

October 29, 2004

VIA FAX (617-727-9665) & CERTIFIED U.S. MAIL

James R. Milkey
Assistant Attorney General, Chief
Carol Iancu
Assistant Attorney General
Environmental Protection Division
Commonwealth of Massachusetts
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108-1598

Re: Appeal of Freedom of Information Act request decision regarding the *U.S. Climate Action Report 2002*

Dear Mr. Milkey and Ms. Iancu:

This is in response to your appeal of the August 9, 2004 final response of the Council on Environmental Quality ("CEQ") to your July 15, 2003 Freedom of Information Act ("FOIA") request on behalf of the Commonwealth of Massachusetts and the States of Connecticut and Maine. Your July 15, 2003, FOIA request sought:

All records of, or concerning, communications by or to CEQ in 2002 or 2003 concerning either the *U.S. Climate Action Report 2002*, which was submitted to the United Nations in May 2002 (Climate Action Report), or drafts or revisions of the Climate Action Report.

Because of the large volume of documents that were potentially responsive to this request, CEQ responded to this request in three stages. In our initial response, on August 13, 2003, we released eighty-five (85) documents totaling one thousand four hundred and ninety-six (1,496) pages. In our second response, on November 1, 2003, we released an additional one hundred eighty-six (186) documents, in their entirety, totaling six hundred and eighty-six (686) pages. At that time we also released twenty-nine (29) documents, totaling one hundred and seven (107) pages, with redactions for non-responsiveness and for exemption from disclosure pursuant to title 5 U.S.C. § 552(b)(5) and title 5 U.S.C. § 552(b)(6).

CEQ's August 9, 2004 final response completed our review of electronic documents and our consultations, pursuant to 5 U.S.C. section 552(a)(6)(B), regarding documents that were created by the Department of Energy (DOE) [Abel Lopez, Director FOIA/Privacy Act Group, Office of the Executive Secretariat], the Department of State (DOS) [Madelina Young, Case Analyst], the Department of Justice (DOJ) [Maureen Rudolph, ENRD/PLSL], the Environmental Protection Agency (EPA) [Sam Napolitano, Acting Division Director, Clean Air Markets

Division], the Department of Agriculture (USDA) [Andrea E. Fowler, FOIA/PA Coordinator], the National Oceanic and Atmospheric Administration (NOAA) [Jean E. Carter-Johnson, FOIA Officer, NOAA FOIA Staff], the Office of Management and Budget (OMB) [Kimberley Luczynski, General Attorney], the Office of Science and Technology Policy (OSTP) [Stanley Sokul, Counsel], the White House Office (WHO) [Jennifer R. Brosnahan, Associate Counsel], and the Council of Economic Advisors (CEA) [Phillip Swagel, Chief of Staff]. CEQ released sixty-three (63) documents, totaling two hundred twelve (212) pages, in their entirety. CEQ also released seventy-eight (78) documents, a total of three hundred eighty-one (381) pages, with redactions. The redactions covered non-responsive material and material exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5). CEQ withheld eleven (11) documents, a total of forty-two (42) pages, and two draft versions of the Climate Action Report as exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5).

In response to your appeal, William Perhach, CEQ Paralegal Specialist, and I reviewed the entire record of redacted and withheld documents. Some of these documents were reviewed by CEQ Chief of Staff, Philip Cooney. We have decided to narrow the redactions of numerous documents and to redact other documents previously withheld in their entirety. We have also decided to release some previously-redacted documents. Of the remaining redactions, we have specifically noted as “(b)(5)” the redactions for deliberative communications or communications that are subject to attorney work-product and attorney-client communication privileges. Redactions for non-responsive information are noted as “NR” on the attached documents. CEQ is not required, under FOIA, to provide you with a *Vaughn* index in response to your request. If it becomes necessary, a *Vaughn* index will be produced and provided to a reviewing court. However, much of the content of such a *Vaughn* index can be discerned from the redacted documents that have been provided or are being provided in response to your request.

These redacted documents undercut your arguments that CEQ improperly withheld, or attempted to withhold, information that is not exempt from disclosure under FOIA. Your first example argues that two sentences redacted from an email from a Senate staff member to Kenneth Peel, CEQ Associate Director for Global Environmental Affairs, cannot be withheld as deliberative because it merely restates another person’s comment regarding the Attorneys General who had signed a letter to President Bush regarding the regulation of greenhouse gases. In fact, this comment was redacted merely because it does not contain information that is responsive to your request. This characterization of the Attorneys General is not a communication by or to CEQ “concerning either the *U.S. Climate Action Report 2002*, which was submitted to the United Nations in May 2002 (Climate Action Report), or drafts or revisions of the Climate Action Report.” Your final example, an email from Special Assistant to the President Robert C. McNally to Office of Science and Technology Policy Director John Marburger, also involves a redaction of non-responsive information. Though the email subject line and the unredacted text pertain to the *U.S. Climate Action Report 2002*, the communication continues on into other topics not included in the scope of your request.

The other examples cited in your appeal letter do involve deliberative communications, including recommendations regarding the priority that CEQ should place on the UNFCCC’s U.S.

Climate Action Report review, changes to a guidance document provided to government officials for their consideration in preparation for their discussion of the U.S. Climate Action Report with the press, and deliberative communications in the course of the EPA Administrator's preparation for testimony before Congress. Indeed, the communications that you cite regarding changes to make clear that the Department of State is responsible for transmittal of the U.S. Climate Action Report reflect an important deliberation that was later disputed under Data Quality Act guidelines. See EPA response to Competitive Enterprise Institute petition, <http://www.epa.gov/quality/informationguidelines/documents/7428AresponsetoCEI.pdf>, <http://www.epa.gov/quality/informationguidelines/documents/7428A.pdf>.

Because of the large volume of documents involved in this appeal and the time required to complete CEQ review and processing of these documents, we requested – and you agreed to – a one-week extension of the due date for CEQ's response. Several documents dating from 2003 are still being processed as of this date and will be sent to you next week. Enclosed is a complete set of redacted or newly-released documents dating from 2002. This letter completes our response to your request. Thank you for your cooperation throughout this process.

Sincerely,

Edward A. Boling
Deputy General Counsel
Freedom of Information Officer