



SOUTHWEST RESEARCH AND INFORMATION CENTER
P.O. Box 4524 Albuquerque, NM 87196 505-262-1862 FAX: 505-262-1864 www.sric.org

August 28, 2017

Myles Hall
Freedom of Information Act/Privacy Act Public Liaison
U.S. Department of Energy
Carlsbad Field Office
P.O. Box 3090
4021 National Parks Highway
Carlsbad, New Mexico 88221-3090

Re: FOIA Request for Records Regarding WIPP

Dear Mr. Hall:

I write on behalf of the Southwest Research and Information Center (SRIC) to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and applicable Department of Energy (DOE) regulations at 10 CFR § 1004.

I. Description of Records Sought

Please produce records¹ of the following types in DOE's possession, custody or control that relate to the overarching vision/strategy and plan for WIPP to achieve its operational lifetime through FY 2050 with both near term and long term operational activities. The request specifically includes, but is not limited to, records related to the robust model for predicting and anticipating RH and CH TRU emplacement rates through 2021 and lifecycle model(s) and overarching strategy for future expansion of the WIPP facility to accommodate future waste emplacement through 2050. Those records were developed as part of the Fiscal Year 2016 Performance Evaluation and Measurement Plan (PEMP) for Nuclear Waste Partnership and for which the contractor earned the entire \$250,000 Performance Base Incentives Fee available:

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any DOE office, including, but not limited to, DOE Headquarters offices, and specifically including the Carlsbad Field Office (to whom the same request is being submitted) and any other offices in possession of responsive records.

II. Request for a Fee Waiver

SRIC requests that DOE waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without charge “if 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 CFR § 1004.9(a). The requested disclosure would meet both of these requirements.

A. SRIC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii). Each of the four factors used by DOE to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 10 CFR § 1004.9(a).

1. *Subject of the request*

The records requested here are directly relevant to DOE’s activities related to the long-term operations of WIPP, the nation’s only geologic repository for defense transuranic waste. The requested records thus directly concern “the operations or activities of the government.” 10 CFR § 1004.9(a)(8)(i)(A).

2. *Informative value of the information to be disclosed*

The requested records are “likely to contribute to” the public’s understanding of government operations and activities. 10 CFR § 1004.9(a)(8)(i)(B). The public does not currently possess comprehensive information regarding the government’s role in addressing public health, environmental, worker safety, and other concerns related to the subject of requested records. There is more than a reasonable likelihood that these records have informative value to the public because there is significant public interest in WIPP’s long term operations and costs, including its Strategic Plan, as evidenced by DOE’s WIPP Recovery website (<http://www.wipp.energy.gov/wipprecovery/recovery.html>) and news media coverage of WIPP. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

We believe that the records requested are not currently in the public domain. Their disclosure would thus meaningfully inform public understanding with respect to WIPP’s strategic plan and future activities, as further discussed below. However, if DOE were to conclude that some of the requested records are publicly available, SRIC would like to discuss that conclusion and might agree to exclude such records from this request.

3. *Contribution to an understanding of the subject by the public is likely to result from disclosure.*

SRIC's expertise regarding WIPP and FOIA, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that SRIC has the ability and will to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. SRIC will make the disclosed records available on its website (www.sric.org), through press releases and other communications with news media, and in presentations to the general public that will reach thousands of people. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

SRIC intends to disseminate any newsworthy information in the released records and its analysis of such records to supporters and to the broader public, through one or more of the communications channels referenced below. SRIC frequently disseminates newsworthy information to the public for free, and will not resell the information requested here. SRIC's supporters and online audience are "a broad audience of the general public" interested in the subject of the requested documents. 10 CFR § 1004.9(a)(8)(i)(C). SRIC's more than 40 years of history of being a leading public information source on WIPP, incorporating information obtained through FOIA into reports, articles, and other communications illustrates, demonstrates that SRIC is well prepared to convey to the public any relevant information it obtains through this records request.

SRIC has the ability to and will disseminate information collected from this FOIA request through various channels. These include, but are not limited to the following:

- SRIC's website, available at <http://www.sric.org> and its Nuclear Waste documents (<http://sric.org/nuclear/nuclear2.php>).
- SRIC's presentations to public audiences, which are also frequently posted on the website and are sometimes posted widely on the internet.
- SRIC's on-going information sharing activities with local, national and international news media.

SRIC issues press releases, issue papers, and reports; participates in interviews with reporters and editorial writers; and responds to dozens of requests from the general public for information about WIPP each month.

SRIC employees appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books.

SRIC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public's understanding of the subject.

4. Significantly contribute to public understanding

The records requested shed light on a matter of considerable public interest and concern: DOE has held two public workshops related to the draft strategic plan during the summer of 2017 and has issued public notices of such workshops. WIPP's long term operations and expansion have been the subject of dozens of newspaper articles and online discussions.

Public understanding of WIPP's operations until 2050 would be significantly enhanced by disclosure of the requested records concerning the overarching vision/strategy. Disclosure would help the public to more effectively evaluate the draft strategic plan and other WIPP activities. Disclosure would also help the public to better understand and evaluate DOE's actions (or inaction) on the range of potential future activities until 2050. Such activities could have major impacts on the environment, worker and public health and safety, regulatory activities, funding for WIPP, and the transportation and disposal of nuclear waste.

B. SRIC Satisfies the Second Fee Waiver Requirement

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because SRIC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 10 CFR § 1004.9(a)(8)(ii). SRIC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Envtl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). SRIC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about WIPP's future activities and expansion. As noted at Part II.A, any work done by DOE on WIPP's future operations and strategic plan relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of WIPP and associated threats to human health and the environment.

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by SRIC to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works. SRIC staff gather information from a variety of sources—including documents provided pursuant to FOIA requests—to write original articles and reports that are featured on its website, in its press releases, public presentations, and on other media outlets. See *Cause of Action v. Fed. Trade Comm'n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it "distributes work to an audience and is especially organized around doing so"). SRIC seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, SRIC will, if necessary and under protest, pay fees in accordance with DOE's FOIA regulations at 10 CFR § 1004.9(b) for all or a portion of the requested records. Please contact me before doing anything that would cause the fee to exceed \$150. SRIC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. Conclusion

Please email or (if it is not possible to email) mail the requested records to me at the SRIC office address listed below. Please send them on a rolling basis; DOE's search for—or deliberations concerning—certain records should not delay the production of others that DOE has already retrieved and elected to produce. *See generally* 5 U.S.C. § 552(a)(6). If DOE concludes that any of the records requested here are publicly available, please let me know.

Please do not hesitate to call or email with questions.

Thank you.

Sincerely,



Don Hancock

SRIC

PO Box 4524

Albuquerque, NM 87196-4524

505/262-1862 (phone)

505-262-1864 (fax)

sricon@earthlink.net