Energy & Environment Legal Institute Report:

EPA Improperly Denies FOIA Fee Waivers for Disfavored Groups,

Inspector General Again Improperly Limits Inquiry into Abuses:

Presenting the Record and Evidence of Bias, and the Impropriety of EPA OIG Narrowing its "Fee Waiver" Inquiry to Avoid the Most Troubling Evidence of Abuse

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EXECUTIVE SUMMARY

Relevant factors relating to EPA's disparate treatment of non-profit policy groups in imposing fee barriers, *i.e.*, in awarding or denying their fee waivers under the Freedom of Information Act, for which abuses its Office of Inspector General is now providing cover, include:

- **EPA's own fee waiver data, during the period it was on its best (and, we show, modified) behavior on the matter due to Inspector General and media attention, shows a statistically significant bias in awarding fee waivers: granting them to environmentalist pressure groups 58% of the time, to "conservative" requesters 33% of the time, and waiving fees for E&E Legal and CEI only 25% of the time.**
- **EPA twice acknowledged in emails that it sets aside requests from Christopher Horner and groups Horner is affiliated with (EELI, CEI, FME Law) for separate handling, behavior that it publicly denies while implicitly acknowledging (as it must) that doing so is improper.**
- **EPA ignores targeted groups' clear and repetitive request language, effectively denying that these groups stated what they stated, requiring the time, expense and opportunity cost of needless administrative appeals and, now, litigation.**
- **EELI and FME Law presented an opportunity for EPA to prove it denies their requests for fee waivers without even reading them, which opportunity EPA seized.**
- **After EELI and FME Law exposed this in court pleadings and it obtained media coverage, EPA dropped this long-running pattern in favor of a new basis for denial.**
- **EPA also repeatedly ignores the groups' alternate basis for fee waiver, as media organizations -- which status EPA grants to, e.g., Sierra Club and which the government has already acknowledged applies to CEI -- regularly refusing to even rule on those requests (constructive denial), imposing more cost and delay.**
- **EPA and other federal agency history affirms this selective bias is improper:**
  - **EPA previously granted these groups' fee waivers**
  - **Other federal agencies regularly grant the groups' waivers based on far less fulsome and specific language than EPA now rejects as insufficient (see examples, FN 45, *infra*).**
  - **'Green' groups routinely receive fee waiver on much lesser showings.**
  - **EPA has continuously adapted its practices denying these targeted groups: when they first drew attention, when the groups sued, again when OIG moved past the initial fact-finding stage, when OIG oddly decided to narrow its inquiry, and finally when the groups exposed that EPA was denying the requests without reading them first.**

- **This costs the groups (and the taxpayer) tens of thousands of dollars in needless appeals and litigation, clogs the courts, and extensively delays targeted groups' access to public records.**
- **Here is how:**
    - **For a time, the groups would prepare a lengthy appeal and EPA would then waive the fees. In response to this "make work," the groups began to include in their original requests all the justification for a fee waiver that requesters normally place into an appeal. EPA then began ignoring the lengthy fee waiver justifications, denying fee waivers entirely without foundation (*e.g.*, on the easily disproved basis that assertions made in the requests were not actually made), again forcing the groups to prepare appeals. EPA would then grant the appeal and waive fees.**
    - **EPA became more aggressive. Despite the fact that these requests for fee waivers were materially identical to the groups' requests routinely granted by federal agencies -- the Departments of Labor and Energy, Federal Energy Regulatory Commission, and even EPA -- EPA began to delay responding to, and then denying, the appeals. The groups responded by filing suit, at which time EPA would agree to grant the fee waiver if they groups dropped the suit. EPA then escalated further by refusing to grant fee waiver even after being sued, imposing further delay and cost as matters moved forward in the courts. It now refuses to review and produce records until after the groups agreed to payment, while refusing to state what that payment must be.**
    - **Once the subject of a lawsuit, EPA would delay resolution, continuing to deny fee waiver even after its counsel acknowledged EPA had waived its ability to seek fees by missing statutory deadlines.**
- **In addition to the tenacity and malleability of the obstructions, the timing of EPA's new pattern and practice, its own past practices and practices of other agencies toward the same groups present a *prima facie* case of EPA retaliation against organizations critical of it and whose use of FOIA has exposed, embarrassed and apparently caused problems for the Agency.**
- **This is a classic campaign of using overwhelming governmental resources to wear down targeted opponents, in this case non-profit watchdog groups.**
- **EPA thereby ensures the groups have much less time to perform their missions.**
- **By designing its inquiry to avoid these abuses OIG avoids addressing even sworn evidence of improper EPA behavior, making this a second recent inquiry conducted in a manner that provides cover for unlawful EPA practices *exposed by these same targeted groups*.**
- **OIG is ensuring, again, that EPA avoids accountability for exposed *political or ideologically grounded abuses* (vs. waste, fraud, offensive personal behavior).**

E&E LEGAL, FME LAW REPORT ON EPA ABUSES, AND ITS OIG IMPROPERLY PLAYING DEFENSE COUNSEL TO PROVIDE COVER

After evidence emerged in Spring 2013 of costly, disparate treatment of conservative or limited-government non-profit groups seeking fee waivers under the Freedom of Information Act (FOIA), similar to contemporaneous exposure of abusive targeting by the Internal Revenue Service, Congress encouraged the United States Environmental Protection Agency's Office of the Inspector General to assess evidence of Agency bias in granting and denying these waivers.[1]

EPA first escalated this practice against the Competitive Enterprise Institute (CEI) then expanded and stepped it up in targeting the Energy & Environment Legal Institute (EELI); this implicated FME Law which, with EELI, has filed numerous requests on issues of common interest. EPA has since acknowledged more than once and in writing that it segregates requests by the groups' shared counsel Chris Horner — and, expressly, groups he is affiliated with — for handling together, separate from others' requests, despite publicly denying that they consider requesters' identities and the obvious impropriety of such targeting.

For the second time in recent months EPA's OIG has improperly designed its inquiry to avoid addressing the most damning evidence, ensuring that "the scope of the investigation was artificially narrow", "provid[ing] cover for inappropriate behavior of EPA officials."[2]

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[1] *See* 5 U.S.C. § 552.

[2] See *Vitter: OIG Narrowed Investigation to Provide Cover for EPA's Email Problems*, February 20, 2014, and Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, to Hon. Arthur A. Elkins, Jr., addressing apparent impropriety in OIG inquiry into use by EPA appointees of private email accounts, also not searched when responding to FOIA or oversight requests, discussed i*nfra*.

Electronic links are embedded for many cited sources; this report is available in electronic format at http://eelegal.org/wp-content/uploads/2014/02/EE-Legal-FME-Law-Report-on-EPA-Fee-Waiver-Bias-and-OIG-Abuse.pdf.

A complaint filed by one OIG employee alleging physically harassing behavior by an employee of EPA's Homeland Security office drew media attention to the lack of cooperation by certain career employees with OIG inquiries into EPA abuses. This willingness to investigate, *e.g.*, supervisors approving unwarranted bonuses or well-paid employees spending their EPA time and computers for viewing and storing pornography, does nothing to mitigate what this report details, which is OIG yet again covering for apparently political or ideological abuses.

Further, an email that has recently become public indicating that the IG Arthur Elkins was elevated to his position by a longtime and close from of Lisa Jackson (Craig Hooks), who then was elevated to an Assistant Administrator position, adds further question to the IG's independence and ability to disinterestedly investigate claims reflecting on the Jackson team's political machinations.[3]

Both instances that OIG has or, we are informed (see *infra*) is preparing to provide cover for were foisted upon the office by congressional Republicans, and were exposed by the same two groups (CEI and E&E Legal). The bias among EPA's political appointees and career activists is clear, as they impose tens of thousands of dollars in costs for unnecessary staff and attorney time spent simply to clear bureaucratic hurdles and obtain waivers provided for in statute, and for which the judicial precedent is clear (as detailed in APPENDIX A).

EPA Behavior

[3] *See* February 17, 2009 email from "Richard Windsor" (Lisa Jackson) to Marygrace Galston asserting her preference to not use an executive search agency to fill the "independent" IG slot because Craig Hooks has a candidate. Hooks is also the EPA appointee who asserted that there was no EPA involvement with Battelle's decision to terminate its contract with a new state air group known as the Association of Air Pollution Control Agencies (AAPCA), which was posing EPA greater challenges than the "National Association of Clean Air Agencies (NACAA), in part due to concerns among some AAPCA members about NACAA's pro-EPA policies." *See*, "EPA Emails Reveal Push To End State Air Group's Contract Over Conflict," Inside EPA, Aug. 21, 2013, http://insideepa.com/Environmental-Policy-Alert/Environmental-Policy-Alert-08/21/2013/epa-emails-reveal-push-to-end-state-air-groups-contract-over-conflict/menu-id-1095.html.

Specifically, EPA selectively denies requests for fee waiver, expressly or constructively (by ignoring them) for groups known to challenge and/or expose EPA. This is particularly pronounced against EELI and FME Law (after OIG narrowed its inquiry to exclude EELI and only consider CEI, EPA scaled back its bias against CEI while simultaneously aggravating its treatment of EELI). Yet EPA regularly grants these waivers to legally similar if ideologically distinct environmentalist pressure groups with which it works closely on shared agenda. (EPA is also credibly alleged to promptly release responsive records to favored groups and unredact copies of records when the groups complain if records are redacted.[4])

This is true both for comparable "national" groups down to purely local organizations -- such as Buzzards Bay Coalition, Edison (NJ) Wetlands Association and Concerned Citizens for the Environment of Throop. Yet EPA's express basis for denying the targeted conservative groups, which have drawn more media attention than any others to EPA over their "FOIA'd" information, is that they are unlikely to broadly disseminate the information they seek. The actual reason appears to instead be the groups' success in doing just that.

[4] *See e.g.*, Lauren McGaughey, "ExxonMobil Baton Rouge safety issues 'prevalent throughout refining sector:' United Steelworkers," *New Orleans Times-Picayune*, February 27, 2013 http://www.nola.com/environment/index.ssf/2013/02/exxonmobil_baton_rouge_safety.html, detailing that EPA immediately released a redacted version of requested report to theLouisiana Bucket Brigade, then (upon the requesters complaining about redactions) released an unredacted version weeks later. *See also*, Press release, "LMOGA President Calls for Greater Transparency of Bucket Brigade-EPA Connections", Louisiana M Oil and Gas Association,, June 14, 2013, http://energizela.com/news/blog/lmoga-president-calls-for-greater-transparency-of-bucket-brigade-epa-connections/; *see also*, May 18, 2010 EPA Emails including from Kelly Rimer to Shira Sternberg and Janet McCabe, "Bucket Brigade outreach" and from Dana Tulis to Janet Woodka, Seth Oster, Stephanie Owens, "Re: meeting with enviros" noting that then-Administrator Lisa Jackson instructed staff to work with the Louisiana Bucket Brigade in addition to national environmentalist groups with which EPA has a close working relationship and from which it has hired many of its senior officials and for which several officials have left EPA. *See also*, James Varney, "A cozy relationship between regulators and activists," *New Orleans Times-Picayune*, August 31, 2013, http://www.nola.com/opinions/index.ssf/2013/08/a_cozy_relationship_between_re.html; Ron Arnold, "EPA manipulates the FOIA to help Big Green", *Washington Examiner*, September 6, 2013, http://washingtonexaminer.com/epa-manipulates-the-foia-to-help-big-green/article/2535290.

For example, EELI and FME Law have analyzed EPA's application of the fee waiver provision and found statistically significant evidence of biased treatment. For example, in a recent six month period for which EPA provided records, after its practice drew attention and it was under IG scrutiny (May 18, 2013-January 30, 2014), EPA received 345 fee waiver requests. It granted full or partial fee waiver to one class of requester, environmentalist pressure groups, 58% of the time, to "conservative" requesters 33% of the time, but granted fee waiver to EELI and/or FME Law only 25% of the time.[5] Even these figures hide further bias as EPA typically includes as "granted" fee waiver requests it constructively denied by goring them, granting them only to later meaninglessly, after being sued; that is, it includes numerous 'false negatives.'

By placing delays in the path of certain groups that it does not impose on allied organizations, EPA financially drains opponents' resources, compelling them to spend hundreds of hours on unwarranted administrative and judicial pleadings, delaying release of information by a year or more and keeping the groups from reviewing and disseminating public information which is part of the organizations' missions.

As OIG is aware, EPA's behavior is a pattern, one that now involves improper denial of more than a dozen E&E Legal and CEI fee waivers though the groups are, for FOIA purposes,

[5] Analysis by David Schnare PhD and Brittany Madni of information produced in response to EPA FOIA No. EPA-2014-002474, Excel spreadsheet of which is available at https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d280186d73. Because of the timing and EPA's modified behavior after OIG initiated its inquiry, this data set is particularly favorable to EPA's position. Further remarkable is that during this period EPA did not grant fee waiver once to educational, state and local government and tribe parties requesting fee waiver; these figures prove EPA is not applying FOIA's fee waiver provision in the manner intended, coming close only when the requester is a group coordinating with EPA on its agenda.

indistinct from the national green pressure groups EPA treats more or less properly.[6] By designing its review to exclude evidence of this practice, OIG provides cover for it.

For example, OIG is aware that EPA has engaged in a pattern of making patently false claims as the bases for its denials: the most thoroughly exposed ruse is the claim that the groups did not express an intention to broadly disseminate the information, when in fact each request dwells upon that intention, and citing as evidence their practice doing so. Exposing that this unsupportable delay tactic was the product of EPA reflexively denying the groups without reading their requests, E&E Legal even presented in one request an image of a chalkboard on which it wrote ten times, "We intend to broadly disseminate responsive information."

EPA promptly denied the fee waiver on the grounds that the group failed to express an intention to broadly disseminate responsive information. Discussed on p. 24-25.

Inventing an easily falsifiable basis for denial affirms the absence of a legitimate one. Choosing to no longer even read targeted groups' requests before denying them is proof of abusive practice.

Calls for Inquiry, OIG Dereliction

The evidence of EPA behaving similar to the IRS came to light after Horner, whose requests EPA has acknowledged are the specific target of its treatment, submitted a FOIA request to EPA to better assess evidence of bias mounting from his personal experience and discussions with other such groups. That March 4, 2013 request sought all of EPA's responses to fee waiver requests since the beginning of 2012 (HQ-2013-004176). These records, produced only after the Competitive Enterprise Institute (CEI) sued EPA to comply with the request, also

[6] HQ-FOI-0152-12, HQ-FOI-0158-12, HQ-FOI-01268-12, HQ-FOI-01269-12, HQ-FOI-01270-12, HQ-2013-003087, R10-2014-000344, HQ-2014-001664, HQ-2014-001684, HQ-2014-003658, R6-2013-003663, R10-2013-008285, HQ-2014-002006, R3-2014-004011, R3-2014-004771, HQ-2014-004759.

convinced congressional oversight staff that the pattern was evident and warranted concern: ideologically aligned groups, which other FOIA'd emails show are uncomfortably close partners with EPA to advance a shared agenda, regularly received fee waiver (*e.g.*, Sierra Club, discussed *infra*); however, particular organizations, specifically CEI and American Tradition Institute (now E&E Legal) were being regularly, improperly denied FOIA fee waivers, both expressly and by the Agency simply choosing to ignore their requests.

Subsequent congressional inquiry independently affirmed the appearance of bias. The U.S. Senate Committees on the Judiciary and Environment and Public Works, and the U.S. House of Representatives Committee on Oversight and Government Reform jointly wrote EPA Acting Administrator Bob Perciasepe on May 17, 2013, suggesting the need for an impartial investigation of the Agency's fee waiver practices. Such independent oversight via adversarial inquiry is the role of an agency Inspector General, not playing protector or defense counsel.[7]

That same letter also included a series of questions for such an inquiry that would aid in "additional congressional scrutiny" and a comprehensive report examining the heart of the bias.

Instead, it now appears that the OIG has, without apparent reason or rational explanation, prepared a report whose limited scope ensures it will avoid the most troubling information. Other factors described in Appendix A indicate EPA FOIA staff have been kept informed of this decision, and of when the inquiry moved beyond its initial fact-gathering stage, and modified their behavior accordingly along the way.

When EPA's actions drew scrutiny, EPA shifted to serially classifying the groups' requests as "not billable." As OIG moved beyond fact-gathering EPA then reverted to denying the groups' fee waivers. Then, EPA began demanding fees before proceeding -- abandoning its

[7] *See* Inspector General Act of 1978, 5 U.S.C. App., Pub.L. 95-452, 92 Stat. 1101.

initial defense against the evidence, of claiming that because it had previously never upheld this delaying tactic on appeal there was in the end no actual impropriety.

In short, after EPA's bias was exposed and subjected to scrutiny, the Agency tread water until the threat passed; then it came back against these groups more aggressively than ever. Then, OIG designed its inquiry in a way that ensures the threat had passed, leaving it once again covering for EPA transparency abuses violating several federal laws.

Specifically, OIG personnel affirm that that office has for the second time deliberately narrowed its inquiry ensuring the inquiry does not reach uncomfortable issues or conclusions. It decided against including in its examination EPA's treatment of ATI/E&E Legal despite that group having the same requesting counsel, using the same or similar language, and receiving the same but more egregious treatment on its fee waivers, all of which it contemporaneously revealed as being of a part with EPA's treatment of all requests by Horner for CEI and ATI/E&E Legal (only later did EPA attorneys confirm that Horner's requests were their target). Notably, E&E Legal's experience includes the most pronounced, most regular and most facially improper behavior. Yet for no asserted reason other than (illogical) "randomness", EPA's OIG chose between the groups, and chose to focus on CEI and "random" groups that did not identify bias.

As a result, OIG's upcoming report will be inherently incomplete. We therefore provide the following facts in this assessment and supporting appendices, all matters of public record, available to the Inspector General, and many of which Horner specifically brought to OIG's attention. This fills unnecessary gaps in OIG's upcoming report, providing much-needed context for and facts ignored in that incomplete effort.

OIG's statement that this design was the result of randomness strains credulity. It also would in any event be an inappropriate approach given the specific pattern of behavior revealed and the particulars of the allegations prompting the inquiry. Inquiring of groups that did not allege improper treatment to the exclusion of one that did, with troubling specifics, is absurd.

Possibly most telling, EPA's Office of the Administrator and Office of General Counsel have both represented to Horner that the Agency separates his requests for specific handling, and those by groups employing him, managing requests "from yourself or your affiliated organizations" [sic] together -- not individually, not by the group making the submission as a class, and certainly not blind to identity. This is improper; it also proves that EPA has targeted these groups for disparate treatment, in addition to the documentary evidence. These admissions also leave no doubt about the wholly artificial bifurcation of this selective treatment by OIG, narrowing its inquiry so as to avoid addressing EPA's most egregious actions which prompted calls for the inquiry in the first place.

As the Wall Street Journal put it in describing the failure to interview conservative groups targeted by the IRS, "That's like investigating a burglary without interviewing the burgled."[8] It also represents the second such helpfully tailored, designed-to-fail OIG inquiry of alleged EPA abuses, proximate in time and design to an earlier inquiry also prompted by CEI and E&E Legal -- which by chance have generated the most unfavorable revelations, media attention and congressional oversight of EPA of any groups -- begs questions about the Inspector General Office's impartiality. Other information in addition to that identifying the Elkins-Hooks-Jackson

[8] Editorial, *The IRS Gets a Pass*, WALL STREET JOURNAL, Jan. 14, 2014.

connection now further calls into question OIG's independence and indicates it is willing to cover for and protect officials, by design and execution of its inquiries.[9]

A note about the costs EPA's obstruction imposes: What this report details is of a part with a demonstrated culture at EPA eager to make examples of and attempt to undermine the effectiveness of those who questioning EPA's authority or agenda. The selective use of denying fee waiver in order to frustrate extraction of public information recalls the enforcement "philosophy" articulated by then-Region 6 Administrator Al Armendariz, as akin to random Roman crucifixions to instill order by examples. Armendariz unlawfully passed through the EPA/greens' "revolving door" to run Sierra Club's "anti-coal campaign" in the region, as phrased in a June 28, 2013 internal EPA email relating Sierra's call to EPA to inform them of the move.

Imposing time-consuming and expensive regulatory hurdles and compelling unnecessary litigation is indistinct as a matter of legal harassment from filing frivolous lawsuits: both have as a principal objective to wear down and subdue, intimidating parties against whom one has no legitimate recourse.

OIG and EPA began a Washington 'whisper campaign' to media and Hill staff in advance of OIG's report on fee waiver bias with the message that, by not billing these parties it isn't actually costing them money. Not only did that talking point soon expire when EPA began demanding thousands of dollars before processing requests, but it ignores the most significant financial costs of this campaign of selective obstructionism, compounding the illegality.

The costs to small, private entities seeking public information that EPA imposes are by no means limited to fees extracted to process requests (although fees can be substantial, which is

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[9] *See e.g.*, *Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, to Hon. Arthur A. Elkins, Jr., Reg'l Adm'r, Inspector General, U.S. Envtl. Prot. Agency* (Feb. 18, 2014) ("Unfortunately, the OIG has left too many questions unanswered, which leads me to suspect that your office has abandoned its obligation under the law to be independent from agency interference."). *See also*, *Vitter Alleges Questionable Independence In Investigations by EPA Inspector General*, Bloomberg BNA, Feb. 20, 2014. This appearance of having assumed the role of covering for EPA is further discussed, *infra*.

why Congress exempted non-profits): EPA's stonewall drains the groups' resources. EPA fee demands have come only after first illegally denying the fee waiver on patently untrue grounds, then illegally delaying ruling on E&E Legal's administrative appeal, then forcing the group to sue (out-of-pocket cost: adding appx. $425.00 and months of delay each occurrence) when it again illegally denied the fee waiver (on completely different grounds). EPA tactics extend even to refusing to provide the legally required cost estimates when denying fee waivers. Like granting the fee waiver, providing a cost estimate pins EPA to a position but also allows a party to move the matter toward production, and moving the process forward appears to be what EPA seeks to avoid however it can. EPA has refused to provide a long-overdue cost estimate months after having re-promised it, producing an estimate once EELI informed the Department of Justice it would seek the court's intervention to force EPA to produce it. Only then did EPA produce a bill, for $60.00, having cost E&E Legal thousands. EPA is now producing the records and, rather than charging EELI, is paying its costs and legal fees, having forced it to sue unnecessarily.

EPA imposes the same selective tax every time it obstructs disfavored requesters.

EPA knows that every hour or 100 hours it can extract from these groups to fight the Agency's obstruction are hours not spent reviewing and disseminating public records. The pattern of selectively and illegally denying fee waivers, detailed in this report also addressing the varied means EPA uses, is intended to discourage certain parties from carrying out the very purpose of the FOIA laws, namely to shine a light on government activities.

OIG covering for this once again enables EPA employees willing to break the law regardless of the disrepute it brings upon the Agency, and the waste of taxpayer and non-profits' resources. The pattern and covering it up are plainly improper and require Congress's oversight.

APPENDIX A

I. The Full Scope of EPA's Recent Selective FOIA Fee Waiver Abuses

A. EPA Unlawfully Uses Fees as a Barrier, and in a Biased Fashion

The representative examples of EPA FOIA fee waiver abuse cited in this report reflect a pattern of improper and apparently retaliatory EPA denials (both express and "constructive" by ignoring the request[10]). E&E Legal and CEI are similarly situated groups, that received similar treatment. They share the same legal counselor making requests on their behalf whose signed requests are those that EPA has taken to obstructing, and which EPA now admits to be targeting. The same individual (Horner) unearthed EPA's "Richard Windsor" embarrassment and discovered widespread EPA destruction of an alternative to email, text messaging (by Lisa Jackson and Gina McCarthy, presently in litigation as *CEI v. EPA*, D.D.C. cv: 14-1532 and cv: 14-582, D.D.C., the latter seeking McCarthy's EPA correspondents' copies). Both groups have drawn substantial media attention disseminating information obtained via FOIA in the past two years which information reveals behavior by EPA officials and employees caused further embarrassment also resulting in significant public and congressional scrutiny of Agency practices.[11] Both groups receive fee waivers from other federal agencies. Both lack an ideological alignment with EPA's high-profile policy initiatives.

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[10] *Oglesby v. Department of the Army*, 920 F.2d 57 (D.C. Cir. 1990). *See also CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013).

[11] Horner submitted for CEI a series of FOIA requests whose productions led to great public, media and congressional scrutiny of EPA before this pattern escalated. For example, he exposed former Administrator Lisa Jackson used a false-identity email account in the name of "Richard Windsor." *See* Freedom of Information Act Requests from the Competitive Enterprise Institute, to the Envtl. Prot. Agency, FOIA Nos. HQ-FOI-01268-12, HQ-FOI-01269, HQ-FOI-01270-12. FOIA requests cited herein my be accessed via https://foiaonline.regulations.gov/foia/action/public/home.

Both non-profit groups are also the recipients of aggressive EPA denial of their FOIA fee waiver requests, delaying and thereby denying their access to records and costing each of them many thousands of dollars in unnecessary staff and attorney time for administrative appeals and judicial review. Together, the groups have received over a dozen improper fee waiver denials for requests, first seeking information on EPA's relationship with green pressure groups, and particularly after their successful use of FOIA — and revelation of FOIA bias — caused problems for the current administration. Each of the groups brought this bias to the public's attention contemporaneously in April and May, 2013.[12]

Use of fee waivers is a well-known means for reluctant agencies to impose a barrier to access.[13] While the events described above and immediately below might conceivably reflect an extended series of coincidences not visited upon others, E&E Legal and CEI do appear to be the focus of a continuing practice of intentionally disparate application by EPA of FOIA's provision of fee waiver for matters of significant public interest. EPA serially refused to even rule on their alternative request for waiver as media outlets, which EPA grants to green pressure groups.

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[12] *See e.g.,* "That is, these green pressure groups encountered a cooperative EPA 92 percent of the time, but Horner's requests on behalf of CEI and the American Tradition Institute were rejected more than 93 percent of the time." CEI Press Release, *EPA Gives Info For Free to Big Green Groups 92% of Time; Denies 93% of Fee Waiver Requests from Biggest Conservative Critics: Clear Political Bias Evident in Agency's Awarding of Fee Waivers on FOIA Requests*, May 14, 2013. E&E Legal is the successor organization to the American Tradition Institute. *See e.g.* Press Release, E&E Legal, INTRODUCING THE ENERGY & ENVIRONMENT LEGAL INSTITUTE, Oct. 3, 2013, http://www.prnewswire.com/news-releases/introducing-the-energy--environment-legal-institute-ee-legal-226354261.html.

[13] *See* February 21, 2012 letter to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of "exorbitant fees" under FOIA as a barrier to access, available at http://images.politico.com/global/2012/03/aclufffeewvrfoialtr.pdf; *see also National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); *see also* "Groups Protest CIA's Covert Attack on Public Access," OpentheGovernment.org, Feb. 23, 2012, http://www.openthegovernment.org/node/3372.

We also note, for the record, evidence of internal "protocols" to deal with "such requests", with CEI (Horner request R6-00361-12) having uncovered an internal EPA email instructing FOIA officers on same. *See e.g.,* Hon. Sen. David Vitter, "Clearing the Air on an Opaque EPA", *US News*, March 13, 2013.

Previously, EPA ritually would overturn the fee waiver denials after these groups sought administrative appeal, or promptly abandon them as unsupportable when the groups sued.[14]

Recently, however, EPA has begun to use a new tactic. The Agency has begun postponing decision on administrative appeal then, after adding more delay, if it responds at all it denies the fee waiver on appeal as well, requiring payment of fees before it will initiate processing; it has also taken to refusing to even provide the estimate of fees, as an apparent, further delaying tactic.[15]

Compelling unnecessary litigation is indistinct as a matter of legal harassment from filing frivolous lawsuits: both have as a principal objective to wear down and subdue, intimidating parties against whom one has no legitimate recourse.

This new twist digs deeper in EPA's campaign against the targeted requesters but also undermines EPA's previous claim, when its fee waiver bias was revealed, that *it had never actually charged CEI or E&E Legal any fees*. That is of course because, as mentioned, these efforts were always overturned or abandoned when challenged as nothing EPA dared defend before a court, because with rare exception EPA is not permitted to charge those groups fees.

Regardless, when the OIG inquiry passed its fact-gathering stage EPA decided to begin charging both CEI and E&E Legal, deciding to make these groups *serially* go to court to have their rights recognized and make the Agency comply with the law. Further, while EPA and its

[14] *See e.g.*, requests in various stages of this routine HQ-2013-003087, R6-2013-003663, HQ-FOI-0152-12, HQ-FOI-0158-12, HQ-FOI-01268-12, HQ-FOI-01269-12, HQ-FOI-01270-12.

[15] Examples include requests HQ-2014-000344, HQ-2014-001664 (now *EELI et al. v. EPA*, cv: 14-538, D.D.C.), HQ-2014-002006 (now *CEI v. EPA*, cv: 14-582, D.D.C.), R10-2013-008285 (now *FMELC et al. v. EPA*, cv: 13-01778, D.D.C.); these recent denials are on the facially unsupportable grounds that requesters did not state an intention to broadly disseminate when they expressly and repeatedly did so, in each such request. See discussion, *infra*. Also, on February 19, 2014, EPA informed CEI on appeal that it was now characterizing 501c(3) CEI as a "commercial" requester and charging fees for all processing of HQ-2014-001684.

champions complain of EPA's budget allocation,[16] it is noteworthy how this decision to further compound its insistence on disparately treating certain parties wastes not only the non-profits' and the courts' resources but also far more taxpayer resources at the agency.

Abusing the statutory provision of fee waivers, for certain disfavored requesters, is not a trifling matter given that fees can run into the five- or even six-figures in large FOIA productions; that is one way this practice is readily analogous to related IRS abuses, as this can make or break a group's ability to perform its mission (precisely as the courts have noted in voluminous precedent prohibiting the use of fees as a barrier to non-profit requesters, discussed, *infra*). Whatever the ultimate fee amount assessed, however, EPA uses the initial denial and appeals process, and now the denial on appeal and the inevitable litigation that follows, to delay and deny selected groups' access to information (also discussed in more detail, *infra*).

B. OIG Urged to Investigate Evidence of Fee Waiver Bias *a la* IRS Discrimination

The United States Environmental Protection Agency Office of Inspector General (OIG) is preparing to release the results of another inquiry into claimed EPA transparency abuses. Specifically, Congress prompted an OIG investigation into EPA's apparent selective and improper denial of statutorily-provided fee waivers at the "initial determination" stage for certain requesters, impeding their access to records, while routinely granting the same fee waivers to

[16] *See e.g.*, Coral Davenport, *EPA Funding Reductions Have Kneecapped Environmental Enforcement*, NATIONAL JOURNAL, Mar. 3, 2013; Darren Goode, *House panel approves bill with deep cuts for EPA*, POLITICO, Jul. 24, 2013.

ideologically aligned requesters.[17] This behavior is consistent with other documented politicization of FOIA by the current administration.[18]

When the documentary evidence first emerged, EPA dismissed it by changing the subject. The Agency denied something that was not alleged — that it had exacted fees from these parties, which with rare exception it is prohibited from doing[19] — ignoring the true issue that it employs fee waiver denials both express and by ignoring the request to delay and discourage disfavored requests and requesters.

Now, we have learned that the EPA OIG – for the second time in as many inquiries into abuses that CEI and E&E Legal were instrumental in exposing – has designed this inquiry in a way ensuring it will minimize negative findings by avoiding a large swathe of the most relevant information, and some of the most damning information.

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[17] *See* Letter from Hon. David B. Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Charles Grassley, Ranking Member, S. Comm. on the Judiciary, Hon. James Inhofe, Ranking Member, S. Subcomm. on Oversight, S. Comm. on Env't & Pub. Works, & Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Govt. Reform, to Hon. Bob Perciasepe, Acting Adm'r, U.S. Envtl. Prot. Agency (May 17, 2013). *See also*, Memorandum from Carolyn Copper, Asst. Inspector General, Office of Program Evaluation, U.S. Envtl. Prot. Agency Office of Inspector General, to Malcolm D. Jackson, Asst. Adm'r and Chief Information Officer, Office of Environmental Information, U.S. Envtl. Prot. Agency, *Notification of Evaluation of EPA's Freedom of Information Act Fee Waiver Process* (Jun. 19, 2013).

[18] C.J. Ciaramella, *Political Review Hampers FOIA Process, Watchdogs Say,* WASHINGTON FREE BEACON, Jan. 27, 2014.

[19] *See e.g.*, "For one thing, EPA says the activist complaining about the agency's denial of fee waivers for document requests never actually had to pay any money, regardless of whether it officially waived the costs." Erica Martinson, *EPA: Numbers disprove conservative claim of bias*, POLITICO, Jun. 10, 2013. *See also* Letter from Hon. Bob Perciasepe, Acting Adm'r, U.S. Envtl. Prot. Agency to Hon. David B. Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Charles Grassley, Ranking Member, S. Comm. on the Judiciary, Hon. James Inhofe, Ranking Member, S. Subcomm. on Oversight, S. Comm. on Env't & Pub. Works, & Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Govt. Reform (Jun. 23, 2013). Also note that, by not considering requests which it simply ignored, and by counting requests for which it granted fee waiver only after appeal and/or after ignoring appeals so as to waive any opportunity to assess fees it could have demanded, EPA further distorted the reality of its behavior through this misdirection and made its own figures wholly irrelevant as a response to the allegations.

This, too, is in keeping with recent behavior. Earlier, OIG illogically narrowed its inquiry into evidence of widespread senior EPA official use of non-official email accounts[20] (which evidence has since grown thanks to other FOIA requests), by asking only those who were alleged to have used such accounts for work-related correspondence if they had behaved in an improper fashion; the employees stated they did not, which was then OIG's conclusion.[21] We now know that at least one EPA official did not tell the truth when asked about this practice, and that this was not the first time a senior official in this EPA was not forthcoming about it.[22] (Also instructive is that, in the prior inquiry, after avoiding the most perilous (to EPA) factual inquiry OIG proceeded to change the subject by arguing that use of *secondary, official email accounts* (as opposed to the real issue, private accounts or the unprecedented "Richard Windsor" false identity) is not improper.[23]

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[20] Congressionally Requested Inquiry into the EPA's Use of Private and Alias Email Accounts, U.S. Envtl. Prot. Agency, Office of Inspector General, Report No. 13-P-0433, Sept. 26, 2013.

[21] *See e.g.*, "based only on discussions with these senior officials, the [Office of the Inspector General] found no evidence that these individuals had used private email to circumvent federal recordkeeping responsibilities." *Id*., at p. 3 ("At a Glance"); *see also* Report at p. 5.

[22] *Eye on the EPA: Less Than Thorough - Flaws in Recent EPA OIG Investigations: OIG Ignores Leads on EPA's Email Follies*, Senate Committee on Environment and Public Works, Minority (Feb. 13, 2014). Also, then-Region 8 administrator James Martin revised his affidavits in litigation seeking his work-related non-official account email after first claiming he did not use such accounts for official correspondence, in *CEI v. EPA* cv: 12-1497 D.D.C.

[23] *See* Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Technology, to Hon. Arthur A. Elkins, Jr., Reg'l Adm'r, Inspector General, U.S. Envtl. Prot. Agency (Feb. 7, 2013), citing evidence prompting this request for inquiry which the OIG's approach avoided addressing. Unfortunately, an IG office acting as defense counsel for the agency it is supposed to examine for compliance with law and policy would not be unprecedented. *See e.g.*, Mike Soraghan, *EPA IG report in Range contamination case leaves unanswered questions*, E&E NEWS, Jan. 14, 2014; Michal Conger, Interior IG kept documents from Congress out of 'respect' for Interior Department, WASHINGTON EXAMINER, Jan. 9, 2014; Lenny Bernstein and Ann E. Marimow, *EPA official's fraud fell through cracks, documents show*, WASHINGTON POST, Feb. 4, 2014.

This most recent, inexplicable narrowing of the inquiry[24] once again puts an end to the venture without it ever actually beginning: OIG has decided to avoid addressing EPA's treatment of the most plainly wronged fee-waiver requester, E&E Legal, thereby again avoiding addressing evidence of wrongdoing prompting the inquiry. That evidence includes sworn testimony by counsel explaining how tow politically unwanted requests were sat upon, until counsel sued.

OIG investigators have acknowledged to Horner that OIG narrowed its inquiry only to EPA's treatment of requests made on behalf of CEI; it says it scrutinized groups "randomly" instead of on the basis of CEI and E&E Legal coming forth. Horner informed OIG investigators of the factors affirming that that both groups of whose behalf he submitted requests are so similarly situated and that the entire controversy traces back to both groups contemporaneously announcing and presenting evidence of their identical treatment, as being of a part.

Further, of the parties, E&E Legal experienced the most egregious examples of bias. Those are the emphasis of this report, as OIG has elected to set them aside without scrutiny.[25]

Possibly most telling, two different EPA offices (Office of the Administrator, and Office of General Counsel), have separately represented to Horner that the Agency separates his requests, and those by groups employing him, for specific handling, managing requests "from yourself or your affiliated organizations" [sic] together — not individually, or even by the group making the submission.[26] EPA's recent statements in a Washington Times article that they

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[24] See Feb. 20, 2014 Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, to Hon. Arthur A. Elkins, Jr., Reg'l Adm'r, Inspector General, U.S. Envtl. Prot. Agency.

[25] *See e.g.*, affidavit filed in *ATI v. EPA* (cv: 13-112, D.D.C.), relating that a FOIA specialist informed Horner that National FOIA Officer Larry Gottesman had instructed her and her colleague to do no more work on two of Horner's FOIAs HQ-FOI-0152-12 and HQ-FOI-0158-12.

[26] Quoting Lynn Kelly, EPA Office of General Counsel, Feb. 19, 2014 email to Horner. *See also* Nov. 6, 2013, email from OA's Jonathan Newton asserting that EPA would satisfy ATI request HQ-009342 after processing Horner's CEI request HQ-2013-001343, which Newton asserted he would satisfy in 100 years.

process requests without regard to a party's identity, untrue though they plainly are,[27] nonetheless implicitly acknowledge that this is the opposite of appropriate: EPA must treat each request distinctly on its merits; these admissions, in addition to the documentary evidence, prove that EPA has singled these groups for particular (improper) treatment. OIG's review of the evidence should address the alleged treatment, not artificially exclude one group or the other to narrow the field of abuses. This makes OIG's artificial narrowing all the more stilted and appearing to be designed to avoid addressing EPA's most egregious actions prompting calls for the inquiry in the first place.

Further, the claim of randomness defies credulity: there is no logical reason to bifurcate groups jointly complaining of and presenting their shared experience, no logic to randomly examining other non-profit requesters which have not made themselves targets of EPA by exposing EPA scandals, and which have not complained of improper treatment; it is further improbable that, in the event randomness was in fact OIG's approach, that E&E Legal was randomly excluded, let alone that CEI was randomly selected.

The available facts indicate it is far more likely that OIG deliberately selected CEI among the complaining groups, and with equal deliberation excluded E&E Legal from scrutiny. Subsequent EPA actions, described below, indicate widespread internal awareness of this decision and of the ongoing status of OIG's effort.

Given this, we present the following facts about EPA's application of FOIA's fee waiver provision, facts that our communications with the OIG indicate have been improperly excluded from consideration. All are matters of public record, available to the Inspector General, and

[27] See Jim McElhatton, *EPA arms Democrats with data, snubs Republicans* available at http://www.washingtontimes.com/news/2014/mar/18/epa-gives-campaign-paper-trail-to-democrats-little/?page=all#pagebreak

many of which Horner specifically brought to the OIG's attention. These facts fill unnecessary gaps in OIG's forthcoming report and provide much-needed context to an apparently contrived but in any event incomplete effort. This document provides context necessary to evaluate OIG's claim to having inquired into the matter of fee waiver bias, and whatever conclusions it reaches.

C. EPA Practice: Dismiss Public Interest in EPA's Behavior and Misbehavior

EPA's targeted denials of fee waivers for certain groups now typically assert that the requested information would not significantly increase public understanding of government operations or activities, and/or that the requester did not express an intention to broadly disseminate responsive information. These are elements in FOIA's fee waiver requirement that the information pertain to a matter of "significant public interest", a standard that EPA finds to be a very low one to clear, indeed, depending upon the requester..

For example, EPA denied CEI's fee waivers for requests seeking the background discussions regarding creation of, and emails from, former-Administrator Lisa P. Jackson's non-public EPA email account (which turned out to be an unprecedented false-identity account, not a "secondary" account), former Administrator Carol Browner's secondary account, and certain emails in Jackson's non-public account. In denying the two relevant requests' fee waivers, EPA claimed there was no evidence "that the release of the information requested significantly increase to [sic] the public understanding of government operations or activities."[28]

[28] EPA response denying fee waiver for FOIA Nos. HQ-FOI-01268-12, HQ-FOI-01269, HQ-FOI-01270-12 May 8, 2012. EPA treated all three separate requests collectively. EPA later overturned two of the fee waiver denials as improper on administrative appeal -- claiming a mere handful of responsive records existed between the two requests, EPA could have charged no fees under any scenario, for any requesting party. Yet it maintained its most risible position denying fee waiver for the "Windsor" account request, until abandoning that position when the matter was tried.

EPA's denial was on its face highly dubious considering the requests included detailed, even voluminous discussion of the accounts and the public interest in that they were never-before revealed non-public email accounts; the requests cited to an internal EPA memo to the National Archivist acknowledging the discovery of these accounts and stating that "Few EPA staff members, usually only high-level senior staff, even know that these accounts exist."[29]

Of course, ultimately by this FOIA CEI counsel Horner revealed that Ms. Jackson used a false-identity email account in the name of "Richard Windsor." Exposure of the "Windsor" account (by CEI disseminating the information) became arguably the biggest FOIA-related news story of the next year or more, as should have been evident in the requests themselves would be the case. Indeed, those requests not only led EPA to post the productions on EPA's Frequently Requested Records page where they constitute the overwhelming majority of such records,[30] and sparked massive coverage on their own merits, but also triggered a broader inquiry by Associated Press into the practice across the Obama administration[31] and led to inquiries and

[29] *See* Letter from John B. Ellis, U.S. Envtl. Prot. Agency, to Paul Wester, Director, Modern Records Program, Nat'l Archives and Records Administration, Apr. 11, 2008. *See also e.g.*, David Martosko, *Phony email account used by recently-resigned EPA administrator was NOT standard practice and broke federal law, researcher responds to Sen. Barbara Boxer*, DAILY MAIL (UK), Apr. 11, 2013.

[30] http://www.epa.gov/epafoia1/frequent.html.

[31] *See e.g.*, "Some of President Barack Obama's political appointees are using secret government email accounts to conduct official business, The Associated Press found, a practice that complicates agencies' legal responsibilities to find and turn over emails under public records requests and congressional inquiries....Late last year, the EPA's critics — including Republicans in Congress — accused former EPA Administrator Lisa Jackson of using an email account under the name "Richard Windsor" to sidestep disclosure rules. The EPA said emails Jackson sent using her Windsor alias were turned over under open records requests. The agency's inspector general is investigating the use of such accounts, after being asked to do so by Congress...The EPA's secret email accounts were revealed last fall by the Competitive Enterprise Institute, a conservative Washington think tank that was tipped off about Jackson's alias by an insider and later noticed it in documents it obtained under the FOIA. The EPA said its policy was to disclose in such documents that "Richard Windsor" was actually the EPA administrator." Jack Gillum, *Top Obama Appointees Using Secret EMail Accounts*, ASSOCIATED PRESS, June 4, 2013.

media coverage thereof expanding into other improper practices such as private email accounts for work-related correspondence.[32]

Yet the position that these records would not significantly inform the public is an actual EPA determination, one used to deny fee waiver in that instance, among numerous others which also drew far more than typical interest. As such, these fee-waiver denials by the Agency not only are absurd, but raise questions whether they are deliberate obstructions and knowingly improper.

Barring some exception whenever EPA denies FOIA fee waiver requests of non-profit parties, particularly those with a record of broad dissemination of public information, it is on its face improper. EPA's selective practice gives the inescapable appearance of an intent to obstruct, particularly given FOIA's bias toward disclosure, and the requirement that not-for-profit groups have the Act's fee waiver provision liberally construed in their favor.

D. Similarly, EPA Ignores Plain and Repetitive Assertions in the Groups' Requests, Falsely Asserting Requesters Do Not State an Intention to Broadly Disseminate

As established by numerous examples cited in footnotes 40, 41 and 44, *infra*, many federal agencies including EPA acknowledge that E&E Legal and CEI merit fee waivers when using the same or less robust versions of the heavily-sourced fee waiver justification that EPA now says is insufficient. This language is also more robust than that offered by the green activist groups for which the Agency regularly waives fees. This practice reflects an effective admission that the recent escalation of denials is improper.

Setting aside the obvious change in circumstances of the embarrassment or otherwise consequential attention that these two groups/their requesting counsel have brought to EPA via

[32] *See e.g.*, Jack Gillum, *Christie Aide Is Latest to Use Private Emails*, ASSOCIATED PRESS, Jan. 11, 2014.

FOIA, in isolation these examples might be considered merely "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[33] However, further specifics of EPA's fee waiver denials indicate this pattern indeed represents intentional obstruction.

Consider that EPA began repeatedly denying fee waivers for E&E Legal (and its co-requester FME Law) on the grounds that they "have not expressed a specific intent to disseminate the information to the general public", although each request did in fact indicate just such an intention in plain language, typically with repetition.

For example, these requests cited, *e.g.*:

> "research, legal, investigative journalism and **publication functions**, as well as **transparency initiative seeking public records** relating to environmental and energy policy and how policymakers use public resources, **all of which include broad dissemination of public information obtained under open records and freedom of information laws**…", "[their] record of obtaining and producing information as would a news media outlet and as a legal/policy **organization that broadly disseminates information on important energy- and environmental policy related issues**...[including] ongoing efforts toward publication on national and state regulatory programs and their environmental and economic consequences", their intention to **produce "a report that is accessible to the public at large"**, and their "'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**.'"[34]

EPA's claim denying these fee waiver requests — that they did not express what the requesters obviously, repeatedly assert both expressly and by direct implication, often with **bold** emphases in the original — is pure invention. Both parties express that intention, both directly and indirectly, and repeatedly.

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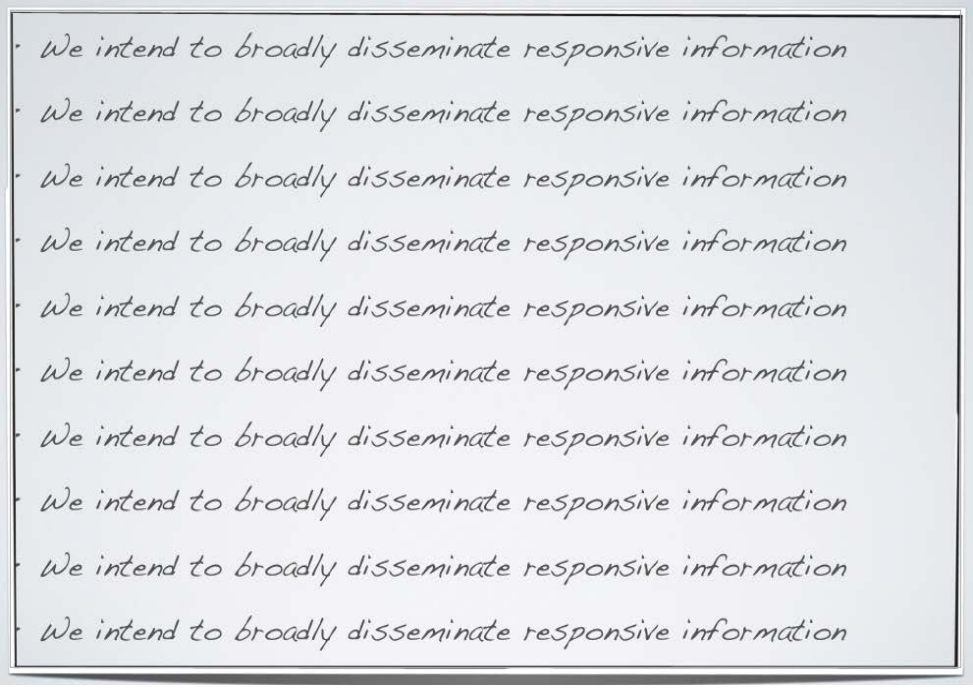
[33] 5 U.S.C. § 706(2)(A).

[34] *See e.g.*, requests HQ-2014-001664 (in litigation), and R10-2013-008285 (in litigation), R10-2014-000344, R6-2013-009363, HQ-2014-002006 (in litigation), HQ-13-003213, HQ-2014-003658. *See also*, HQ-2013-006008. EPA similarly denied certain CEI fee waiver requests during this period, *see e.g.*, HQ-13-003088, R6-2013-003663, HQ-2014-001684, in the latter case once again upholding the denial but on entirely new grounds as with -008285.

Nothing in FOIA or President Obama's asserted policy of transparency indicates any additional requirement of repetitive verbatim assertions of "we intend to broadly disseminate." Despite this, EPA refuses to properly apply of the law, selectively using FOIA as a withholding statute just as the bureaucracy turned FOIA's predecessor, § 3 of theAdministrative Procedure Act (5 U.S.C. § 1002), into a withholding statute. That very abuse (applied generally, not selectively as this report details) which led to Congress enacting FOIA in the first place, as the United States Supreme Court made plain in its first FOIA opinion.[35] Regardless, "to underscore [FOIA's] meaning, Congress rejected the traditional rule of deference to administrative determinations by '[p]lacing the burden of proof upon the agency' to justify the withholding."[36] E&E Legal, CEI and FME Law detail in numerous administrative appeals, judicial pleadings, and in this document how EPA cannot permissibly place that burden back on requesters. It does so, however, selectively and apparently in retaliation.

In response to this pattern of facially unsupportable denials grounded in these groups supposedly failing to state an intention to broadly disseminate responsive information, E&E Legal inserted a "chalkboard" on which they wrote ten times, "We intend to broadly disseminate responsive information."[37]

[35] *EPA v. Mink*, 410 U.S. 73 (1973).
[36] *Id.* at 101, citing S.Rep. No. 813, p. 8; H.R.Rep. No. 1497, p. 9.
[37] HQ-2014-003658, overturned on April 15, 2014.



Playing down to expectations, EPA promptly denied that request stating that plaintiffs failed to express an intention to broadly disseminate.

As such, EPA staked out the position that there is nothing that E&E Legal can say that will express an intention to broadly disseminate. Or it has given up even reading requests from disfavored, targeted groups. Regardless, unfortunately for EPA it is not permitted to implement laws in a way that makes them impossible to satisfy.

During the period of time between when EPA next denied E&E Legal's fee waiver on those same grounds, and when it ruled on their appeal, E&E Legal along with FME Law informed a court of this behavior in a complaint also made necessary by EPA's actions (*EELI et al. v. EPA*, cv:14-538)(filed April 1, 2014)). The pattern of behavior also drew media attention.

EPA promptly reversed its "chalkboard" denial in the face of having been shown in pleadings and media coverage that it does not even read these groups' requests before denying them, abandoning that serial claim and pivoting to a new reason for obstructing their requests. This new excuse to deny access to public records, invoked in EPA's next three responses to the

groups (to HQ-2014-004759, 2014-R3-004011, and R3-2014-004771), is that they do not explain how their request will significantly contribute to public understanding of governmental operations or activities. However, even the Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. Further, continuing its adamant refusal to dampen the enthusiasm for denying these particular groups any further records, EPA then added a complaint that the groups did not demonstrate how the public will be educated on the particular *issue*, inventing a requirement found nowhere in FOIA.

Any OIG inquiry that avoids scrutiny of EPA's most egregious examples of this practice, which Horner brought to OIG's attention early in its proceeding, is inherently insufficient and begs questions in its own right about OIG's operation. Additional evidence of inconsistencies in OIG's story about former employee John Beale only begs these questions much more seriously (*see* FN 22, *supra*).

Further, as ample judicial precedent also makes plain, FOIA's fee waiver provision was designed to avoid using fees as an impediment to non-profit groups — as EPA plainly is now doing, aggravating its abuses of the law — because disseminating such information is an integral part of such groups' mission.[38]

[38] *See e.g.*, *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984) (Congress enacted FOIA clearly intending that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." *Ettlinger v. FBI*, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8); *see also* SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)). "This is in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987)(quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

That this is an integral part of E&E Legal's mission, like CEI's, is also irresistible — as EPA knows better than others — given that over the relevant period both CEI and E&E Legal arguably have more broadly disseminated FOIA-obtained information than any requester (and more from EPA than any other agency). Print and broadcast media coverage amplifies the groups' initial dissemination of the information they obtain through FOIA.[39] This also reflects

[39] Given that CEI has already been recognized by one agency as a media outlet, regardless of EPA's resistance to accepting this reality, consider the following non-broadcast media examples for E&E Legal/FME Law: Editorial, *Public interest group sues EPA for FOIA delays, claims agency ordered officials to ignore requests*, WASHINGTON EXAMINER, Jan. 28, 2013; Michal Conger, *Emails show green group influence on EPA coal rule*, WASHINGTON EXAMINER, Jan. 9, 2014; C.J. Ciaramella, *Sierra Club Pressed EPA to Create Impossible Coal Standards*, WASHINGTON FREE BEACON, Jan. 10, 2014; C.J. Ciaramella, *Emails Show Extensive Collaboration Between EPA, Environmentalist Orgs*, WASHINGTON FREE BEACON, Jan. 15, 2014; Jason L. Riley, From the IRS to the EPA?, WALL STREET JOURNAL, May 15, 2013; Greg Pollowitz, *ATI Law Center to UVA: Give us the Climategate E-mails*, NATIONAL REVIEW ONLINE, May 16, 2011; John Wihbey, *Strange Bedfellows … and Fear of Broad Impacts of Mann/UVa Court Ruling*, YALE FORUM ON CLIMATE CHANGE & THE MEDIA , Feb. 20, 2014; Stephanie Paige Ogburn, *Climate scientists, facing skeptics' demands for personal [sic] emails, learn how to cope*, E&E NEWS, Jan. 21, 2014; Anthony Watts, *New FOIA emails show EPA in cahoots with enviro groups, giving them special access*, WATTS UP WITH THAT, Jan. 15, 2014; Anthony Watts, 'Richard Windsor seems to be a governmental 'everyman' issue, WATTS UP WITH THAT, Jun. 4, 2013; Stephen Dinan, *Obama energy nominee Ron Binz faces rocky confirmation hearing*, THE WASHINGTON TIMES, Sept. 17, 2013; Stephen Dinan, *Top Obama energy nominee Ron Binz asked oil company employees for confirmation help*, WASHINGTON TIMES, Sept. 17, 2013; Vitter, Issa Investigate EPA's Transparency Problem, More Suspicious E-mail Accounts, WATTS UP WITH THAT, Jan. 29, 2013 ("It should also be noted that this has come to light thanks to the work of Chris Horner and ATI, who forced production of these documents by EPA in their FOI litigation."); Stephen Dinan, *Obama energy nominee in danger of defeat*, WASHINGTON TIMES, Sept. 18, 2013; Stephen Dinan, *Greens, lobbyists and partisans helping Ron Binz, Obama's FERC pick, move through Senate*, THE WASHINGTON TIMES, Sept. 12, 2013; Stephen Dinan, *Energy nominee Ron Binz Loses voltage with contradictions, Obama coal rules*, WASHINGTON TIMES, Sept. 22, 2013; Conn Carroll, *FOIA reveals NASA's Hansen was a paid witness*, WASHINGTON EXAMINER, Nov. 7, 2011; *NASA Scientist accused of using celeb status among environmental groups to enrich himself*, FOX NEWS, Jun. 22, 2011; Editorial, *The EPA: A leftist agenda*, PITTSBURGH TRIBUNE-REVIEW, Jan. 18, 2014; John Roberts, *"Secret dealing"? Emails show cozy relationship between EPA, environmental groups*, FOX NEWS, Jan. 22, 2014; Elana Schor, *Proponents pounce on emails between EPA, enviros on pipeline*, E&E NEWS, Jan. 23, 2014; Mike Bastasch, *Analysis: Green Hypocrisy in Keystone XL pipeline opposition*, DAILY CALLER, Feb. 6, 2014; Mark Tapscott, *Emails expose close coordination between EPA, Sierra Club and other liberal environmental activist groups*, WASHINGTON EXAMINER, Jan. 23, 2014; Bonner R. Cohen, *Emails Reveal EPA Collaboration with Activist Groups*, HEARTLANDER, Feb. 11, 2014; Energy Policy Center (Independence Institute), *Emails Show EPA's Denver "Listening Tour" Stop A Collaboration Between Agency, Environmentalist Orgs*, Jan. 15, 2014; Forest Policy, *Elections Have Consequences: EPA Version*, Jan. 16, 2014; Editorial, *EPA has ties to radical environmentalists*, DETROIT NEWS, Feb. 13, 2014; Michael Batasch, *Report: EPA coal plant rule tainted by secretiveness, collusion with green groups*, DAILY CALLER, Mar. 10, 2014. Jennifer G. Hickey, *Legality of EPA Rules Questioned by Environmental Litigators*, NEWSMAX, Mar. 21, 2014; Michael Bastasch, *Confidential document reveals the Sierra Club's plan to shut down the coal industry*, DAILY CALLER, Mar. 26, 2014, Michael Bastasch, *Conservative group sues EPA over its 'IRS-like' tactics*, DAILY CALLER, Apr. 1, 2014; Stephen Dinan, *Conservative group sues EPA over open-records requests*, WASHINGTON TIMES, Apr. 1, 2014; Manuel Quiñones *Judge faults Alpha over selenium dumps*, E&E NEWS, Apr. 1, 2014; FOX NEWS, *EPA accused of stonewalling records requests from conservative groups*, Apr. 2, 2014; Michal Conger, *Watchdog group sues EPA for text messages from top officials*, WASHINGTON EXAMINER, Apr. 10, 2014.

substantial public interest. That EPA grounds its denials in a claim of no likely public illumination to be found in these or related requests for issues of such obvious public interest, and an alleged failure to express an intention to broadly disseminate that the requests actually make plain, further illustrates the obstructive nature of EPA's pattern and practice of denying the groups' fee waivers either expressly or by ignoring them.

Further, in none of these cases did EPA contact requesters seeking further information about their intention to broadly disseminate responsive information, or what their asserted intention to disseminate might possibly otherwise mean; nor did the Agency at any time assert any uncertainty about the intention set forth in these numerous direct assertions of requesters' intent, or otherwise seek to implement President Obama's vowed bias toward releasing records. EPA showed no interest in concluding that the expressed intention in fact expressed the required intention; instead, it went out of its way to deny the words on paper, to delay and deny these groups' access to records and wear down their limited resources with needless hurdles. It simply invented a facially untrue position to deny the requests, ensuring delay and attritional use of the targeted groups' resources.

It is difficult to imagine a pattern and practice running more starkly counter to the law or particularly the Obama administration's asserted FOIA policy than EPA's use of fees to deny access to select groups access to public records, inventing bases for denial, making no effort to clarify claimed (if facially implausible) ambiguities, which abuses EPA has always either overturned on appeal or dropped later when the groups sued. Only now has EPA taken matters that next step, as discussed herein, and demanded fees before a court.

E. EPA Previously Acknowledged These Groups Warrant Fee Waivers; Other Federal Agencies Grant Waiver for Identical, Lesser Fee Waiver Requests: EPA's Selective Denial Is on its Face Improper and Apparently Retaliatory

EPA historically has acknowledged that, *e.g.*, both CEI[40] and E&E Legal[41] warrant fee waivers when using the same or even less thorough language, either by expressly waiving fees or simply processing the request without citing to fees let alone assessing them. Yet EPA now says that even more robust language than these groups previously used, developed in response to EPA's escalating obstructionism, fails to satisfy FOIA's elements. Given that the law has not changed, this begs the question why EPA changed its mind.

Whatever prompted it (see *Timing* discussion, *infra*), this change is selective. EPA regularly grants fee waivers to environmentalist pressure groups,[42] both small ones unlikely to "broadly disseminate" and the larger institutions from which EPA draws many career employees and political appointees (and conflicts of interest),[43] and to which EPA supplies employees in a revolving door relationship. Curiously, EPA now treats the FOIA requesters who have obtained the greatest dissemination of their findings differently in this analysis, less favorably, than it

[40] *See e.g.*, fees waived by EPA either formally, or *de facto* with no fees required for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language (**CEI**): HQ-2013-000606, HQ-FOI-01087-12, HQ-2013-001343, R6-2013-00361, R6-2013-00362, R6-2013-00363, R6-2013-003663, HQ-FOI-01312-10, HQ-FOI-01268-12, HQ-FOI-01269, HQ-FOI-01270-12, 08-FOI-00203-12, R9-2013-007631, R2-2014-001585, HQ-2014-006434. These examples involve EPA either waiving fees (sometimes because their having ignored the request left them no other choice), not addressing the fee issue, or denying fee waiver but dropping that posture when requesters sued.

[41] *See e.g.*, fees waived by EPA either formally, or *de facto* with no fees required for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language (**ATI/E&E Legal**): HQ-2013-008049, R3-2013-008601. *See also*, HQ-FOI-0152-12 and HQ-FOI-0158-12, in which EPA dropped its initial demand for fees to ATI/E&E Legal on the same or less robust version of the same waiver-request language, two requests that are producing thousands of records over many months but for which EPA knows it cannot obtain fees as ATI/E&E Legal's requests plainly merit the statutorily provided waiver.

[42] *See e.g.*, exemplars at https://www.dropbox.com/s/fjqf7929wg9iz7i/EPA%20Disparate%20Treatment%20FOIA.zip.

[43] *See e.g.*, 5/21/12 EMail from Bob Perciasepe to Brendan Gilfillin, forwarding article received in an email, *EPA Probes for Conflicts of Interest Should Start in Their Own Building*.

treats those small groups and of course those larger, similarly situated groups with which the Agency is ideologically aligned and from which it draws is cadre of senior officials.

Furthermore, EPA treats those now-disfavored requesters CEI and E&E Legal differently than even other federal agencies treat the same conservative, free-market, or otherwise non-ideologically aligned groups, which is to recognize they warrant fee waiver under FOIA (*e.g.*, dozens of CEI requests to **DoI, Commerce**, **NOAA, Labor, FERC, Energy**, **NSF**, **OSTP, Treasury**, **SBA; ATI/E&E Legal requests to** EPA, **FERC**, Labor, **Energy**, **NSF**, **NOAA, Smithsonian Institute, TVA)**. [44]

[44] *See e.g.*, fees waived by other agencies for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language, either formally or *de facto* with no fees required, (**CEI**): **DoI** OS-2012-00113, OS-2012-00124, OS-2012-00172, FWS-2012-00380, BLM-2014-00004, BLM-2012-016, BLM: EFTS 2012-00264, CASO 2012-00278, NVSO 2012-00277; **Commerce** 2014-000269, **NOAA** 2013-001089, 2013-000297, 2013-000298, 2010-0199, 2014-000442, and "Peterson-Stocker letter" FOIA (August 6, 2012 request, no tracking number assigned, records produced); **DoL** 689053, 689056, 691856; **FERC** 14-10; **DoE** HQ-2010-01442-F, 2010-00825-F, HQ-2011-01846, HQ-2012-00351-F, HQ-2014-00161-F, HQ-2010-0096-F, GO-09-060, GO-12-185, HQ-2012-00707-F, GO-14-148; **NSF** 10-141, 14-9; **OSTP** 12-21, 12-43, 12-45, 14-02; **Treasury** 2012-08-053, 2012-08-054, 2013-051, 2013-052; **SBA** 2013-1220-5.

One odd scenario included, just as the "Windsor" embarrassment was still fresh and before EPA settled on a strategy of simply declaring CEI requests "not billable" (see *infra*), EPA denied CEI's fee waiver even for a request merely seeking a copy of a production already compiled for and released to another requester (R6-2013-003663). After CEI appealed that absurdity, instead of acknowledging and adding to the record that CEI warrants fee waiver, EPA declared the appeal moot and posted the records online. EPA also declared CEI's appeal of a fee waiver denial moot after providing the records once CEI appealed. EPA counts both of these cases as fee waivers granted, despite the cost in time and other resources, and opportunity cost, that these actions impose on groups EPA treats as such. With E&E Legal EPA denied fees then produced records after CEI appealed in R6-2013-009363, subsequently claiming the issue "moot" but, again, having forced expenditure of resources on administrative appeal.

See also, fees waived by other agencies for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language, either formally or *de facto* with no fees required,(**ATI/E&E Legal**): **EPA** HQ-2013-008049, R3-2013-008601, HQ-FOI-0152-12, HQ-FOI-0158-12 (see FN 41 *supra*); **FERC** 13-075, 13-078, 14-001, 14-069; **DoL** 725377 (2012); **DoE** 2012-01448-F, 2012-01449-F; **NSF** 12-059, 12-099; **NOAA** 2012-00068, 2012-00084, **Smithsonian Institute** Nov. 21, 2011 and Nov. 21, 2011 requests (not assigned tracking numbers but which yielded several thousand pages of records); **TVA** 14-4426 (after denying waiver, TVA merely walked away from the denial).

One obvious explanation for the disparate, discriminatory treatment as a pattern and practice of EPA is that these groups that have caused EPA the most trouble, and are not among EPA's collaborator or partner groups.

The prejudice is *prima facie*. Only a skewed inquiry could fail to discern this. Unfortunately, we now know a skewed inquiry is precisely what is EPA OIG is producing.

Consider the Agency producing — under court order — 12,000 "Richard Windsor" emails using four specific keywords without imposing fees (the fee demand disappeared when CEI sued), and also a larger set estimated at 120,000 records, *not* under court order if also without charging fees. Yet it is the identical (if now even more robust) fee waiver language used by both CEI and E&E Legal that EPA now claims fails to satisfy FOIA's requirements.

It is also noteworthy that these cited instances when EPA dropped its demand for fees involved matters that had already gained, or plainly threatened to gain, public attention. New requests typically pose a minimal such threat, and in response to those requests EPA regularly denies the groups' fee waivers. It does so consistently for E&E Legal (and its co-requester the Free Market Environmental Law Clinic); it did so previously, and now does again, for CEI, though during the early stages of the OIG's scrutiny of EPA's treatment *of CEI* EPA issued a spate of classifications of CEI requests as "not billable." EPA then resumed largely denying CEI fee waivers in late 2013 when OIG moved beyond the interviewing or fact gathering drafting stage.

When the spotlight is on, EPA will do the right thing, but otherwise uses fee waivers as a barrier to delay certain groups' access, and as an attritional tool to force parties to sue before dropping the fee demand. EPA selectively uses FOIA as a withholding statute, not a disclosure law. OIG refuses to consider the broader pattern of this behavior, directed at E&E Legal.

F. EPA Refuses to Consider Alternate Request for Fee Waiver, as Publication Outlet

There is another aspect to EPA's abusive discrimination against disfavored FOIA requesters, in addition to its pattern of denying the statutorily provided fee waiver requests grounded in FOIA's "significant public interest" pathway: EPA has at the same time serially refused to even rule on the groups' fee waiver request offered in the alternative — that they should receive fee waivers because they qualify as "media organizations."[45] The requesters add editorial input and appear in print and on radio and television to discuss their work.

These requests in the alternative should ensure fee waiver even if the Agency continues its pattern of delay by wrongfully denying the "public interest" request. Yet EPA compounds its initial obstruction by simply ignoring this argument in the alternative. Pretending the requesters did not make the request, while utterly impermissible, is the legal equivalent of denying it and ensures that no processing occurs and throws requesters into the same administrative appeal and/or litigation delay/attritional processes.

It is again facially improper for EPA to (serially) refuse to even acknowledge and rule on the request in the alternative (with one recent exception acknowledging the request, on appeal, which EPA then denied[46]). The rationale for refusing to address these requests is equally

[45] Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, including after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also* Serv. Women's Action Network v. DOD, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012); *Electronic Privacy Information Center v. Department of Defense*, 241 F.Supp.2d 5 (D.D.C. 2003) (court ruled that the publisher of a bi-weekly electronic newsletter qualified as the media, entitling it to a waiver of fees on its FOIA request)*; Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that "aims to place the information on the Internet"; "Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities").

[46] After OIG began interviewing EPA about it its fee waiver practices, EPA lawyers did address the request for media status for E&E Legal, *on appeal*, in R10-2013-008285 (denying it), having as usual ignored the fulsomely made argument it in its August 14, 2013 initial determination. *See* Letter from

apparent, with the federal government having already acknowledged that CEI qualifies as a media organization under FOIA[47] and, for similar reasons, E&E Legal qualifying as a media outlet.[48] That is that acknowledging and granting these fee waiver requests also begin the process toward producing records.

Despite the groups' publication activities EPA has regularly denied E&E Legal fee waiver as a media requester, first constructively and now expressly. Meanwhile, it grants fee waiver to, *e.g.*, local "green" organizations calling themselves "Bucket Brigades", Michigan Chapter CAFO Water Sentinel, Buzzards Bay Coalition, Edison Wetlands Association,

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Lynn Kelly, EPA Acting Assistant General Counsel, to Christopher Horner and Craig Richardson denying in part and granting in part E&E Legal's fee waiver and denying FME Law's in full, October 24, 2013. Notice that alarmist environmental advocacy groups have already been deemed to be media outlets.

[47] *See e.g.*, Treasury FOIA Nos. 2012-08-053, 2012-08-054.

[48] Examples of FOIA-derived publications by E&E Legal requesters include, Horner: *The FOIA coping response in climate scientists*, WATTS UP WITH THAT, Jan. 21, 2014; *Nothing to See Here! Shredding Parties and Hiding the Decline in Taxpayer-Funded Science*, WATTS UP WITH THAT, Feb. 17, 2014 (this is a website where ATI/E&E Legal disseminated FOIA-obtained information from NASA, University of Arizona and EPA on many additional occasions, see http://wattsupwiththat.com/?s=horner); *The Collusion of the Climate Crowd*, WASHINGTON EXAMINER, Jul. 6, 2012. *See also*, Christopher Horner: *Yes, Virginia, you do have to produce those 'Global Warming" documents* (with David W. Schnare and Del. Robert Marshall), WASHINGTON EXAMINER, Jan. 5, 2011; David W. Schnare, "FOIA and the Marketplace of Ideas", E&E Legal Letter (Sept. 2013); *Why I Want Michael Mann's Emails*, THE JEFFERSON JOURNAL, The Thomas Jefferson Institute for Public Policy, Dec. 7, 2011. Information is also disseminated is issue-specific pages of E&E Legal's website, *see e.g.*, "FOIA Requests" section.

Recent EPA obstruction requiring hundreds of hours spent instead on administrative appeals has reduced the time available for publication. However, past CEI publications prior to and directly relevant to this pattern include Horner: *Obama Admin Hides Official IPCC Correspondence from FOIA Using Former Romney Adviser John Holdren*, BREITBART, Oct. 17, 2013; *Most Secretive Ever? Seeing Through 'Transparent' Obama's Tricks*, WASHINGTON EXAMINER, Nov. 3, 2011; *NOAA releases tranche of FOIA documents -- 2 years later*, WATTS UP WITH THAT (two-time "science blog of the year"), Aug. 21, 2012; *The roadmap less traveled*, WATTS UP WITH THAT, Dec. 18, 2012; *EPA Doc Dump: Heavily redacted emails of former chief released*, BREITBART, Feb. 22, 2013; *EPA Circles Wagons in 'Richard Windsor' Email Scandal*, BREITBART, Jan. 16, 2013, *DOJ to release secret emails*, BREITBART, Jan. 16, 2013; *EPA administrators invent excuses to avoid transparency*, WASHINGTON EXAMINER, Nov. 25, 2012; *Chris Horner responds to the EPA statement today on the question of them running a black-ops program*, WATTS UP WITH THAT, Nov. 20, 2012; *FOIA and the coming US Carbon Tax via the US Treasury*, WATTS UP WITH THAT, Mar. 22, 2013; *Today is D-Day -- Delivery Day -- for Richard Windsor Emails*, WATTS UP WITH THAT, Jan. 14, 2013; *EPA Doubles Down on 'Richard Windsor' Stonewall*, WATTS UP WITH THAT, Jan. 15, 2013; *Treasury evasions on carbon tax email mock Obama's 'most transparent administration ever' claim*, WASHINGTON EXAMINER, Oct. 25, 2013.

Concerned Citizens for the Environment of Throop, Galveston Baykeeper, Washington Forest Law Center and Cottonwood Environmental Law Center (while denying Horner requests for Free Market Environmental Law Clinic), if not as media requesters still inherently concluding that those parties without the direct and indirect media participation and impact of E&E Legal and CEI will broadly disseminate responsive information.

The key to "media" fee waiver is whether a group publishes, as CEI and E&E Legal most surely do. *See* FN 48, *supra*. Also, E&E Legal publishes a quarterly newsletter (E&E Legal Letter) through which it reaches over 5,500 members. It intends to analyze the records and place them into context using information from other sources in order to disseminate the information rising from the records sought. In addition, E&E Legal publishes books dealing with environmental matters, various technical reports and bureaucratic pathologies. Reference to these is available the E&E Legal's website at www.eelegal.org. E&E Legal's publication of books, reports and newsletters far surpasses the publishing plan that was, standing alone, sufficient in *National Security Archive v. Department of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989), 1386.

In *National Security Archive*, the D.C. Circuit wrote:

> The relevant legislative history is simple to state: because one of the purposes of FIRA is to encourage the dissemination of information in Government files, as Senator Leahy (a sponsor) said: "It is critical that the phrase `representative of the news media' be broadly interpreted if the act is to work as expected.... If fact, *any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a `representative of the news media.'"*

Id. at 1385-86 (emphasis in original).

As the court in *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) noted, this test is not only met by outlets in the business of publishing such as newspapers; instead, citing to the *National Security Archives* court, it noted one key fact

is determinative, the "*plan to act, in essence, as a publisher*, both in print and other media." *EPIC v. DOD*, 241 F.Supp.2d at 10 (*emphases* added). "In short, the court of appeals in *National Security Archive* held that '[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.'" *Id*. at 11. *See also, Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989).

For these reasons, E&E Legal (like CEI) plainly qualifies as a "representative of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the pubic. The additional, repetitive refusal by EPA to acknowledge a stated alternative basis for E&E Legal's (or CEI's) fee waiver removes any question whether the Agency's obstruction is in fact intended to block select parties' access to public records.

G. **Pattern, Practice and Timing Add to the Appearance of Prejudicial Treatment**

This change in behavior also raises questions about what might have prompted it. A close examination of events informs a conclusion that these denials are in furtherance of prejudicial and improper practice. Consider the following.

On April 4, 2013, the Competitive Enterprise Institute filed suit for records relating to EPA's disparate fee waiver practice in light of the similar treatment it discovered among CEI and ATI/E&E Legal.[49] Soon thereafter, EPA's Inspector General initiated the "preliminary research" stage of interviews regarding disparate fee waiver application. Within two weeks of CEI filing suit and approximately coinciding with initiation of the OIG inquiry, EPA then began informing

[49] *Competitive Enterprise Institute v. EPA*, cv:13-434 (filed April 4, 2013 in D.D.C.) (RJL).

CEI that its requests were "not billable."[50] A "not billable" request is one that takes so little time that it requires no payment of fees, and the classification is essentially a claim that the request can be processed in two hours.

For EPA to dedicate those two hours has so far taken from a minimum of six months to a year and counting, leaving it unclear how seriously to take, as a substantive matter, this temporary spasm of these classifications.[51] EPA did inform E&E Legal that an August 22, 2013 request was "not billable" — and therefore implicitly asserted that it could be satisfied in two hours or less — then subsequently vowed to find those to hours in 100 years, which is the cartoonish slow-walk EPA offers for satisfying another, apparently very unwelcome Horner request (for CEI, no less, not E&E Legal, behind which request EPA improperly insists on placing other FOIAs by him or groups he works with; this case accounts for one of EPA's

[50] EPA adopted this new practice for a dozen requests, on April 19, 2013, after which it only denied CEI outright for one request. Oddities include *e.g.*, HQ-2013-005626, HQ-2013-005618, both retroactively awarded "full grant" of fee waiver on August 20, 2013, after being classified as "not billable" in April; and HQ-2014-002474 retroactively awarded "full grant" of fee waiver on February 11, 2014, after being classified as "not billable" in January. EPA's one full grant for ATI/E&E Legal free of any "not billable" caveat was for a May 2013 request, HQ-2013-006650 by David W. Schnare.

See also, HQ-2013-006588, declared "not billable" after EPA asserted CEI did not provide sufficient information, which was promptly abandoned hours later when, it would seem, EPA noticed the request's acknowledgement that it was a near verbatim replica of a request for which fees were granted to a green pressure group, EarthJustice (HQ-2013-006136), in essence again merely requesting a copy of a production already provided to another (similarly, ATI request HQ-2013-006858, filed amid the media coverage of revelations about EPA fee waiver practices, was declared "not billable", yet it yielded several productions and a substantial number of records). Further, although EPA asserted HQ-2013-008015 was "not billable" (July 11, 2013), it then stated this implicitly two-hour production would come in 100 years, rather undermining the implication that the request would take two hours to satisfy; *see* Nov. 6, 2013 email from Jonathan Newton, Office of the Administrator, Envtl. Prot. Agency, to Christopher C. Horner.

[51] For example, as of July 2014 EPA has yet to produce one record in response to HQ-2014-008015 (Jul. 9, 2013), HQ-2013-009621 (Jul. 25, 2013), HQ-2014-009342 (Aug. 23, 2013), HQ-2014-001184 (Nov. 18, 2013). It took six months to invest those two hours and produce anything in response to HQ-2013-009249 (Aug. 8, 2013, production nearly seven months later on Feb. 25, 2014).

admissions of singling out requests by him or that EPA associates with him for special treatment).[52]

That sudden and frequent use of "not billable", and for requests no less substantial than earlier requests for which EPA denied fee waiver,[53] does have the odor of seeking to avoid further creating a record either of granting or denying fee waiver requests during this period of OIG fact-gathering.

Possibly further relevant is that, after the IG inquiry passed its initial inquiry stage, EPA then resumed its denials of CEI fee waiver requests with an outright denial on December 23, 2013, again citing the temporarily holstered, still facially untrue basis that the request's express and repeated assertions of an intention to broadly disseminate really weren't made at all. It then serially deferred decision on the appeal of that facially untrue statement.[54]

As litigation over the remarkable case of R10-2013-008285 (see discussion immediately below) advanced, and one long-running denial of E&E Legal's fee waiver in a separate Region 10 request threatened to require explanation of the aggravated nature of these abuses before a court, EPA abandoned its stall tactics and dropped its obstruction in both matters but admitting nothing, waving off its obligation and insisting this was "a matter of administrative discretion."[55]

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[52] Nov. 6, 2013, email from Jonathan Newton asserting that EPA would satisfy ATI request HQ-009342 after processing Horner's CEI request HQ-2013-001343, which Newton asserted he would satisfy in 100 years. At first it appeared that EPA incorrectly attributed this request -009342 to CEI, however, a later (Feb. 19, 2014) email to Horner from Office of General Counsel's Lynn Kelly affirmed that the bias is against requests "from yourself or your affiliated organizations" [sic].

[53] These substantive "not billable" requests include HQ-2013-009249, HQ-2013-009235, HQ-2013-008908, HQ-2013-008015, HQ-2013-006937, HQ-2013-006939, HQ-2013-006588, HQ-2013-005618, HQ-2013-006005, HQ-2013-004176 and EPA-HQ-2014-002474 (the "fee waiver" FOIAs), HQ-2014-000356, R8-2014-000358, R2-2014-001585.

[54] *See e.g.*, R10-2014-00344, HQ-2014-002006.

[55] February 28, 2014 Letter from Lynn Kelly, EPA Assistant General Counsel, to Horner re: R10-2014-000344; EPA did this on its own out of strategic self-interest, it was *not* related to resolving -008285.

It is highly unlikely that these are simply further matters of chance, that EPA FOIA and OGC staff — and those who have inserted themselves into the FOIA process — remained unaware of the developments, either in court or with OIG limiting its inquiry, which coincided with the Agency adapting its actions. The chronology suggests instead that EPA tailored its behavior to better present what is a clear pattern of biased and seemingly retaliatory actions.

II. EPA Obstruction Imposes Substantial Costs on Targeted Groups

In addition to the violations of law and disregard for principle, EPA is plainly imposing substantial costs on the two groups it has demonstrably treated with prejudice and in apparent retaliation. These costs are not so much found in amounts EPA now demands before processing records, so far barely exceeding $4,000.00. The demands began with request R10-2013-08285 noted, *supra*, in which EPA first illegally denied the fee waiver on patently untrue grounds, then illegally delayed ruling on E&E Legal's administrative appeal, forcing E&E Legal to sue when EPA then illegally denied the fee waiver (on completely different grounds, another tactic now employed against both E&E Legal and CEI when facially improper denials were exposed on appeal); EPA then continued its refusal to provide the long-overdue cost estimate even months after having re-promised it, producing it only after E&E Legal informed the Department of Justice it would seek the court's intervention to force EPA to produce an estimate *(*Email from E&E Legal counsel Horner to Department of Justice, Kevin Laden, January 6, 2014).

As the subsequent delay (EPA then produced an estimate to E&E Legal on January 22, 2014) appeared to affirm, only at that time did EPA set to work to produce a cost estimate, owed many months before. This led to a bill for $60.00.

That case is not about $60. For EPA to claim otherwise would be akin to the administration saying it didn't cost Judicial Watch anything to obtain the long-withheld Benghazi or IRS records, over which Judicial Watch had to litigate for a year, on the basis the group was not charged for them. The abuse is found in the process of unlawful obstruction and delays costing E&E Legal many thousands of dollars, as well as EPA and the courts. As will continue to occur, each time EPA employes this tactic to obstruct those it opposes.[56]

Further, in the above-described case E&E Legal (and FME Law) were forced to prepare to compel production as a result of EPA bizarrely refusing to even respond to an inquiry about it, on the grounds that the request was in litigation; that is not only not a legitimate excuse, but the issue of the fee estimate, recently re-promised, was *not* in fact in litigation. Again, EPA used delay tactics grounded in facially untrue, easily falsifiable assertions.

This example of EPA's abusive behavior reveals the classic deployment of the overwhelming resources of the federal government to grind down a smaller target. Yet the larger point remains that these groups became targets after proving to be a problem for said federal government.

EPA's labyrinth of obstruction keeping groups from accessing records to which they are entitled under the law is an expensive affair, not only to the target groups but to the taxpayer whose resources are also being squandered. Any reasonable analysis reveals that it is not these groups which are taking the courts' time over, *e.g.*, (long-belated) bills for $60, but the EPA.

[56] Soon EPA arrived upon $2,000.00 as the fee estimate to use, presenting that figure as the condition that must be satisfied before processing the groups' requests, in its next two obstructions of four requests (FOIA Nos. HQ-2014-001664, R3-2014-004011, HQ-2014-004759, R3-2014-004771), both identical and with no breakdown as to how much each of the two requests in question each time represented of this amount, and therefore seemingly arbitrary.

Wearing down disfavored groups is EPA's apparent objective, compelling the Agency's targets to spend hundreds of hours preparing administrative and judicial pleadings, time that — as EPA surely knows — the groups would otherwise spend reviewing and disseminating public records to further educate the public about EPA.

The issue here remains one of principle: the law is clear and EPA is stating patent non-truths to circumvent applying it in ways it prefers not to, with the clear objective of draining these disfavored groups' resources no differently than the IRS drains the resources of groups it delays granting the proper tax status, and which it then audits. As with the IRS, these abusive agencies seek to wear down those whose activities they disapprove of and in ways, the record makes clear, they do not impose upon those they view as allies.

EPA simply does not have the argument available to it that these challenges are over small amounts of money, which argument only diverts attention from the principal issue, that these denials are illegal.

In truth, EPA's campaign is wasting absurd amounts of resources, both the taxpayers' and requesting groups'. Any legitimate OIG inquiry would also consider these facts in their entirety.

III. **OIG designs its inquiry to avoid difficult conclusions**

A. **OIG's design avoids addressing sworn evidence of improper EPA behavior**

By OIG's inexplicable decision communicated to Chris Horner that it elected to not consider EPA's treatment of E&E Legal when scrutinizing EPA's treatment of non-ideologically aligned requesters, it avoids addressing a troubling incident about which OIG possesses the relevant affidavit and pleadings. As Horner set forth in an affidavit filed in *ATI v. EPA* (cv:13-

112, D.D.C.), an EPA career FOIA specialist informed him that the Agency's National FOIA Officer Larry Gottesman instructed her and one other employee to do no work on two of Horner's requests that were assigned to them. There were 2012 FOIA Nos. HQ-FOI-01058 and HQ-FOI-01052, the Sierra Club and American Lung Association email requests that prompted so much media and congressional interest in January 2014 (*see supra*, and affidavit attached as Appendix C). According to this FOIA specialist Mr. Gottesman took the files from these employees; the record shows he then did nothing to process them.

Notably, when ATI finally sued to compel production, filing with the court the affidavit laying these facts out, EPA quickly dropped its pretense of demanding fees and promptly began processing and producing records. It is reasonable to surmise that EPA preferred to avoid further developing the record on this damning point. Regardless, any inquiry into EPA bias in implementing FOIA requires that Mr. Gottesman and these FOIA specialists be interviewed and their assertions placed in the record. Indeed, EPA ignored two requests by congressional investigators for an interview with Mr. Gottesman for at least eight months.[57] Now OIG has chosen a course ensuring the matter will receive no scrutiny.

B. IG's Inquiry Design Ensures EPA Again Will Avoid Accountability

On December 4, 2013, EPA OIG staff interviewed Chris Horner, counsel for CEI, E&E Legal, and FME Law. OIG staff made plain they were only interested in interviewing him in his CEI capacity, having decided to limit its scrutiny of the events which prompted the inquiry to

[57] *See* Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Gina McCarthy, Apr. 10, 2013; Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, James Inhofe, Ranking Member, S. SubComm. on Oversight, EPA, Charles Grassley, Ranking Member, S. Comm. on Judiciary, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Gina McCarthy, May 17, 2013.

only EPA's treatment of CEI.[58] OIG staff later asserted that CEI was included "randomly", as were several other groups — which had *not* presented evidence of disparate treatment — randomly also including them *in lieu of* E&E Legal, one of the two parties expressly drawing attention to the abusive pattern.

Most striking about this isn't the self-evident impropriety of proceeding randomly in the face of specific and supported allegations of behavior by two groups sharing so many common elements, not least of which is their treatment by EPA, but that the "random" process excluded by far the most glaring case study in EPA's pattern of violations.

Whether by intent or curious happenstance, this inexplicable exclusion of a group having common and contemporaneous treatment,[59] complained of simultaneously, and with shared requesting counsel, this also ensures a less relevant and less meaningful inquiry/report. By avoiding much of the documentary evidence it also gives the appearance of OIG seeking to declare no problem exists where great and documentary evidence indicates otherwise. This is similar to EPA's own internal effort to deflect responsibility by changing the subject of debate

[58] *See* Memo from Christopher Horner, to Erin Barnes-Weaver, U.S. Envtl. Prot. Agency, Office of the Inspector General, Dec. 15, 2013, Appendix B.

[59] EPA's production in response to CEI's FOIA, HQ-2013-004176 documented EPA's selective use of attritional fee waiver denial at the initial determination stage. That response also omitted certain CEI and E&E Legal requests, including constructive denials -- that is, those that EPA simply ignored -- while also claiming that EPA granted fee waiver for requests it had constructively denied, only after waiving its ability to seek fees to then meaninglessly claim waiver was granted.

EPA instead denied that it had charged the groups fees, which under FOIA it is prohibited, with rare exception, from doing. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* FN 19, *supra.* However, at no time did the parties assert that EPA managed to extract fees from them; instead, the groups' underlying argument was that the law prohibiting EPA from doing so is clear. Citing as somehow dispositive that, in the end it had not done do what the law plainly prohibits it from doing -- extract fees from non-profits groups that broadly disseminate public information -- deliberately avoids confronting what it does do, which is use the fee waiver process to delay and deny access to public records for groups it deems problematic, as described above. Regardless, as described, *supra*, it is noteworthy that with the OIG inquiry wrapping up EPA is now doing precisely what it vehemently if irrelevantly at the time denied doing.

when this evidence was first revealed, and again now, informally arguing to media and staff that the dollar amount it has sought is *de minimis*.

More troubling, it is similar to OIG's recent effort protecting EPA with a non-inquiry into improper use of false-identity and private email accounts, described, *supra*.

This is improper, lacks any apparent logical basis, and ensures an unacceptably narrow snapshot of EPA's behavior in question. It also comes despite counsel Horner having subsequently provided EPA OIG with information establishing this as the inevitable result of the decision to narrow the inquiry.[60] It is the second such obvious effort in recent months.

IV. CONCLUSION

> "[I]nsofar as… [agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood – information." *Better Gov't Ass'n v. State Dep't.*, a D.C. Circuit opinion discussing improper denial of fee waiver to non-profit groups

EPA denies CEI's and E&E Legal's FOIA fee waivers at the initial determination stage and, in a recent escalation, on administrative appeal, offering readily disprovable bases and despite that the groups' justifications are much more robust than that typically submitted by environmentalist pressure groups. EPA proved it does not even read E&E Legal's fee waiver requests, denying the "chalkboard" request bearing a trap easily spottable for anyone who actually read the request.

Other federal agencies continue to routinely grant these groups' fee waiver requests on the basis of the same or less robust fee waiver justification language.

[60] See Appendix A, Memo from Christopher Horner to Ms. Erin Barnes-Weaver, December 15, 2013; *see also* Horner emails to Barnes-Weaver November 21, 2013, November 22, 2013, December 6, 2013.

EPA's newfound aggressive denial of the groups' requests is on its face an obstructionist pattern. It is particularly focused on E&E Legal but admittedly (by two EPA offices) targets shared counsel Chris Horner and any group that works with him; it came on the heels of revelations from Horner requests having led to great embarrassment and complication for the Agency. It also thereby appears to be retaliatory, adding to the inescapable picture of biased application of the law and a campaign to selectively delay and effectively deny these requesters from further accessing public information.

Regardless of whether this is retaliatory for past embarrassments, driven by ideology, or grounded elsewhere, the practice is clear and is improper.

EPA's response to these revelations to date was to change the subject, denying that it ever extracting fees from these groups for FOIA requests. But the law largely prohibits that, and the statutory language and clear judicial precedent prohibit using fees as a barrier to non-profits that broadly disseminate public information, which by its inconsistent demands for fees among similarly situated if ideologically distinct groups indicate EPA surely is doing. But that EPA was charging the groups was not the allegation and the *non sequitor* ignores that EPA's denials were routinely overturned or dropped upon the requester suing. It also ignores the sudden refusal to grant fee waivers, and admissions that certain requests are singled out for special treatment, despite the impropriety and public denials.

Regardless, when OIG improperly narrowed its inquiry and then concluded its information gathering stage, EPA proceeded to begin demanding fees from these groups, while even on occasion refusing to provide a fee estimate at all despite refusing to grant waiver. That is, at an opportune moment EPA took its obstruction one step further, requiring that certain requesters expend ever more resources litigating just to obtain what is due them under the law.

Whether OIG was openly keeping EPA informed of its plans and its progress, the appearance that this was the case is troubling. Similarly disturbing is OIG improperly narrowing an inquiry into allegations credibly raised by the same FOIA requesters EPA is targeting.

Prior EPA's escalation it does appear that, amid media scrutiny and as the OIG inquiry got underway, EPA tread water in its campaign of selective denial of FOIA fee waiver requests by classifying many requests as non-billable, while also escalating denials of other groups' requests.[61] Of course, that could explain the desirability of having OIG "randomly" include other groups in its analysis, groups that had not previously presented evidence of disparate treatment.

However temporary or lasting this change in practice proves to be, and while it did alter the aggregate numbers regarding EPA actions that will appear in OIG's report, it cannot undo the pattern which E&E Legal and CEI pointed to as revealed by EPA's Spring 2013 response to request 2013-004176 (illustrating the disparate treatment). Nor can it alter the subsequent, further obstacles it then placed in these two groups' way, described in above, costing these perceived opponents of EPA many thousands of dollars, requiring scarce resources dedicated to appealing and, now, ritually, to suing, in order to compel EPA to do what the law requires.

An OIG inquiry which by design avoids fully considering the relevant evidence — specifically the most egregious examples — and which instead focuses where no problem is alleged, is similarly and facially improper. OIG has acknowledged this design to CEI, but when asked for a logical rationale for the decision failed to offer one. This follows on the heels of OIG designing its inquiry to similarly limit problematic outcomes in the "private email account"

[61] This was revealed by a February 11, 2014 FOIA production under CEI request HQ-2014-002474.

inquiry discussed, *supra*. As such, OIG appears to be serving not as EPA's watchdog when it comes to EPA's political team, but more as the Agency's lapdog.

OIG is not the EPA's defense counsel, and should not compound the appearance of an ideological Agency gone out of control. It should instead properly review the relevant facts surrounding EPA's pattern and practice of misapplying FOIA's fee waiver provisions to delay and deny certain disfavored requesters from accessing public records. Congress should also review remedies available for instances such as this, when federal employees abuse their positions to unlawfully disadvantage parties they disfavor.

APPENDIX B

-----Original Message-----
From: Chris Horner <chornerlaw@aol.com>
To: barnes-weaver.erin <barnes-weaver.erin@epa.gov>
Sent: Sun, Dec 15, 2013 9:48 am
Subject: OIG Inquiry into EPA application of FOIA fee waiver

Dear Erin,

We suggest it is proper that the Office of Inspector General revisit its troubling decision to narrow its inquiry into EPA's uneven application of FOIA's fee waiver provision. This narrowing, as you described to me in our interview of December 4, 2013, is to just one group whose treatment was first and contemporaneously exposed as part of a pattern of inappropriate behavior against several groups having relevant factors in common, the Competitive Enterprise Institute.

During our telephone interview with your team we did specifically emphasize that the revelation of EPA's practice, which prompting the IG's scrutiny, was of several similarly situated groups suffering repeated denials of their requests for fee waivers. I also noted that, after the IG made its decision to narrow its inquiry to only CEI, EPA quickly resumed its past behavior, denying fee waiver on facially untrue grounds to the two other groups first identified as targets of EPA's prejudicial application of fee waivers.

It does seem that word of this narrowing is known among certain congressional offices. It is reasonable to assume that it is also known within EPA, and we suspect that this knowledge is behind the resumption of EPA's improper behavior directed toward the other groups identified as also subject to the abusive application of FOIA fee waiver provision.

As part of this resumption EPA even denied administrative appeal of its fee waiver denial, such that it requires fees before proceeding. As you are aware these fees can be substantial, in the six-figures, and as such this is a barrier to non-profit groups proceeding. That this occurs in the context of requests of obvious concern to EPA, with groups that have been granted fee waivers previously, it does seem that impeding these groups is precisely the rationale. Forcing requesters to litigate buys more than a year before EPA will have to even begin processing the request for desired records of public interest.

Regardless of EPA's intent, you may recall that EPA's public argument, to Congress and curious media, when these revelations emerged was that it had never gone that far. With the IG's decision having passed its initial stage, and the decision to limit the inquiry away from the parties obviously treated improperly (*see e.g.*, affidavit filed in *ATI v. EPA* (cv: 13-112; HQ-FOI-0152-12 and HQ-FOI-01058-12)), this has now changed. These groups, the Free Market Environmental Law Clinic and the Energy & Environment Legal Institute (formerly the American Tradition Institute), should not be excluded from the IG's inquiry.

As of this past Friday, December 13, 2013, EPA has issued three denials for fee waiver requests made jointly by those two groups. All of which is to say that upon completion of the IG's "preliminary research" stage and limitation of its inquiry to EPA's treatment of CEI, EPA resumed and then markedly escalated its campaign against other groups identified as the subject of EPA's improper FOIA treatment.

In each of these matters, EPA alleged that we failed to express an intention to broadly disseminate responsive information. As detailed in the attached complaint, in fact we directly addressed that intention comprehensively in several hundred words. To ignore these waiver denials during the IG inquiry does EPA, the public and our organizations a deep disservice. It has emboldened the Agency to misbehave which, in turn, has forced us to seek redress in court. Left free from scrutiny, the only party not disadvantaged by this move is the party engaging in it.

The complaint which I attach was filed in DC District Court last month for the first such recent denial. In that case, EPA went beyond its pattern of denying fee waiver to certain groups as a delaying and attrition tactic at the initial determination stage, but for the first time maintained the stance on administrative appeal, forcing abandonment or litigation (cv: 13-1778; FOIA# EPA-R10-2013-008285). This came just after the IG concluded its initial inquiry phase ("preliminary research" interviews) and narrowed its inquiry as you described to me. The other two denials came in Friday, and were for requests EPA-HQ-2014-001664 and EPA-R10-2014-000344.

I note that Larry Gottesman is back to issuing these denials, despite EPA being on notice of his having informed career FOIA specialists to perform no more work on FOIA requests of mine for ATI. EPA is on notice of this through both the administrative process and by affidavit filed in *ATI v. EPA* (cv: 13-112; HQ-FOI-0152-12 and HQ-FOI-01058-12).

We view resumption of this waiver denial pattern as in clear contravention of the statute, abusive, arbitrary and capricious and unwarranted. We believe that if you look, you will not be able to find the Agency has similarly treated the waiver issue for other non-profit policy groups, let alone any with these two groups' demonstrated records of broadly disseminating FOIA-obtained public information. It surely appears that, to be credible, the IG's inquiry must include not only the groups with similar requests to CEI, but also consider whether this recent escalation has precedent.

By reference, I reiterate my arguments against the wisdom and propriety of the IG's puzzling decision to exclude these other two organizations from the inquiry, arguments I made at the beginning and conclusion of our telephone interview attended also by my CEI colleagues and co-counsels Hans Bader and Sam Kazman.

The Free Market Environmental Law Clinic and the Energy & Environment Legal Institute request the Office of Inspector General to revisit its decision to narrow its inquiry into EPA's uneven application of FOIA's fee waiver provision to just one group among several similarly situated parties, excluding the two groups most obviously the subject of improper treatment.

As always, we remain open to further communication. If you have any questions please do not hesitate to contact me.

Best,

Chris Horner
202.262.4458 M

APPENDIX C

AFFIDAVIT OF CHRISTOPHER C. HORNER, ESQ.

DIRECTOR OF LITIGATION, AMERICAN TRADITION INSTITUTE

APPEAL OF EPA DENIAL OF FOIA NOS. HQ-FOI-01052-12, HQ-FOI-01058-12

My name is Christopher C. Horner, I am an attorney licensed to practice law in the District of Columbia. I attest to the following on behalf of the American Tradition Institute (ATI).

On April 2, 2012, on behalf of ATI I sent by electronic mail two Requests under the Freedom of Information Act (FOIA) to the Environmental Protection Agency, for certain records dated "between January 21, 2009 and the date EPA performs the relevant, respective search(es) in response to this Request, inclusive" and citing or referring to two different environmental pressure groups, the Sierra Club ("Sierra") and the American Lung Association ("ALA") (respectively, FOIA Request Nos. HQ-FOI-01052-12, HQ-FOI-01058-12.

EPA responded with acknowledgement letter(s) on April 2 and April 3, respectively.

Specifically, approximately one week after sending these requests the undersigned received a telephone call from a man identifying himself as being a FOIA officer with EPA, asking that we narrow the "Sierra" Request, FOIA No. HQ-FOI-01052-12. His position was that there are many people named "Sierra" and that if I rephrased the search parameter to Sierra Club it would expedite handling. The actual search parameters indicate such a narrowing is not necessary even given that fact, however, as we specify if the word "Sierra" appears in the *domain name*. (e.g., @Sierra.org).

Given that Sierra Club is commonly referred to among relevant professionals or communities simply as "Sierra", and that searching for "Sierra Club" would inappropriately limit

the search to exclude many responsive records, we concluded the call reaffirming that this Request sought records using "Sierra" as described, referencing Sierra Club.

After this telephone call, however, EPA provided no further response. EPA did not seek an extension or otherwise notify ATI of reasons it must delay responding to ATI. EPA provided no responsive records and is improperly withholding responsive information through selective and uneven application, and therefore misapplication, of FOIA.

On July 5, 2012, three months after EPA received these Requests, at approximately 1:10 p.m. EDT I telephoned the number provided on both acknowledgement letters (202.566.1667). This call was answered by a woman identifying herself as Vivian, and the FOIA specialist assigned FOIA No. HQ-FOI-01058-12. She informed me that "Cindy" [ph] in her office was assigned FOIA No. HQ-FOI-01052-12.

When Vivian pulled the file to check on the status she uttered what sounded like a surprised "Oh." After a pause she informed me, according to my contemporaneous notes of this conversation, that "Larry [Gottesman] told us he was going to write you a letter" and that neither she nor Cindy should take further action on the Requests that had been assigned to them. She stated that Mr. Gottesman had informed her that he would take over their handling, and specifically that he would send the fee waiver response and the initial determination.

ATI has not received any correspondence or otherwise communication from Mr. Gottesman after EPA's acknowledgement letters.

My contemporaneous notes of this conversation also reflect Vivian stating that the "Request went to the administrator's office and OAR [Office of Air and Radiation]." Vivian also mentioned that a factor in the fee waiver would likely be that the requests were "very broad." I asked where "breadth" was located among the relevant factors in determining a fee waiver. After

she did not understand my pronunciation of "breadth" twice, I restated her assertion that because they were "very broad" that would impact the Agency's fee waiver determination, asking where that consideration is found and that according to statute and regulation that is not an appropriate consideration. "Vivian" demurred and the call ended with Vivian stating that she would make a note to Mr. Gottesman and he would contact me the next day. We have not received any such contact.

I submit this affidavit under penalty of perjury on this date, the 9th of July, 2012.

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Christopher C. Horner, Esq. July 9, 2012