



**SIERRA  
CLUB**

August 13, 2018

**VIA ELECTRONIC MAIL**

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Pub Int

**RE: Freedom of Information Act request – DOE Communications: Bernard  
McNamee; Expedited Processing Requested**

Dear Mr. Morris:

On behalf of the Sierra Club, I write to request that the United States Department of Energy (“DOE”) provide copies of the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the regulations of the Department of Energy set forth at 10 C.F.R. § 1004.

Sierra Club is the nation’s oldest grassroots environmental organization. It has more than 3.5 million members and supporters nationwide. Sierra Club is dedicated to the protection and preservation of the natural and human environment. Sierra Club’s purpose is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

Sierra Club is leading a non-governmental organization seeking to educate and mobilize the public on issues of climate change, fossil fuel energy and clean energy. It has been conducting multiple campaigns around these issues, including its Beyond Coal Campaign and Dirty Fuels Campaign. This request is made on behalf of those campaigns, as well as the organization’s long standing interest in government accountability and transparency.

*Pub Int*

According to multiple recent press accounts, Mr. Bernard McNamee, who is currently the Executive Director of DOE's Office of Policy, may be nominated by President Trump to the Federal Energy Regulatory Commission ("FERC"). Sierra Club regularly advocates before FERC to promote its members' interests in wholesale market rules and reliability standards that allow clean energy resources to compete on fair terms, and to maintain and improve the affordability of electric rates. Sierra Club seeks records in the Department's possession which will inform the public about how Mr. McNamee has performed his duties at the Department and the nature of his involvement in recent Department policy actions. The records are also relevant to his qualifications and suitability for a FERC seat.

According to Mr. McNamee's LinkedIn profile, he has been employed in the Office of Policy since June 2018. He was also employed by DOE from May 2017 through February 2018, as Deputy General Counsel for Energy Policy.

**Requested Records:**<sup>1</sup>

Sierra Club requests Records of the following type in the possession, custody, or control of DOE:

1. All emails, text messages, faxes, voice mails, and other forms of communications between Mr. McNamee and other staff at DOE or any outside individual, during his current employment with DOE and during his prior employment period from approximately May 2017 through February 2018.
2. All emails, text messages, faxes, voice mails, and other forms of communications between Mr. Bernard McNamee and officials and staff at DOE during any period, beginning in January 2017, in which Mr. McNamee was not officially employed at DOE.
3. All calendars, whether electronic or in paper format, of Mr. McNamee during his prior employment with DOE, and from the date of his current official employment to and including the date of fulfillment of this request.
4. All sign-in sheets or other records memorializing attendance at any meetings with Mr. McNamee during his prior employment with DOE, and from the date of his current official employment to and including the date of fulfillment of this request.

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<sup>1</sup> "Records" means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, e-mails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described below at any stage of development, whether proposed, draft, pending, interim, final or otherwise. All the foregoing are included in this request if they are in the possession of or otherwise under the control of Department of Energy and its underlying offices.

## **Expedited Processing Request**

I respectfully seek expedited processing of this request on the basis that the above-requested records are relevant to “Federal Government activity” and matters of “widespread and exceptional media interest” and of which there is “an urgency to inform the public.” 28 C.F.R. § 16.5(e)(1).

Mr. Bernard McNamee is currently the Executive Director of the Office of Policy at DOE who is being considered for nomination to an empty seat at the Federal Energy Regulatory Commission (“FERC”). There is “widespread and exceptional media interest,” *id.* §16.5(e)(1)(iv), in Mr. McNamee’s potential nomination.<sup>2</sup> This interest is driven in part by reports that Mr. McNamee was heavily involved in DOE’s proposal in fall 2017<sup>3</sup> to offer cost-based compensation to so-called fuel secure resources, a proposal which was widely viewed as a costly bailout for coal and nuclear plants.<sup>4</sup> Given the overlap in subject matter between Mr. McNamee’s current and prior employment at DOE and his potential future role at FERC, the public has an immediate need for information about Mr. McNamee’s views regarding electric system reliability, competitive electric markets, electric generation technologies and fuel types, and similar matters. I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief. *See also* responses to “Fee Waiver Request” below.

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<sup>2</sup> *See e.g.* Gavin Bade, Report: Trump to nominate DOE policy head McNamee to FERC, Utility Dive, August 8, 2018, <https://www.utilitydive.com/news/report-trump-to-nominate-doe-policy-head-mcnamee-to-ferc/529701/>; Mark Hand, Trump coal bailout plan to have powerful ally if frontrunner for energy agency opening is confirmed, ThinkProgress, August 9, 2018, <https://thinkprogress.org/trump-ferc-replacement-bernard-mcnamee-tppf-coal-bailout-3b4955fd2d65/>; Rod Kuckro, Powelson warns against politics creeping into FERC’s work, E&E News, August 10, 2018, <https://www.eenews.net/stories/1060093813>; Jeff St. John, Trump Admin’s Push for Coal, Nuke Bailout Reflected in Key Staff Positions at Federal Agencies, Green Tech Media, August 9, 2018, <https://www.greentechmedia.com/articles/read/political-pressure-ferc-doe-to-push-coal-and-nuclear-bailout#gs.zuTQ=5o>; Kelsey Tamborrino, Name emerges for FERC, Politico, August 9, 2018, <https://www.politico.com/newsletters/morning-energy/2018/08/09/name-emerges-for-ferc-310660>; Tom Tiernan, With Powelson Exit, White House Expected to Nominate DOE’s Bernard McNamee, The Foster Report, August 10, 2018, <https://www.fosterreport.com/featured-stories/with-powelson-exit-white-house-expected-to-nominate-does-bernard-mcnamee/>.

<sup>3</sup> *See e.g.* Gavin Bade, Report: Trump to nominate DOE policy head McNamee to FERC, Utility Dive, August 8, 2018, <https://www.utilitydive.com/news/report-trump-to-nominate-doe-policy-head-mcnamee-to-ferc/529701/>; Rebecca Kern, Likely Energy Regulator Nominee Was Advocate for Coal Bailout (1), Bloomberg Environment, August 9, 2018, <https://news.bloombergenvironment.com/environment-and-energy/likely-energy-regulator-nominee-was-advocate-for-coal-bailout-1?context=article-related>.

<sup>4</sup> *See e.g.* The Trump Administration’s Coal Bailout, The New York Times, December 7, 2017, at A28, <https://www.nytimes.com/interactive/2018/opinion/editorialboard.html>; Jody Freeman & Joseph Goffman, Rick Perry’s Anti-Market Plan to Help Coal, The New York Times, October 25, 2017, <https://www.nytimes.com/2017/10/25/opinion/rick-perry-coal-antimarket.html>; Jeff St. John, Behind the Backlash to Energy Secretary Rick Perry’s Demand for Coal-Nuclear Market Intervention, Green Tech Media, October 5, 2017, <https://www.greentechmedia.com/articles/read/behind-the-backlash-to-energy-secretary-rick-perrys-demand-for-coal-nuclear#gs.bMsXDyM>.

## **Exempt Records**

If you regard any of the requested records to be exempt from required disclosure under FOIA, I request that you disclose them nevertheless; as such disclosure would serve the public interest of educating citizens. *See* 10 C.F.R. § 1004.1 (authorizing disclosure of documents exempt from FOIA disclosure where such disclosure is in the public interest).

Should you decide to invoke a FOIA exemption, please include in your full or partial denial letter sufficient information for the Club to appeal the denial. To comport with legal requirements this information must include:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of the records requested are exempt from disclosure, please segregate the exempt portions and mail the remaining records within the statutory time limits after the exempted material has been redacted from the records the Club is seeking.

## **Fee Waiver Request**

I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 10 C.F.R. § 1004.9(a)(8). The Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment, and has routinely received fee waivers under FOIA. The Department has previously waived fees associated with requested submitted by the Sierra Club (*see, e.g.,* DOE FOIA Request HQ-2017-00991-F, HQ-2018-00883-F, HQ-2018-00985-F).

The Sierra Club is a national, nonprofit, environmental organization with no commercial interest in obtaining the requested information. Instead, the Sierra Club intends to maintain public websites containing the requested information, so the public can access this important information regarding pollution in their communities.

As explained below, this FOIA request satisfies the factors listed in DOE's governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 10 C.F.R. § 1004.9(a)(8).

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The requested records relate to Mr. McNamee's activities as a DOE employee, and his communications with DOE during the brief time between his two DOE employment periods when he worked on related issues in the private sector. Mr. McNamee's activities are unquestionably "identifiable operations or activities of the government." The Department of Justice Freedom of Information Act Guide expressly concedes that "in most cases records possessed by a federal agency will meet this threshold" of identifiable operations or activities of the government.

2. The disclosure of the requested documents must have an informative value and be "likely to contribute to an understanding of Federal government operations or activities."

The FOIA Guide makes it clear that, in the Department of Justice's view, the "likely to contribute" determination hinges in part on whether the requested documents provide information that is not already in the public domain. The requested records are "likely to contribute" to an understanding of your agency's activities and decisions related to DOE's evaluations of energy markets and reliability. This information will facilitate meaningful public participation in the decision-making process, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of your agency.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined.

The Sierra Club and its members have long-standing experience and expertise in the subject area of FOIA requests, specifically, issues related to the Federal Power Act, DOE Organization Act, Clean Air Act, Clean Water Act, and the development and use of energy resources and protection of endangered species. Sierra Club also has a long standing interest in government accountability and transparency.

Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, including, but not limited to: analysis and distribution to the media, distribution through publication and mailing, posting on the Club's website, emailing and list serve distribution to our members across the U.S., and via public meetings and events. Every year the Sierra Club website receives 40,730 unique visits and 100,381 page views; on average, the site gets 104 visits per day. Sierra Magazine, which is a quarterly magazine published by the Sierra Club, has a circulation of approximately 1,000,000. Sierra Club Insider, an electronic newsletter, is sent to over 850,000 people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system. In the past, the Sierra Club has published, posted, and disseminated numerous stories on coal and coal power plants regarding their impacts on health, the environment and alternative energy. This includes information on our various webpages, such as

our Beyond Coal Campaign portal, our Clean Energies Solutions portal and our press releases.<sup>5</sup> Sierra Club intends to share the information received from this FOIA request with the public.

Sierra Club unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner outlined above, and to do so in a manner that contributes to the understanding of the “public-at-large.”

4. The disclosure must contribute “significantly” to public understanding of government operations or activities. The public’s understanding must be likely to be enhanced by the disclosure to a significant extent.

The records requested will contribute to the public understanding of the DOE’s “operations and activities,” as the requested records relate to DOE’s evaluations of energy markets and reliability. The disclosure of the requested records is essential to the public’s understanding of DOE’s operations and activities. After disclosure of these records, the public understanding of DOE’s activities will be significantly enhanced. The requirement that disclosure must contribute “significantly” to the public understanding is therefore met.

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

The Sierra Club has no commercial interest in the requested records. Nor does it have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. The Sierra Club is a tax-exempt organization under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of the Sierra Club’s mission to inform the public on matters of vital importance to the environment and public health.

6. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.”

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the “public interest” in disclosure. If no commercial interest exists, an assessment of that nonexistent interest is not required.

As noted above, the Sierra Club has no commercial interest in the requested records. Disclosure of this information is not “primarily” in the Sierra Club’s commercial interest. On the other hand, it is clear that the disclosure of the information requested is in the public interest. It

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<sup>5</sup> For example, the Sierra Club sought information about coal export and permitting activities in Oregon via a state public records act request at the Port of Coos Bay. All correspondence is published online and has received extensive media attention from press releases on the subject. *See* <http://content.sierraclub.org/environmentallaw/lawsuit/2013/sierra-club-challenges-dirty-and-dangerous-fossil-fuelexports-oregon>.

will contribute significantly to public understanding of DOE's activities related to evaluations of energy markets and reliability.

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

### **Record Delivery**

We request that the DOE, in responding to this request, comply with all relevant deadlines and other obligations set forth in FOIA and the agency's regulations. 5 U.S.C. § 552, (a)(6)(A)(i); 10 C.F.R. § 1004. Please produce the records above in a timely manner by sending them to me at the address listed below. Please produce them on a rolling basis; at no point should the search for-or the deliberation concerning-certain records delay the production of others that the agency has already retrieved and elected to produce.

Lauren Hogrewe  
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- or -

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415-977-5789

Thank you for your cooperation. If you find that this request is unclear in any way please do not hesitate to call me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at 415-977-5789 or by e-mail at [lauren.hogrewe@sierraclub.org](mailto:lauren.hogrewe@sierraclub.org).

Sincerely,



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