



Yale Law School

Via Email

April 30, 2021

NRC Freedom of Information Act Officer
U.S. Nuclear Regulatory Commission
Mail Stop TWFN-6 A60M
Washington, DC 20555-0001

Re: Freedom of Information Act Request and Request for Expedited Processing and Fee Waiver – Nonbinding International Agreements

Dear Sir or Madam:

This is a request for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the U.S. Nuclear Regulatory Commission (“NRC”) regulations relating to FOIA requests, 10 C.F.R. §§ 9.11-9.45. It is also a request for expedited processing under 10 C.F.R. § 9.25(e), and for a reduction or waiver of fees under 10 C.F.R. § 9.41(c).

I am submitting this request on behalf of the Yale Law School Center for Global Legal Challenges. The Center for Global Legal Challenges is an independent center within the Yale Law School that bridges the divide between the legal academy and legal practice on global legal issues. It provides a forum where academic experts and students engage with public and private sector actors responsible for addressing global legal challenges. By bringing these communities together, the Center aims to inject new ideas into the public debate and grow a new generation of lawyers with a sense of their capacity and responsibility to use international law, foreign-affairs law, and national-security law to address the nation’s challenges.

I. Background

This FOIA request focuses on the nonbinding understandings or arrangements that U.S. agencies conclude with foreign governments and international organizations. The Case-Zablocki Act (“the Act”) requires U.S. agencies that “negotiat[e] and conclud[e] . . . international agreements” to transmit “the texts of any document or set of documents that might constitute an international agreement” to the State Department. 1 U.S.C. § 112b(a). The Secretary of State then determines whether these documents constitute “international agreements” within the meaning of the Act. 1 U.S.C. § 112b(e)(1). “International agreements” are those agreements—other than treaties—that create binding obligations under international law. 22 C.F.R. § 181.2(a). Ultimately, the Secretary of State must report binding agreements to Congress. 1 U.S.C. § 112b(a); 22 C.F.R. § 181.7. Nonbinding understandings or arrangements—sometimes referred to as “political commitments”—do not qualify as “international agreements,” and legally need not be reported.

NRC concludes both binding agreements and nonbinding understandings or arrangements. See, e.g., Memorandum of Cooperation Between the U.S. Nuclear Regulatory Commission and the Canadian Nuclear Safety Commission, NRC (Aug. 2019),

<https://www.nrc.gov/docs/ML1927/ML19275D578.pdf>. As the State Department’s website has noted: “Governments frequently wish to record in writing the terms of an understanding or arrangement between them without, by so doing, creating obligations that would be binding under international law.” Guidance on Non-Binding Documents, U.S. State Dep’t, <https://2009-2017.state.gov/s/l/treaty/guidance/index.htm> [hereinafter State Guidance].

The text and drafting history of an international agreement, understanding, or arrangement inform whether it is legally binding or nonbinding. 22 C.F.R. § 181.3(a); see State Guidance. Some nonbinding understandings or arrangements may use any number of titles or descriptors, including “Memorandum of Understanding,” “Statement of Intent,” and “Cooperative Arrangement.” See State Guidance. However, the use, or the omission, of such descriptors does not always signify that a document is, or is not, a nonbinding understanding or arrangement. Id. Some, but not all, nonbinding understandings or arrangements include a disclaimer that the document is not binding under international law, such as “not legally binding,” “no binding obligations,” “no legal obligations,” “not constitute a legally binding agreement,” and other similar phrases. Id. But, again, such disclaimers are not inevitably included. Nonbinding understandings or arrangements may also include signature lines, and nonbinding understandings or arrangements will have been sent outside the agency to a representative of a foreign government or international organization.

Given the reporting requirements that the Case-Zablocki Act imposes on U.S. agencies, NRC must have a mechanism for distinguishing between binding agreements (which constitute “international agreements” that must be reported to Congress) and nonbinding arrangements and understandings (which need not be reported), both when drafting documents and when reviewing them. Such a mechanism is necessary to ensure that NRC complies with its statutory responsibilities by identifying and transmitting to the State Department both binding agreements and potentially binding understandings or arrangements. The State Department’s Office of Treaty Affairs also “encourages agencies and offices to share the text of non-binding documents” with their office. Id.

This FOIA request focuses on the guidance, directives, policies, rules, or regulations that NRC has established to fulfill its responsibilities under the Case-Zablocki Act, as well as the records that the notification process generates and the nonbinding arrangements or understandings themselves.

I am requesting these records to promote increased transparency regarding the many nonbinding arrangements and understandings U.S. agencies and foreign governments have concluded since 1989. Many of these arrangements have a significant impact on the nation’s economic and security interests. Prominent examples of nonbinding understandings or arrangements include the Atlantic Charter, the Helsinki Accords, and the Joint Comprehensive Plan of Action with Iran. They regulate numerous subjects of public concern, including trade policy, nuclear energy, sanctions regimes, and environmental protection. Given the far-reaching impact of nonbinding understandings and arrangements on American society, it is critical that the public has a complete understanding of their nature and scope—especially since they fall outside the Case-Zablocki Act’s oversight regime.

II. Formal Request

Unclassified nonbinding understandings or arrangements in written form. I request for the period from January 1, 1989 to December 31, 2020, any and all unclassified nonbinding understandings or arrangements with foreign countries or international organizations actually in NRC's possession. My understanding is that records responsive to this request are potentially retained within NRC's Office of the General Counsel, and/or the Office of International Programs.

This request *includes*:

- Any and all understandings or arrangements that are nonbinding based on the text or drafting history, as described in the Background statement above.
- Any and all understandings or arrangements transmitted to the Department of State and determined to be nonbinding and therefore *not* reportable to Congress as an international agreement under the Case-Zablocki Act.
- Any and all nonbinding arrangements represented in the table at this website: <https://www.nrc.gov/about-nrc/ip/bilateral-relations.html>.

This request *excludes*:

- Any agreement, understanding, or arrangement that has been reported to Congress as an international agreement under the Case-Zablocki Act.
- Any nonbinding understanding or arrangement that is exclusively in oral form.

III. Application for Expedited Processing

I request expedited processing for this request pursuant to 5 U.S.C. § 552(a)(6)(E) and implementing regulations 10 C.F.R. § 9.25(e). There is a compelling need for these records because, as described above, the information requested is sought by a requester “primarily engaged in disseminating information,” and there is “urgency to inform the public about an actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(ii); 10 C.F.R. § 9.25(e)(1)(ii). The Yale Law School Center for Global Legal Challenges identifies “the dissemination of ideas to the policy community outside academia” as “[a] central aspect of [its] mission.” Projects & Publications, Ctr. for Global Legal Challenges, <https://law.yale.edu/center-global-legal-challenges/projects-publications>; see also COVID and the Global Order, Yale L. Sch. (Sept. 28, 2020), <https://law.yale.edu/yls-today/news/covid-and-global-order> (summarizing a virtual discussion series with senior policymakers organized by the Center). I am the Director of the Center and have a long record of furthering its mission by disseminating information to the general public through academic publications, legal blogs, and the popular press. See, e.g., Oona Hathaway, Reengaging on Treaties and Other International Agreements (Part II): A Path Forward, Just Security (Oct. 6, 2020), <https://www.justsecurity.org/72690/reengaging-on-treaties-and-other-international-agreements-part-ii-a-path-forward>; Oona Hathaway, The International Criminal Court Is No Threat to America, But John Bolton Is, Newsweek (Sept. 12, 2018), <https://www.newsweek.com/international-criminal-court-no-threat-america-john-bolton-opinion-1115820>. Indeed, the Center previously filed a FOIA request with the State Department seeking Case-Zablocki Act cover memos, which I (along with two co-authors) used to write a recently published article in the *Harvard Law Review*. See Oona A. Hathaway, Curtis

A. Bradley & Jack L. Goldsmith, The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis, 134 Harv. L. Rev. 610 (2020) [hereinafter Hathaway, Bradley & Goldsmith Article].

The requested records indisputably concern operations or activities of the Federal Government. Further, there is particular “urgency to inform the public concerning actual or alleged Federal Government activity” involved in request. 10 C.F.R. § 9.25(e)(1)(ii). Many of the arrangements at issue are enormously consequential to the nation’s security and economic interests, see supra Part I, and any delay continues to leave the public in the dark about the understandings that the U.S. is reaching with foreign governments and international bodies. Moreover, recently proposed federal legislation addressing nonbinding agreement reporting requirements was approved by the Senate Foreign Relations Committee in April 2021. See Curtis Bradley, Jack Goldsmith, & Oona Hathaway, An Opportunity for Congress to Improve Transparency of the Executive’s International Agreements, Lawfare, (April 21, 2021), <https://www.lawfareblog.com/opportunity-congress-improve-transparency-executives-international-agreements>. The legislation is a breaking news story of general public interest and will be directly informed by the requester’s research.

I certify that the information above is true and correct to the best of my knowledge, pursuant to 10 C.F.R. § 9.25(e)(2). If you require further explanation concerning the basis of this request for expedited processing, please contact me at the email address listed below.

IV. Application for Waiver or Limitation of All Fees

I also request that NRC waive and/or limit the search, review, and duplication fees associated with this request. An NRC regulation states that NRC will waive or reduce fees if disclosure “is likely to contribute significantly to public understanding of the operations or activities of the Federal Government and is not primarily in the commercial interest of the requester.” 10 C.F.R. § 9.41(c). Both factors counsel in favor of a fee waiver in this instance.

First, disclosure of the requested records is likely to contribute significantly to public understanding of operations or activities of the government. The requested records—nonbinding arrangements between the U.S. and foreign governments or international bodies—indisputably “concern[] the operations or activities of the Federal Government.” 10 C.F.R. § 9.41(d)(1). Disclosure of the requested records “is likely to contribute significantly to public understanding of Federal Government operations or activities.” 10 C.F.R. § 9.41(d)(2). Many nonbinding arrangements have a significant impact on the nation’s economic and security interests, see supra Part I, and limited oversight of these arrangements means that the public knows little about them. Further, disclosure will contribute to the understanding of the public at large. 10 C.F.R. § 9.41(d)(2). The Yale Law School Center for Global Legal Challenges—of which I am the Director and on behalf of which I file this request—identifies “the dissemination of ideas to the policy community outside academia” as “[a] central aspect of [its] mission.” Projects & Publications, Ctr. for Global Legal Challenges, <https://law.yale.edu/center-global-legal-challenges/projects-publications>. I advance the Center’s mission by frequently contributing to popular legal blogs, see, e.g., Oona Hathaway, Universal Health Care is a National Security Issue, Just Security (Mar. 12, 2020), <https://www.justsecurity.org/69130/universal-health-care-is-a-national-security-issue>, and by writing about legal issues for the popular press, see, e.g., Oona Hathaway, Turkey is Violating International Law. It Took Lessons from the U.S., Wash.

Post (Oct. 22, 2019), <https://www.washingtonpost.com/outlook/2019/10/22/turkey-is-violating-international-law-it-took-lessons-us>. I also co-authored the *Harvard Law Review* article discussed above based on the State Department's Case-Zablocki Act cover memos—documents the Center obtained through a previous FOIA request. See Hathaway, Bradley & Goldsmith Article. I am, accordingly, well placed to effectively disseminate the requested information to a reasonably broad audience of persons interested in the subject. 10 C.F.R. § 9.41(d)(2). My record of research and commentary that influences the public debate demonstrates that the requested records will inform a broad public audience.

Second, disclosure is not primarily in the commercial interest of the requester. 10 C.F.R. § 9.41(d)(3). The requested records are not sought for commercial use and will be disclosed to the public at no cost. In addition, I am affiliated with Yale Law School, an educational institution, and am seeking the records described in this request for the purpose of contributing to the public understanding of the federal government's activities, and for related scholarly research.

I am therefore entitled to a waiver of search fees and review fees, and a waiver or reduction of duplication fees. See 10 C.F.R. § 9.41(c). Should NRC determine that I am not eligible for a fee waiver under 10 C.F.R. § 9.41(c), I request a fee limitation under 10 C.F.R. § 9.39(a). As discussed above, I am affiliated with an educational institution and file this FOIA request to further my scholarly research. If you require further information concerning the basis of this request for a fee waiver and/or limitation, please contact me at the email address listed below.

Should NRC determine that I am not eligible for a waiver of all fees, I am willing to pre-authorize the expenditure of up to \$100.00 to process this request. Please contact me via email to obtain my authorization prior to charging any fees above that amount.

V. Response Requested in 20 Days

Your attention to this request is appreciated, and I anticipate your determination concerning this request within twenty (20) working days pursuant to 10 C.F.R. § 9.25(a).

If this FOIA request is denied in whole or in part, I respectfully request that NRC provide a reasonable description of any withheld materials, and a justification for the withholding of such materials, including a reference to the FOIA exemption (or other legal authority) supporting the withholding. See 5 U.S.C. § 552(a)(6)(A)(i); 10 C.F.R. § 9.27(b).

Should you have any questions regarding this request, please contact me at your earliest convenience at the email address listed below.

Sincerely,

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