Given the intense political pressure put on the State Department, White House, and Environmental Protection Agency to deny the Keystone XL permit, we seek documents responsive to this request to make sure that President Obama's decision was not premised on politics, but on science and sound economics.

About the request:

We note the [inaugural post](#) on the White House "blog" made immediately upon President Obama's swearing-in to office which restated, in pertinent part, a promise made when courting votes during the election campaign:

Transparency—President Obama has committed to making his administration the most open and transparent in history, and WhiteHouse.gov will play a major role in delivering on that promise. The President's executive orders and proclamations will be published for everyone to **review, and that's just the beginning of our efforts to provide a window for all Americans** into the business of the government. You can also learn about some of the senior leadership in the new administration and about the President's policy priorities. WhiteHouse.gov, "Change has come to WhiteHouse.gov", January 20, 2009 (12:01 p.m.), http://www.whitehouse.gov/blog/change_has_come_to_whitehouse-gov/

Identification of Withheld Documents

Please identify 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 state 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] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information." *King v. U.S. 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. U.S. 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.

Please provide copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable. By this we mean that no delay need 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.

Request for Fee Waiver

We request your office(s) waive any fees associated with this request on the basis that IER is a nonprofit, tax-exempt public interest organization, with formal research, educational and publication functions as part of its mission, and because release of these records will serve the public interest by contributing significantly to the public's understanding of the controversial topics of environment- and energy-related policy and specifically the ongoing debate over the transparency and credibility of taxpayer-funded programs or regulations, and the activities of senior policy officials, and because such a release is not primarily in our organization's commercial interest.

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.

As explained below, this FOIA Request satisfies the factors 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).

IER has spent years promoting the public interest advocating sensible policies to protect the public interest and private industry. IER is a national, nonprofit organization dedicated in great part to relevant energy and environment issues with no commercial interest in obtaining the requested information. Instead, IER intends to use the requested information to inform the public, so the public can meaningfully participate in the energy policymaking and grant-making and loan-guarantee processes with complete, relevant information.

- 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 IER's process, assessments and determinations regarding policy formulation and the expenditure of taxpayer dollars in an objective and unbiased fashion. 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 at issue here, it is important for information relating to development and implementation of the relevant government policies 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 disbursement of taxpayer funds.

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 examined. As described, above and below, IER has a longstanding interest and expertise in the subject of taxpayer-funded science and the related regulatory policies.

More importantly, IER 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." IER 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 is already demonstrable, significant public interest in the issues at the core of this FOIA Request, to judge by internet and media attention, and hence the request for fee waiver. To deny this would be *prima facie* capricious.

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

There is currently no information publicly available specifically 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.

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 EPA’s decision making process and the above-described decisions. After disclosure of these records, the public’s understanding of these processes 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 IER has no commercial interest in the information sought or otherwise in the requested records. Nor does IER have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. IER 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 IER’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, IER has no commercial interest in the requested records.

Disclosure of this information is not “primarily” in IER’s commercial interest. On the other hand, it is clear that the disclosure of the information requested is in the public interest. It will contribute significantly to public understanding of the regulatory and grant-making processes as already described.

We respectfully request, because the public will be the primary beneficiary of this requested information, that IER 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.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel R. Simmons". The signature is fluid and cursive, with a long horizontal stroke at the end.

Daniel Simmons
Institute of Energy Research
1100 H St NW
Suite 400
Washington, DC 20005

dsimmons@ierdc.org
202-621-2954