

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE)	
COUNCIL,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 09-0935 (RBW)
)	
FEDERAL MARITIME COMMISSION,)	
Defendant.)	
_____)	

PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff Natural Resources Defense Council hereby moves for partial summary judgment on the ground that there is no genuine issue of disputed material fact and it is entitled to judgment as a matter of law. Specifically, plaintiff is entitled to a public interest waiver of fees under the Freedom of Information Act, and, in the alternative, recognition as a representative of the news media entitled to reduced fees. In support of this motion, plaintiff submits the accompanying memorandum, a statement of material facts as to which there is no genuine dispute, the declaration of Adriano Martinez with attached exhibits, and a proposed order.

Dated: September 28, 2009

/s/ Margaret B. Kwoka
Margaret B. Kwoka (D.C. Bar No. 988255)
Adina H. Rosenbaum (D.C. Bar No. 490928)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-7733

Adriano Martinez (CA Bar No. 237,152)
NATURAL RESOURCES DEFENSE COUNCIL
1314 Second St.
Santa Monica, CA 90401
(310) 434-2300

Counsel for Natural Resources Defense Council

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE)
COUNCIL,)
)
Plaintiff,)
)
v.) C.A. No. 09-0935 (RBW)
)
FEDERAL MARITIME COMMISSION,)
)
Defendant.)
_____)

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

Margaret B. Kwoka (D.C. Bar No. 988255)
Adina H. Rosenbaum (D.C. Bar No. 490928)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-7733

Adriano Martinez (CA Bar No. 237,152)
NATURAL RESOURCES DEFENSE COUNCIL
1314 Second St.
Santa Monica, CA 90401
(310) 434-2300

Counsel for Natural Resources Defense Council

Dated: September 28, 2009

TABLE OF CONTENTS

INTRODUCTION1

STATEMENT OF FACTS1

 I. Clean Trucks Programs.....1

 II. NRDC’s FOIA and Fee Waiver/Reduction Requests and FMC’s Response3

ARGUMENT5

 I. NRDC Is Entitled to a Public Interest Fee Waiver.5

 a. Disclosure to NRDC of the Requested Records Is Likely to Contribute
 Significantly to the Public Understanding of FMC’s Review of the Clean Trucks
 Programs.6

 i. The Requested Material Is Not Already Public.8

 ii. NRDC Has the Ability to Disseminate the Requested Materials.13

 b. NRDC Has No Commercial Interest in the Requested Records.14

 i. NRDC’s Advocacy for the Employee Requirement.....16

 ii. NRDC’s Other Litigation.....20

 II. In the Alternative, NRDC Qualifies for Reduced Fees As a News Media
 Representative.22

CONCLUSION.....26

TABLE OF AUTHORITIES

CASES

* *Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20 (D.C. Cir. 1998) 8, 9, 11, 12

Citizens for Responsibility and Ethics in Washington v. United States Department of Health and Human Services, 481 F. Supp. 2d 99 (D.D.C. 2006)..... 12

Center for Public Integrity v. United States Department of Health and Human Services, No. 06-1818, 2007 WL 2248071 (D.D.C. Aug. 3, 2007) 5, 23

Edmonds Institute v. United States Department of Interior, 460 F. Supp. 2d 63 (D.D.C. 2006). 14

Electronic Privacy Information Center v. Department of Defense, 241 F. Supp. 2d 5 (D.D.C. 2003) 5, 24

Federal Maritime Commission v. City of Los Angeles, et al, No. 08-1895 (D.D.C. filed Oct. 31, 2008). 3

Fitzgibbon v. Agency for International Development, 724 F. Supp. 1048 (D.D.C. 1989) 12

Forest Guardians v. United States Department of the Interior, 416 F.3d 1173 (10th Cir. 2005)..... 6, 11-12

Judicial Watch, Inc. v. United States Department of Justice, 122 F. Supp. 2d 5 (D.D.C. 2000) ... 5

Judicial Watch, Inc. v. United States Department of Justice, 185 F. Supp. 2d 54 (D.D.C. 2002) 5

* *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003) 5, 6, 7

McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282 (9th Cir. 1987)..... 6, 18, 21

* *National Security Archive v. United States Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990)..... 18, 22, 23, 26

Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency,

581 F. Supp. 2d 491 (S.D.N.Y. 2008)..... 6

Prison Legal News v. Lappin, 436 F. Supp. 2d 17 (D.D.C. 2006) 12

Rozet v. Department of Housing and Urban Development, 59 F. Supp. 2d 55
(D.D.C. 1999) 19, 21

S.A. Ludsin & Co. v. United States Small Business Administration, No. 96-2146,
1997 WL 337469 (S.D.N.Y. June 18, 1997), *aff'd*, 662 F.3d 1148 (2d Cir. 1998) 19

Schrecker v. United States Department of Justice, 970 F. Supp. 49 (D.D.C. 1997) 12

VoteHemp, Inc. v. Drug Enforcement Agency, 237 F. Supp. 2d 55 (D.D.C. 2002)..... 19

STATUTES

5 U.S.C. § 552(a)(4)(A)(ii) 5, 23, 25, 26

5 U.S.C. § 552(a)(4)(A)(ii)(II)..... 22

5 U.S.C. § 552(a)(4)(A)(iii) 5, 6

5 U.S.C. § 552(a)(4)(A)(vii) 5

Pub. L. No. 110-175, 121 Stat. 2524 (2007) (codified as amended at 5 U.S.C. § 552)..... 23

OTHER AUTHORITIES

132 Cong. Rec. S16496 (daily ed. Oct. 15, 1986) (statement of Sen. Leahy)..... 5

132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy)..... 22

REGULATIONS

46 C.F.R. § 503.43(a)(4)..... 15, 18

46 C.F.R. §§ 503.43(b)(vi)(A)-(D) 8

46 C.F.R. §§ 503.43(b)(vi)(E)-(F) 14-15

*Authorities on which we chiefly rely are marked with asterisks.

INTRODUCTION

This Freedom of Information Act (FOIA) case arises from the decision of defendant Federal Maritime Commission (FMC) to deny the request of plaintiff Natural Resources Defense Council (NRDC) for a full public interest waiver of fees associated with its FOIA request and, in the alternative, for recognition as a representative of the news media entitled to reduced fees. NRDC demonstrated that the requested records would serve the public interest by informing the public about FMC regulatory activities that threatened environmental programs at two California ports and that NRDC had no commercial interest in the records. NRDC also demonstrated its history of using raw material and applying its editorial and technical skills to publish written work on issues of current interest and its intent to do so in this case. Accordingly, this Court should grant NRDC partial summary judgment on the issue of fees.

STATEMENT OF FACTS

I. The Clean Trucks Programs

NRDC is a national non-profit organization with more than 1.2 million members and e-activists, more than 82,000 of whom reside in California. Declaration of Adriano Martinez (Martinez Declaration) Ex. 3 Attach. G ¶ 2, Attach. M.¹ One of NRDC's organizational purposes is to protect the environment and public health, including the environment and health of its members. Martinez Decl. Ex. 3 Attach. G ¶ 2. As part of this mission, NRDC has long been concerned about pollution associated with ports. Martinez Decl. Ex. 3 Attach. G ¶¶ 3-5. In 2004, NRDC published two in-depth reports in a series entitled *Harboring Pollution*. Martinez Decl. Ex. 3 Attach. I, Attach. J. In these reports, NRDC detailed the various sources of pollution

¹ Exhibit 3 to the Martinez Declaration is a copy of NRDC's administrative appeal of FMC's initial denial of NRDC's fee waiver request. NRDC submitted numerous documents to FMC in support of that administrative appeal. Although, when they were submitted, those documents were labeled as "exhibits" to the administrative appeal, we will cite and refer to them in this brief as "attachments" to the administrative appeal to avoid any confusion between them and the exhibits to the Martinez Declaration.

and identified diesel trucks as the second highest source of emissions from ports. Martinez Decl. Ex. 3 Attach. I at 4-5. NRDC explained: “While new trucks are fairly clean compared to other diesel sources, the local trucks that serve container ports tend to be much older than the long-haul truck fleet, and therefore more polluting.” *Id.* at 4; *see* Martinez Decl. Ex. 3 Attach. G ¶¶ 10, 11. Moreover, NRDC identified both environmental and human health risks associated with the pollution, noting that because “major ports operate virtually next door to residential neighborhoods, schools, and playgrounds,” those communities “face extraordinarily high health risks from associated air pollution.” Martinez Decl. Ex. 3 Attach. J. at vii. NRDC also created environmental “report cards” for ten U.S. ports, including the ports of Los Angeles and Long Beach, giving each a dismal “C+” for air quality. Martinez Decl. Ex. 3 Attach I at 12, 19.

In 2006, the Los Angeles and Long Beach ports issued a joint Clean Air Action Plan (CAAP). Martinez Decl. Ex. 3 Attach. K. NRDC participated centrally in the development of CAAP by joining a pre-CAAP task force, providing expert testimony, issuing written comments, and engaging in public advocacy. Martinez Decl. Ex. 3 Attach. G ¶¶ 3, 4. NRDC retains a seat on the CAAP advisory group established by the mayors of both cities. Martinez Decl. Ex. 3 Attach. G ¶ 4. NRDC has also been engaged in substantial public education and news dissemination about port pollution generally and CAAP specifically. *See, e.g.*, Martinez Decl. Ex. 3 Attach. N, Ex. 5, Ex. 6.

CAAP included the adoption of a Clean Trucks Program at each of the two ports, which were to go into effect October 1, 2008. Martinez Decl. Ex. 3 Attach. F at 3. The principal components of both programs were, first, a phase-out of older trucks at the ports and, second, funding for the purchase or lease of new, relatively clean trucks by trucking companies who signed concession agreements that would come from new fees on cargo containers to be paid by

the beneficial cargo owner (that is, the business for whom the cargo is being shipped). Martinez Decl. Ex. 3, Attach. F at 4, Attach. G ¶ 11.

FMC is a regulatory agency responsible for overseeing the Shipping Act of 1984. Although environmental programs are outside the traditional purview of FMC, on September 24, 2008, FMC, in a closed session, issued an Order of Investigation and Hearing of the Ports of Los Angeles and Long Beach for possible violations of the Shipping Act in the Clean Trucks Programs. Martinez Decl. Ex. 3 Attach. F at 1, Attach. L. The investigation threatened to delay or even prevent full implementation of the Clean Trucks Programs. Martinez Decl. Ex. 1 Attach. H. Commissioner Brennan publicly dissented from the decision to investigate, issuing several scathing statements about FMC's decision, including that it "displays a bureaucratic arrogance and ignores the felt needs of the citizens of Los Angeles to clean up their air" and that it was a "colossal mistake." Martinez Decl. Ex. 7. He also noted that the Clean Trucks Programs concerned primarily environmental and labor issues, and that "the agency has neither the charge nor the necessary expertise to rule on those issues." Martinez Decl. Ex. 10.

On October 31, 2008, FMC sued the ports in district court, alleging the same violations and seeking to enjoin the ports from implementing the Clean Trucks Programs. *Fed. Mar. Comm'n v. City of Los Angeles, et al*, No. 08-1895 (D.D.C. filed Oct. 31, 2008). FMC later dropped both its administrative investigation and its lawsuit.

II. NRDC's FOIA and Fee Waiver/Reduction Requests and FMC's Response

On October 9, 2008, shortly after FMC's decision to investigate the ports' programs, NRDC sent a FOIA request to FMC asking for "all records related to the FMC review of the ports of Los Angeles and Long Beach's clean trucks programs," including "records presented to the FMC and/or its agents from outside parties related to the clean trucks programs," and "any

records presented by the FMC and/or its agents to any outside parties related to these clean trucks programs.” Martinez Decl. Ex. 1 at 1. In a subsequent letter, NRDC eliminated from the scope of its request any publicly available documents, including on the internet; any documents given to FMC by NRDC, Sierra Club, or Coalition for Clean Air; and any documents available on Public Access to Court Electronic Records (PACER). Martinez Decl. Ex. 3 Attach. D at 2.

In its initial request, NRDC also requested a public interest waiver of fees associated with processing its request, or, in the alternative, that it be recognized as a representative of the news media entitled to reduced fees. Martinez Decl. Ex. 1 at 2-9. In support of these requests, NRDC submitted extensive documentation about the Clean Trucks Programs, the public’s interest in FMC’s review, and NRDC’s own ability and intent to disseminate information contained in the requested records. *See* Martinez Decl. Ex. 1. On March 4, 2009, FMC denied NRDC’s request for a full waiver of fees under the public interest fee waiver provision of FOIA, and granted instead a 20% reduction in search and duplication costs. Martinez Decl. Ex. 2. FMC also denied NRDC’s request to be recognized as a representative of the news media. *Id.*

On March 17, 2009, NRDC appealed the fee waiver denial. Martinez Decl. Ex. 3. In support of its appeal, NRDC submitted additional documentation of NRDC’s intent to use the requested records, interest in the records, and interest in the Clean Trucks Programs. *See id.* On April 15, FMC denied NRDC’s appeal. Martinez Decl. Ex. 4. FMC stated that the requested records would duplicate information already publicly available, and that NRDC had a commercial interest in the records and was not entitled to a full fee waiver. *Id.* at 2-10. FMC also concluded that NRDC did not show sufficient intent to inform the public about issues of current public concern and, thus, was not a representative of the news media. *Id.* at 11-12.

ARGUMENT

“Intended to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed, . . . the Freedom of Information Act requires federal agencies to disclose information upon request unless the statute expressly exempts the information from disclosure.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (internal citation and quotation omitted). Although an agency may charge a requester reasonable fees associated with processing a request, FOIA limits the fees an agency may assess by requester category and provides for fee waivers when the request is in the public interest. 5 U.S.C. §§ 552(a)(4)(A)(ii), (iii). These fee-limiting provisions are designed to “remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA to the news media and public interest users of the FOIA.” 132 Cong. Rec. 16496 (daily ed. Oct. 15, 1986) (statement of Sen. Leahy).

Judicial review “[i]n any action by a requester regarding the waiver of fees” is *de novo* and “limited to the record before the agency.” 5 U.S.C. § 552(a)(4)(A)(vii). A majority of courts apply the same standard in reviewing an agency’s fee-category determination. *See, e.g., Ctr. for Pub. Integrity v. U.S. Dep’t of Health and Human Servs.*, No. 06-1818, 2007 WL 2248071 at *3 (D.D.C. Aug. 3, 2007); *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 9 (D.D.C. 2003); *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 185 F. Supp. 2d 54, 59 (D.D.C. 2002); *but see Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 122 F. Supp. 2d 5, 11-12 (D.D.C. 2000).

I. NRDC Is Entitled to a Public Interest Fee Waiver.

An agency must waive fees under FOIA “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). Although the requester bears the initial burden of showing that the fee waiver requirements have been met, Congress intended the provision to “be liberally construed in favor of waivers for noncommercial requesters.” *Rossotti*, 326 F.3d at 1312 (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)). A requester meets his burden by presenting the agency with a “reasonably specific” and “non-conclusory” showing that the requested disclosure is in the public interest. *Rossotti*, 326 F.3d at 1312. NRDC has more than met its burden here.

a. Disclosure to NRDC of the Requested Records Is Likely to Contribute Significantly to the Public Understanding of FMC’s Review of the Clean Trucks Programs.

NRDC demonstrated with specificity that the requested records would contribute significantly to the public understanding of governmental activities, which is the first prong of the fee waiver requirement. In its fee waiver request, NRDC first explained that it needed the requested records to shed light on FMC’s reasons for investigating the Clean Trucks Programs, including what influence, if any, private parties had. Martinez Decl. Ex. 1 at 3-4. Second, NRDC reasoned that the requested records would inform the public about if and how FMC obtained the necessary expertise to investigate these programs, as they fall outside of the normal scope of FMC regulatory activity. *Id.* Ex. 1 at 4.

The reasons for agency action are of quintessential interest to the public. “An understanding of how [a federal agency] makes policy decisions, including the influence of any outside groups on this process, is . . . important to the public’s understanding of the [agency].” *Forest Guardians v. U.S. Dep’t of Interior*, 416 F.3d 1173, 1179 (10th Cir. 2005); see *Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency*, 581 F. Supp. 2d 491, 499 (S.D.N.Y. 2008)

(“Regardless of NRDC’s ultimate findings, disclosure of the information it seeks is likely to contribute significantly to the public’s understanding of the EPA’s decisionmaking process and the role, if any, played by outside groups in that process.”). Moreover, a requester does not have to prove that improper private influence will be uncovered by the requested records to demonstrate a public interest in disclosure because “the American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not.” *Rossotti*, 326 F.3d at 1314.

Although NRDC had no obligation to produce evidence of outside influence, NRDC did provide a detailed explanation for why the public would want to know more about FMC’s reasons for investigating in this case. First, the decision to investigate was made in a closed session of the Commission. Martinez Decl. Ex. 1 at 3, Ex. 3 Attach. L. Second, in a rare occurrence, one FMC Commissioner publicly dissented from FMC’s decision to investigate the Clean Trucks Programs, calling it a “colossal mistake” and proclaiming that it “displays a bureaucratic arrogance and ignores the felt needs of the citizens of Los Angeles.” Martinez Decl. Ex. 1 at 3, Ex. 7. Third, news reports suggested that even the act of investigating itself—regardless of the outcome—could delay the implementation of the programs, thereby having environmental and human health effects of great public concern. *Id.* Ex. 1 Attach. H. And finally, the Clean Trucks Programs fall far outside of FMC’s normal area of expertise. *Id.* Ex. 1 at 3-4, Ex. 9 at 19, Ex. 10. As such, NRDC, above and beyond meeting a public interest standard, demonstrated why FMC’s actions in this case specifically merit further attention.

Although this Court does not owe deference to FMC’s interpretation of FOIA, *Rossotti*, 326 F.3d at 1313, FMC used the six factors enumerated in its regulations to determine whether a fee waiver is appropriate, four of which go to this first prong of the fee waiver provision:

(A) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government;

(B) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(C) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to public understanding; [and]

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

46 C.F.R. §§ 503.43(b)(vi)(A)-(D).

In analyzing the four factors under its regulations, FMC conceded that NRDC's request met the first factor: the requested records concern the activities of the government because they "relate to the FMC's review of the LA/Long Beach Clean Trucks Program," which was "conducted in the course of the Commission's duties as the agency responsible for administering and enforcing the Shipping Act of 1984." Martinez Decl. Ex. 4 at 3. FMC stated, however, that the remaining three factors, analyzed as a group, counseled against a finding that the request was in the public interest because, it claimed, "[w]hile a public interest may exist in the environmental clean-up plans contemplated by the Ports of LA and Long Beach in their respective Clean Trucks Programs, much of the information NRDC says is needed to assist public understanding is already in the public domain." Martinez Decl. Ex. 4 at 7.

i. The Requested Material Is Not Already Public.

An agency that denies a fee waiver based on a claim that the requested material is already in the public domain must substantiate that claim by demonstrating where the requested material publicly resides. *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1998). Here, FMC made no such showing. To begin with, NRDC specifically excluded from its request (1)

any publicly available records, including records available on the internet, (2) any records provided to FMC by NRDC and two of its coalition partners, to which NRDC already has access, and (3) any court-filed records available on the Public Access to Court Electronic Records (PACER). Martinez Decl. ¶ 4, Ex. 3 Attach. D at 2. In other words, NRDC sought only records that were not already public.

More importantly, the records FMC identified as public are not the same as the requested material. *See Campbell*, 164 F.3d at 36 (rejecting agency's argument that requested agency summaries of news articles would not inform the public because the articles themselves were public, concluding that the news articles were not the same as the requested material). NRDC requested, for example, all records "presented to the FMC and/or its agents from outside parties related to the clean trucks programs," and all records "presented by the FMC and/or its agents to any outside parties related to these clean trucks programs." Martinez Decl. Ex. 1 at 1. NRDC also provided a list of third parties with whom FMC may have communicated about the programs, including industry groups, businesses, unions, state government agencies, and non-profit organizations. *Id.* Ex. 1 at 1-2. The substance of those communications would show whether interested parties pressured FMC, how FMC responded to any such pressure, and whether private interests played any role in FMC's decision. In addition, the requested agency records concerning FMC's review of the Clean Trucks Programs would reveal FMC's contemporaneous rationale for its decision to investigate and the factors it took into account.

In contrast, the public documents on which FMC relied consist primarily of two declarations by FMC's economist, Roy J. Pearson, submitted in litigation as expert testimony on potential anti-competitive effects of the programs. His few statements concerning the motives for the investigation are cursory and are not the same as the material requested by NRDC:

In the past two years, I have met with the parties to the agreement once in Washington, D.C. and have visited them in the Los Angeles area on three separate occasions. During these trips, I also visited with licensed motor carriers (“LMCs”), representatives of their trade associations both regionally and nationally, independent owner operators (“IOOs”) involved in drayage, marine terminal operators (“MTOs”), ocean carriers, large retailers, cargo intermediaries, warehouse owners/operators, environmental groups, a local community organization, as well as interested academics at the California State University, Long Beach and the University of Southern California.

Martinez Decl. Ex. 4 at 4. The quoted passage neither purports to represent an exhaustive list of interested parties who communicated with FMC about its investigation nor reveals the content of those communications. Rather, it gives a brief list of categories of parties with whom one economist at FMC met. In short, a paragraph like this is a far cry from being able to examine the actual communications between FMC and private parties about the investigation.

As to the factors FMC considered in deciding to investigate, again, FMC points to several paragraphs of the Pearson declaration that, rather than providing a complete list of reasons for FMC’s actions, explain Pearson’s own expert opinion of the competitive effects of the programs:

My analysis raises several serious issues about the clean trucks program at POLA and POLB. The employee mandate will almost certainly (and unnecessarily) increase transportation costs and reduce service, while doing nothing to ensure compliance with the CTP’s rolling ban on older trucks. Further, the key aspects of the harmonized concessions plan, including the requirement that LMCs operate their own truck fleet and hire the drivers of their trucks as full-time employees (“employee mandate”), CTP fee and exemptions, truck subsidies, and economic pressures on LMCs, will likely transform the drayage market from a perfectly competitive market to a severely constrained market.

Martinez Decl. Ex. 4 at 4 (emphasis added). FMC cites several other paragraphs of the declaration that are also fairly read as Pearson’s own economic opinions regarding the programs’ potential effects, not an agency justification or rationale for the investigation. *See* Martinez Decl. Ex. 4 at 4-6. And even if the Pearson declaration did represent agency views, an agency’s post-hoc summary of events submitted in court in support of its litigation position is not the same

as the requested materials, which are the actual records used by the agency at the time it decided to take action. The material NRDC requested is even more different from the information in the Pearson declaration than the requested summaries of news articles in *Campbell*, which were deemed non-duplicative of the publicly available news articles themselves. *See* 164 F.3d at 36.

In addition to the Pearson Declaration, FMC cites several other litigation documents, including FMC's complaint, FMC's motion for a preliminary injunction, a second declaration submitted by FMC in support of its motion, and voluminous unidentified "declarations and exhibits." Martinez Decl. Ex. 4 at 7. FMC fails to cite any portion of these records that purports to give a comprehensive record of documents used in deciding to investigate or communications between FMC and private parties about the investigation.

Finally, FMC vaguely states that "much of the information NRDC says is needed to assist public understanding is already in the public domain due to earlier media attention . . . [in] sources such as Journal of Commerce and American Shipper, newsletters such as the Congressional Information Bulletin, and on-line media such as the Cunningham Report" Martinez Decl. Ex. 4 at 7. FMC did not identify any particular article that sheds light on the questions of concern to NRDC, and NRDC is not aware of any news outlet, including those listed by FMC, having conducted an in-depth study of FMC's decision to investigate the Clean Trucks Programs or provided a comprehensive log of all communications between FMC and private parties. The requested material is not the same as the documents FMC identified.

In any event, even if the public information FMC identified has some informative value, the important issue is not whether the public has *any* awareness about a government activity; it is whether the records would *contribute* significantly to the public understanding. None of the press FMC cites has provided the in-depth information NRDC is seeking under FOIA. *See*

Forest Guardians, 416 F.3d at 1180 (although the agency program was well known through the press, requested records would add to public understanding of details of the program); *see also Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Health and Human Servs.*, 481 F. Supp. 2d 99, 117–18 (D.D.C. 2006) (fee waiver appropriate where media accounts of issue only touched on the question of external influence in an agency decision, and the FOIA request would allow more in-depth treatment).

Finally, “the mere fact that material is in the public domain does not justify denying a fee waiver; only material that has met a threshold level of public dissemination will not further ‘public understanding’ within the meaning of the fee waiver provisions.” *Campbell*, 164 F.3d at 36. Here, the information that FMC identifies as publicly available on the question of FMC’s reasons for investigating the Clean Trucks Programs fails this test. For instance, the declarations cited by FMC were filed in court proceedings, available either at the courthouse or through paid services to obtain court-filed documents. *See Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 24 (D.D.C. 2006) (information in various court filings not sufficiently available to the public); *Schrecker v. U.S. Dep't of Justice*, 970 F. Supp. 49, 50 (D.D.C. 1997) (information not publicly available when public must pay to get it); *Fitzgibbon v. Agency for Int'l Dev.*, 724 F. Supp. 1048, 1051 (D.D.C. 1989) (records in reading room in Washington DC not publicly disseminated). Although FMC claimed these records are available on its website, attempts to access them revealed that about half of the links to the records did not work. Martinez Decl. ¶ 14, Ex. 4 at 7. In this context, NRDC’s demonstrated ability to disseminate very broadly its analysis of the much more detailed information it requested would significantly enhance the public understanding of FMC’s investigation.

In addition to explaining how the requested records would contribute to the public's understanding of the reasons for FMC's decision to investigate, NRDC also explained that the records would contribute to the public's understanding of a second governmental activity: how FMC acquired the expertise necessary to conduct the investigation of the Clean Trucks Programs. *See* Martinez Decl. Ex. 1 at 3-4. In a 2010-2015 FMC Strategic Plan document, FMC stated that new types of port programs, including "environmental mitigation proposals" "tend to involve industries . . . and issues . . . that require the development, by agency staff, of additional information sources and areas of expertise." Martinez Decl. Ex. 9 at 19. Commissioner Brennan, who dissented from FMC's decision to investigate the programs, cited as a concern that "the agreement filed with the Commission represents principally an environmental and labor/management matter, and the agency has neither the charge nor the necessary expertise to rule on those issues." Martinez Decl. Ex. 10. FMC identified no public source that would shed light on the question of FMC's expertise, much less reveal any shortcomings that FMC may have had in conducting an investigation.

The record thus demonstrates that the public information FMC identified is not the same as the requested material and that even the bits of information that are public are in sources that are not even readily accessible, much less have they reached any threshold of dissemination. FMC's justification for finding that NRDC's request was not in the public interest fails.

ii. NRDC Has the Ability to Disseminate the Requested Materials.

NRDC's fee waiver request went far beyond simply explaining unanswered questions of public importance concerning FMC's investigation of the Clean Trucks Programs. NRDC demonstrated unequivocally that it has the means to analyze and distribute widely any information obtained as a result of its FOIA request. NRDC explained that its website, updated

daily, receives 800,000 visits per month, its quarterly magazine *OnEarth* is distributed to approximately 450,000 readers, its periodic newsletter *Nature's Voice* is distributed to NRDC's 420,000 members nationwide, its action email list has more than 145,000 subscribers, its *Legislative Watch* bulletin is distributed to more than 35,000 readers, and NRDC dedicates extensive resources to press efforts. Martinez Decl. Ex. 1 at 4-5. NRDC also documented how its employees provide expert analysis to Congress, members of the media, and periodicals. *Id.* Finally, NRDC documented twelve specific and significant instances in which it used information obtained through FOIA to inform the public about the operations of government with respect to environmental issues. *Id.* at 5-7; see *Edmonds Inst. v. U.S. Dep't of Interior*, 460 F. Supp. 2d 63, 75 (D.D.C. 2006) (fee waiver requester's past use of records obtained through FOIA can be relevant). NRDC stated its intention to do the same with any records released in response to its FOIA request to FMC. Martinez Decl. Ex. 1 at 7, 8.

NRDC has met the first prong of the fee waiver test by demonstrating how the requested records would contribute to the public understanding of two aspects of FMC activities and by showing its ability and intent to disseminate the requested material to the public.

b. NRDC Has No Commercial Interest in the Requested Records.

In addition to showing a likelihood of contributing significantly to the public understanding, NRDC also satisfied the second prong of the test for assessing entitlement to a fee waiver: NRDC has no commercial interest in the requested records.

FMC's regulations provide two factors in determining a requester's commercial interest:

(E) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(F) The primary interest in disclosure: 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.

46 C.F.R. §§ 503.43(b)(vi)(E)-(F).²

NRDC is a non-profit public-interest organization dedicated to protecting the environment and public health, including the environment and health of its over 1.2 million members and e-activists. Martinez Decl. Ex. 3 Attach. G ¶ 2, Attach. M. One of NRDC's long-standing priorities in serving that goal has been reducing diesel emissions associated with port operations in California. *Id.* As NRDC documented, not only are diesel emissions particularly dangerous to human health and the environment, but the ports of California constitute the largest source of all diesel pollution in California. *Id.* ¶¶ 10-14.

Because NRDC has more than 82,000 members in California, and more than 1,000 in the immediate vicinity of the ports of Los Angeles and Long Beach, it has dedicated resources to reporting on this problem, advocating for policy changes, and working with the ports and state government officials to find solutions. *Id.* ¶¶ 2-4. NRDC requested records under FOIA to shed light on FMC action that threatened the Clean Trucks Programs and to educate the public about why FMC decided to investigate in this case. Martinez Decl. Ex. 1. Not only did NRDC submit to FMC sworn statements about the history of its interest in this issue, NRDC also submitted sworn statements that it has no commercial interest in the Clean Trucks Programs generally, or in the records requested under FOIA specifically. Martinez Decl. Ex. 3 Attach G ¶ 15.

Despite this detailed record of NRDC's interest in the requested records, FMC claims that two of NRDC's actions convert NRDC from a non-profit public interest environmental group

² In considering NRDC's fee waiver request, FMC also employed its standard for a commercial use request: a "request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made." 46 C.F.R. § 503.43(a)(4). FMC did not, however, categorize NRDC as a commercial use requester. It only concluded that NRDC's so-called commercial interest in the records precluded a fee waiver. Martinez Decl. Ex. 4.

into a FOIA requester seeking records to advance a commercial interest. First, FMC pointed to NRDC's advocacy for the employee requirement component of one of the Clean Trucks Programs. *See* Martinez Decl. Ex. 4 at 8-9. Second, FMC relied on the fact that NRDC sued FMC over FMC's failure properly to comply with environmental laws. *See id.* at 9-10. Neither action, however, demonstrates a commercial interest in the requested records.

i. NRDC's Advocacy for the Employee Requirement

The Clean Trucks Programs require a sharp reduction of the emissions of diesel trucks doing business at the ports of Los Angeles and Long Beach by phasing out older trucks and providing funding for the purchase of newer trucks. Martinez Decl. Ex. 3 Attach. F at 4, G ¶ 11. The program at the Los Angeles port also involves a phased-in requirement that truckers doing business at the ports be employees of trucking companies who hold the licenses to conduct such business, rather than independent contractors. Martinez Decl. Ex. 3 Attach. F at 4. NRDC formed a coalition with a broad range of groups in advocating for measures to reduce ports' diesel emissions. FMC correctly cited articles noting the alliance formed between environmental groups, including NRDC, and labor unions, among many others. Martinez Decl. Ex. 4 at 8. And FMC correctly stated that NRDC advocated for the employee requirement along with the other provisions of the Clean Trucks Programs. *Id.*

Where FMC erred, however, was in attributing NRDC's purpose in advocating for the employee requirement as being the same purpose as that of the labor unions. FMC claims: "NRDC is no longer simply advocating for cleaning up the air. Rather, they [sic] acknowledge joining with the Teamsters and the Ports in support of the non-environmental components of the Ports' Clean Trucks Plans, specifically including the employee driver mandate." Martinez Decl. Ex. 4 at 8. To illustrate this claim, FMC cites two articles on NRDC's website, but those articles

state exactly the opposite. The first one explains that NRDC is “still trying to work with the Port of Long Beach . . . to enact a clean truck plan that actually has a chance of success instead of creating a financial burden for the low-income drivers driving the big rigs” and that “the L.A. plan puts the financial burden of new, clean trucks on the real trucking companies with employee drivers, not on the drivers themselves.” Martinez Decl. Ex. 5. In other words, the employee requirement is essential to NRDC’s goal of having a clean trucks program that “has a chance of success.” The second article is even more explicit in identifying NRDC’s environmental interest in the employee requirement: “We advocated for a different model . . . where real trucking companies would be held accountable for buying and maintaining trucks and employ the drivers, in the belief that, under this model, the trucks will be better maintained and more quickly replaced.” Martinez Decl. Ex. 6. The article also explained that “the independent contractor model of port trucking is broken and needs to be discarded because drivers can’t afford to maintain their trucks or buy new ones and, ultimately, that’s bad for clean air and bad for the environment.” *Id.* In short, FMC pointed to evidence directly demonstrating NRDC’s interest in the employee requirement as being an environmental one and explaining that NRDC viewed the mandate as essential to its overall goals of reducing diesel emissions. Even if the FOIA request were only about FMC’s records concerning the employee requirement, which is not the case, NRDC’s interest in the employee requirement is not commercial.

Moreover, even under the mistaken assumption that NRDC did have the same purpose, FMC erred in concluding that NRDC’s FOIA request was actually on behalf of the labor unions. FMC cites nothing to support its statement that “the information sought by NRDC appears destined for a use or purpose that primarily furthers commercial, trade, or profit interests of others *on whose behalf the request is made.*” Martinez Decl. Ex. 4 at 9 (emphasis added). There

is simply no evidence that NRDC is fronting FOIA requests on behalf of labor unions in order to advance the agenda of the unions.³

In fact, NRDC's FOIA request itself supports the opposite conclusion. The request was not focused on the employee requirement aspect of the Clean Trucks Programs as opposed to other aspects. Indeed, the request encompassed FMC's actions both as to the program at the Los Angeles port, which has an employee requirement, and the program at the Long Beach port, which does not even have the employee requirement. Nothing about the request was tailored to any interest a union might have; rather, it was tailored to the two identified agency actions on which NRDC wanted to shed public light. And NRDC provided uncontroverted evidence about its interest in the Clean Trucks Programs, which is to advocate for the environment and health of millions of Californians, including thousands of NRDC's own members.

In any event, even under FMC's unsupported theory that NRDC both adopted the unions' motivation for advocating for the employee requirement and fronted FOIA requests made "on behalf" of the unions to help them advocate for the employee requirement, the request still would not be primarily in a commercial interest because the unions themselves have no commercial interest in the employee requirement. Under FOIA, "commercial use" does not mean an interest in any type of monetary benefit, but rather an interest in "commerce, trade, or profit." 46 C.F.R. § 503.43(a)(4); *Carlucci*, 835 F.2d at 1285 (interest in tort claim for damages not commercial use); *see also Nat'l Sec. Archive v. U.S. Dep't of Def.*, 880 F.2d 1381, 1387-88 (D.C. Cir. 1989) (remuneration for publishing not commercial use), *cert. denied*, 494 U.S. 1029 (1990). Unions

³ In raising for the first time in its letter denying NRDC's administrative appeal the theory of a commercial interest in the request made *on behalf of* unions, FMC's actions appear to contradict its own FOIA regulations, which provide: "Where the agency has reasonable cause to doubt the use to which a requester will put the records sought, or whether that use is not clear from the request itself, the agency will seek additional clarification before assigning the request to a specific category." 46 C.F.R. § 503.43(a)(4). If FMC harbored these doubts about whether NRDC was fronting this FOIA request on behalf of a union, it never sought any additional information that it could use to support its determination.

are non-profit, tax exempt entities that neither engage in commerce or trade nor make a profit. Rather, they advocate for workers' rights. The employee requirement may well raise wages and improve working conditions for truck drivers at the ports. But FMC did not identify any way in which the union used or could use its advocacy for the employee requirement to gain any sort of competitive advantage, make a profit, or facilitate any trade or business. *See Rozet v. Dep't of Hous. and Urban Dev.*, 59 F. Supp. 2d 55, 57 (D.D.C. 1999) (commercial interest where requester sought information to help his corporations, which had been sued by HUD for fraud); *S.A. Ludsin & Co. v. U.S. Small Bus. Admin.*, No. 96-2146, 1997 WL 337469, at *7 (S.D.N.Y. June 18, 1997) (requester sought information related to real estate he was selling as part of a business), *aff'd*, 662 F.3d 1148 (2d Cir. 1998). Because unions are not engaged in commerce or trade, and do not advocate on behalf of any industry or commercial enterprise, a union seeking documents to help it achieve an employee requirement would not advance a commercial interest.

In denying the administrative appeal, FMC relied on *VoteHemp, Inc. v. Drug Enforcement Agency*, 237 F. Supp. 2d 55 (D.D.C. 2002). In *VoteHemp*, the record before the agency demonstrated that the requester was a non-profit organization that advocated for *industry* interests. For instance, the court found that the requester's own website contained "direct links to the websites of companies that sell hemp products" and asked visitors to donate money to support the "*industry's*" legal efforts. *Id.* at 65. Here, FMC offered no evidence that NRDC was making a FOIA request on behalf of the unions' interests, rather than its own, much less did it offer evidence that NRDC was advocating in the interests of any industry. The record in this case supports NRDC's position that it is requesting the information to further its interests in advocating for a cleaner environment and increased human health by scrutinizing FMC's decision to investigate the Clean Trucks Programs and reporting its findings to the public.

ii. NRDC's Other Litigation

FMC references, although does not appear ultimately to rely on, another theory to explain why NRDC has a commercial interest in the requested records: that NRDC was involved in other litigation with FMC regarding the Clean Trucks Programs.⁴ Martinez Decl. Ex. 4 at 9-10. Again, FMC's chain of logic fails in two independent ways: NRDC's request was not designed to seek documents helpful to any of its litigation, but rather was designed to shed light on agency action of public importance. And even if, contrary to the record, NRDC's FOIA request had been made to advance its position in other litigation, NRDC's other litigation about the Clean Trucks Programs itself has no commercial purpose.

NRDC is involved in two other cases regarding the Clean Trucks Programs and FMC. The first case was brought by NRDC against FMC for declaratory and injunctive relief, primarily alleging that FMC violated environmental laws by failing to prepare, among other documents, an Environmental Impact Statement in conjunction with FMC's decision to investigate the Clean Trucks Programs under the Shipping Act. *See* Martinez Decl. Ex. 3 Attach. H. NRDC did not seek damages, but rather sought to force FMC to comply with environmental laws. *Id.* at 23. The second case is an administrative action brought by FMC against the ports of Los Angeles and Long Beach, alleging that the Clean Trucks Programs violated the Shipping Act. *See id.* Attach. F. FMC granted NRDC, along with other organizations, intervention in that action. *Id.* at 12-13. In its decision, FMC noted that NRDC and the other groups "want to participate to defend the [programs]." *Id.* at 12. No monetary benefit to NRDC was ever at issue.

First and foremost, NRDC's FOIA request did not target records concerning either FMC's compliance with environmental laws or the allegations in the Shipping Act action.

⁴ This second theory formed the primary basis for the original fee waiver denial, *see* Martinez Decl. Ex. 2, but was seemingly abandoned in FMC's denial of NRDC's appeal, as the appeal denial focused on NRDC's supposed commercial interest on behalf of unions. *See* Martinez Decl. Ex. 4.

Rather, the FOIA request targeted communications to and from FMC with private parties about its *decision* to investigate, and records concerning the investigation itself. NRDC identified two issues of public concern on which these records would shed light: first, the factors weighed by FMC in deciding to investigate the programs, including what, if any, influence private parties had on that decision, and second, whether and how FMC acquired the necessary expertise to conduct this investigation properly. Martinez Decl. Ex. 1 at 4. The FOIA request was calculated to lead to records pertaining to those two questions, not records specific to any litigation. As such, and for this reason alone, its other litigation is irrelevant to the fee-waiver analysis.

Second, even requesters who seek records for use in other litigation are not deemed to have a commercial interest in the request unless the other litigation is commercial. *Compare Carlucci*, 835 F.2d at 1287 (interest in records useful to individual plaintiffs in a tort suit for damages is non-commercial), *with Rozet*, 59 F. Supp. 2d at 57 (interest in records useful to defending corporations in fraud suit brought by federal government is commercial). In *Carlucci*, for example, the plaintiff requested under FOIA technical records that would assist in his tort suit for damages, acknowledging that the tort suit prompted the request. 835 F.2d at 1287. Even in those circumstances, the court concluded that damages claims “do not constitute a commercial interest” because “[i]nformation helpful to a tort claim furthers a requester’s interest in compensation or retribution, but not an interest in commerce, trade, or profit.” *Id.* at 1285. Although *Carlucci* upheld the agency’s partial denial of a fee waiver, it was because the plaintiff had not demonstrated a likelihood of significant contribution to public understanding, in large part because “the request gives no indication of requesters’ ability to understand and process this information [and] the record before the agency does not reveal whether requester have a history of disseminating such information” *Id.*

If a tort suit for damages does not constitute a commercial interest in records, NRDC's involvement with administrative and court actions for injunctive and declaratory relief certainly does not, even if it were the case—contrary to the record—that the FOIA request had been made for that purpose. And NRDC's FOIA request, unlike the request in *Carlucci*, amply demonstrated NRDC's capacity for analyzing and synthesizing technical records concerning these programs and a proven history of using agency records to inform the public about the operations of government. As NRDC attested in sworn statements, it has no commercial interest in these records and it should be granted a full fee waiver. FMC's various theories of NRDC's alleged commercial interest in the FOIA request are incorrect and unsupported by the record.

II. In the Alternative, NRDC Qualifies for Reduced Fees As a News Media Representative.

NRDC requested that, in the event that a public interest fee waiver were not granted, FMC recognize it as a representative of the news media. Under FOIA, “[f]ees shall be limited to reasonable standard charges for document duplication when records are not sought for a commercial use and are requested by . . . a representative of the news media.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). That is, such requesters are not charged for the agency's search and review costs.

As early as 1990, the D.C. Circuit recognized that “because one of the purposes of [FOIA] is to encourage the dissemination of information in Government files . . . [i]t is critical that the phrase “representative of the news media” be broadly interpreted if the act is to work as expected” *Nat'l Sec. Archive*, 880 F.2d at 1386 (quoting 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy)). As such, the court held that a representative of the news media is “a person or entity that gathers information of potential interest to a segment of

the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” *Id.* at 1387.

Congress amended FOIA by passing the OPEN Government Act of 2007. *See* Pub. L. No. 110-175, 121 Stat. 2524 (2007) (codified as amended at 5 U.S.C. § 552). There, Congress, for the first time, provided a statutory definition of “representative of the news media,” in which it adopted the definition given in *National Security Archive* and then explained:

In this clause, the term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are . . . publishers of periodicals (but only if such entities qualify as disseminators of “news”) who make their products available for purchase by or subscription by or free distribution to the general public. . . . Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities.

5 U.S.C. § 552(a)(4)(A)(ii).

In *National Security Archive*, the D.C. Circuit granted the Archive status as a representative of the news media based on its past publication of a single book and its stated intent to publish a number of “document sets,” each of which would contain information obtained under FOIA (and through other means) on a particular topic of current interest and which the Archive would organize with indices. 880 F.2d at 1386. Similarly, the Center for Public Integrity, another non-profit organization, was granted news media representative status based on its statement that the requested records would “serve as the basis for several press releases and articles,” its publication of an online newsletter, and a list of past publications demonstrating the Center’s record for informing the public about current affairs. *Ctr. for Pub. Integrity*, 2007 WL 2248071, at *5. And, the Electronic Privacy Information Center, a non-profit organization, was considered a representative of the news media based on its past

publication of books and its biweekly newsletter distributed to over 15,000 readers. *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11-15.

In the record it presented to the agency, NRDC met and, indeed, exceeded the standards articulated in this Circuit's news media status cases. NRDC updates its webpage daily with current environmental news and draws approximately 2.7 million page views and 800,000 visits per month. Martinez Decl. Ex. 1 at 4. NRDC also identified four periodic publications that it uses to disseminate news about the environment and human health. The first, *OnEarth*, is a quarterly magazine published by NRDC distributed to over 460,000 readers and available on newsstands and in bookstores. Martinez Decl. Ex. 1 at 4, 8 & Attach. 2. The second, *Nature's Voice*, is a newsletter on current environmental issues that is published five times a year and distributed to NRDC's approximately 420,000 members. Martinez Decl. Ex. 1 at 4 & Attach. 3. The third, *Earth Action*, is an email bulletin that goes to more than 145,000 subscribers. Martinez Decl. Ex. 1 at 4 & Attach. 4. The fourth, *This Green Life*, is an electronic newsletter distributed to more than 60,000 subscribers. Martinez Decl. Ex. 1 at 4 & Attach. 5.

In addition to its numerous regular publications, NRDC presented evidence of its investment in press releases and communications directly to the public about current environmental issues. For example, NRDC explained that it has a staff of over twenty employees dedicated to press releases, press conferences and coordinating interviews of NRDC staff in various types of media. Martinez Decl. Ex. 1 at 4 & Attach. 10. The fee waiver request also documented NRDC staff members' contributions to numerous non-NRDC publications and broadcasts, including radio programs, newspapers, magazines, academic journals and other periodicals. Martinez Decl. Ex. 1 at 4-5 & Attach. 11-16. NRDC documented *twelve* separate instances in which NRDC requested records under FOIA and then used those records in its

reporting on current events to the public. NRDC used the requested records to contribute to website digests, press releases, published research reports and articles appearing in various periodicals. *See* Martinez Decl. Ex. 1 at 5-7 & Attach. 17-34.

Finally, NRDC stated its intentions: “NRDC intends to disseminate any newsworthy information in the released records, and its analysis of such records, to its member base and to the broader public, through one or more of the many communications channels referenced above. As NRDC’s long history of incorporating information obtained through FOIA into reports, articles and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.” Martinez Decl. Ex. 1 at 7.

Despite the abundance of documentation in the record of NRDC’s activities as a representative of the news media, FMC concluded that NRDC did not “firmly intend” to publish documents relating to the FOIA request because of the words “any newsworthy information” in the above-quoted passage. Martinez Decl. Ex. 4 at 11. FMC reasoned that this language “indicates that NRDC may *not* publish or disseminate any information it receives.” *Id.* Such a strained reading of NRDC’s statement of intent cannot outweigh the volumes of documentation that NRDC provided. Fairly read, that statement indicates that since NRDC does not know the records’ contents, it will use its editorial and research skills to get newsworthy—and not mundane—portions of the information out to the public. That judgment call is precisely the function of a representative of the news media. *See* 5 U.S.C. § 552(a)(4)(A)(ii) (news media representative “uses its editorial skills to turn the raw materials into a distinct work”).

FMC’s second rationale for denying news media status to NRDC was that NRDC, in its view, has not sufficiently reported on the Clean Trucks Programs in the past. FMC’s main complaint, it seems, is that NRDC did not post its litigation documents on its website. *See*

Martinez Decl. Ex. 4 at 12. But the function of a news media representative is not simply to “mak[e] information available to the public.” *See Nat’l Sec. Archive*, 880 F.2d at 1386. Rather, it is to synthesize and publish articles using editorial skills. *See* 5 U.S.C. § 552(a)(4)(A)(ii). Furthermore, the record shows that NRDC has reported on current events with respect to the Clean Trucks Programs. *See* Martinez Decl. Ex. 3 Attach N, Ex. 5, Ex. 6. Indeed, FMC itself cited two such NRDC articles. *See* Martinez Decl. Ex. 4 at 8.

NRDC has far exceeded the standard qualifying it for status as a representative of the news media entitled to reduced fees.

CONCLUSION

For the foregoing reasons, the Court should grant NRDC’s motion for partial summary judgment.

Respectfully Submitted,

/s/ Margaret B. Kwoka

Margaret B. Kwoka (D.C. Bar No. 988255)
Adina H. Rosenbaum (D.C. Bar No. 490928)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-7733

Adriano Martinez (CA Bar No. 237,152)
NATURAL RESOURCES DEFENSE COUNCIL
1314 Second St.
Santa Monica, CA 90401
(310) 434-2300

Counsel for Natural Resources Defense Council

Dated: September 28, 2009

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE)	
COUNCIL,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 09-0935 (RBW)
)	
FEDERAL MARITIME COMMISSION,)	
)	
Defendant.)	
_____)	

**PLAINTIFF’S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE**

NRDC’s Interest in the Clean Trucks Programs

1. Natural Resources Defense Council (NRDC) is a national non-profit organization with more than 1.2 million members and e-activists, more than 82,000 of whom reside in California and more than 1,000 of whom reside in the area of the Los Angeles and Long Beach ports.

Martinez Decl. Ex. 3 Attach. G ¶ 2, Attach. M.

2. One of NRDC’s organizational purposes is to protect the environment and public health, including the environment and health of its members. Martinez Decl. Ex. 3 Attach. G ¶ 2.

3. NRDC has long been involved in efforts to reduce pollution associated with ports. Martinez Decl. Ex. 3 Attach. G ¶¶ 3-5.

4. In 2004, NRDC published two detailed reports in a series entitled *Harboring Pollution*. Martinez Decl. Ex. 3 Attach. G ¶ 5, Attach. I, Attach. J. In these reports, NRDC detailed the various sources of pollution at ports, including specifically discussing diesel emissions from older, dirtier trucks. Martinez Decl. Ex. 3 Attach. I at 4-5.

5. NRDC identified both environmental and human health risks associated with port pollution. Martinez Decl. Ex. 3 Attach. J at vii.

6. NRDC issued environmental report cards to ten U.S. ports, including the ports of Los Angeles and Long Beach, which each received a C+ grade for air quality. Martinez Decl. Ex. 3 Attach. J at 12, 19.
7. NRDC participated in the development of the California Air Resources Board's Emission Reduction Plan for Ports and Goods Movement by providing expert testimony at hearings and submitting comments. Martinez Decl. Ex. 3 Attach. G at ¶ 3.
8. NRDC also participated in the development of the Los Angeles and Long Beach ports' Clean Air Action Plan (CAAP), which included the Clean Trucks Programs, by providing testimony, submitting comments and advocating for CAAP's adoption. Martinez Decl. Ex. 3 Attach. G ¶¶ 3, 4.
9. NRDC also participated in Los Angeles Mayor Hahn's No Net Increase Task Force that worked to develop a comprehensive plan to address port pollution at the Port of Los Angeles. Martinez Decl. Ex. 3 Attach. G ¶ 4.
10. NRDC commented on port plans that were precursors to CAAP. Martinez Decl. Ex. 3 Attach. G ¶ 4.
11. NRDC retains a seat on the CAAP advisory group established by the mayors of both cities. Martinez Decl. Ex. 3 Attach. G ¶ 4.
12. NRDC has published articles and reports about port pollution generally and CAAP specifically. *See, e.g.*, Martinez Decl. Ex. 3 Attach. N; Ex. 5; Ex. 6.
13. In explaining its support for the inclusion of an employee requirement in the Clean Trucks Programs, NRDC has stated: "We advocated for a different model . . . where real trucking companies would be held accountable for buying and maintaining trucks and employ the drivers, in the belief that, under this model, the trucks will be better maintained and more

quickly replaced.” Martinez Decl. Ex. 6. NRDC also stated that “the independent contractor model of port trucking is broken and needs to be discarded because drivers can’t afford to maintain their trucks or buy new ones and, ultimately, that’s bad for clean air and bad for the environment.” *Id.*; *see also* Martinez Decl. Ex. 5 (expressing same reasons).

14. NRDC’s motivation for supporting the employee requirement was to ensure the reduction of diesel emissions through the use of newer, cleaner trucks at the ports. Martinez Decl. Ex. 5, 6.

15. Numerous articles have been published about the Clean Trucks Programs. *See* Martinez Decl. Ex. 1 at 3. Eight sample news articles are attached as Martinez Declaration Exhibit 1 Attachments A through H.

16. One news account indicated that a federal inquiry by FMC itself could delay or even prevent these clean-up efforts. Martinez Decl. Ex. 1 ¶ 3 & Attach. H.

17. On November 10, 2008, NRDC filed a lawsuit against FMC, alleging that FMC violated federal environmental laws by failing to prepare an Environmental Assessment, an Environmental Impact Statement, and a Statement of Energy Impact in conjunction with FMC’s decision to investigate the Clean Trucks Programs. Martinez Decl. Ex. H.

18. In the lawsuit, NRDC did not seek damages, but rather declaratory and injunctive relief to force FMC to comply with federal environmental laws. Martinez Decl. Ex. H. at 23.

19. NRDC has no trade, profit, or commercial interest in the lawsuit. *See* Martinez Decl. Ex. H.

20. On January 22, 2009, NRDC was granted intervention in the administrative action brought by FMC against the ports of LA and Long Beach. Martinez Decl. Ex. F at 12-13. In granting NRDC intervention, FMC noted that NRDC and other environmental groups “want to participate to defend the [Clean Trucks Programs].” *Id.* at 12.

21. NRDC does not have any trade, profit, or commercial interest in the FMC administrative action. *See* Martinez Decl. Ex. F.

22. NRDC provided FMC with a sworn statement that NRDC has no commercial interest in advocating for the clean up of port-serving diesel trucks. Martinez Decl. Ex. G. ¶ 15.

Chronology of NRDC's Fee Waiver/Reduction Requests and FMC's Denial

23. On October 9, 2008, NRDC sent a FOIA request to FMC, a copy of which is attached as Exhibit 1 to the Martinez Declaration, including all of the attachments submitted in conjunction with the request. In that request, NRDC asked for: "all records related to the FMC review of the ports of Los Angeles and Long Beach's clean trucks programs," including "records presented to the FMC and/or its agents from outside parties related to the clean trucks programs," and "any records presented by the FMC and/or its agents to any outside parties related to these clean trucks programs." NRDC provided a long but non-exhaustive list of outside parties with whom FMC may have communicated on this topic to aid in FMC's search for records. NRDC also requested a waiver of fees or, in the alternative, recognition as a representative of the news media entitled to reduced fees.

24. On December 6, 2008, FMC Secretary Gregory emailed Mr. Martinez. Among other things, she asked him to consider proposals to limit the scope of NRDC's request. Martinez Decl. Ex. 3 Attach. C.

25. On December 17, 2008, Mr. Martinez sent a letter by email to Secretary Gregory agreeing to narrow NRDC's request in three ways. He agreed to eliminate from the scope of the request any publicly available documents, including documents available on the internet; to eliminate from the scope of the request documents given to FMC by NRDC, Sierra Club, or Coalition for Clean Air; and to eliminate from the scope of the request documents available on

the Public Access to Court Electronic Records (PACER). Mr. Martinez also identified NRDC's highest priority documents, requested production in reverse chronological order, and stated that it authorized FMC to incur up to \$2,500 in costs, which he stated NRDC would pay under protest upon production of documents. Martinez Decl. Ex. 3 Attach. D.

26. On March 4, 2009, Secretary Gregory denied NRDC's request for a full waiver of fees under the public interest fee waiver provision of FOIA, and granted instead a 20% reduction in search and duplication costs. Martinez Decl. Ex. 2.

27. FMC's principal rationale for denying a full fee waiver was NRDC's involvement with the FMC administrative proceeding and the district court case brought under NEPA. Martinez Decl. Ex. 2.

28. Secretary Gregory also denied NRDC's request to be recognized as a representative of the news media, for the same reasons. Martinez Decl. Ex. 2.

29. FMC granted a 20% reduction because NRDC's request, in FMC's view, met one of the six factors FMC uses to determine whether a requester is entitled to a fee waiver. Martinez Decl. Ex. 2 at 2. FMC concluded that NRDC's request concerned the operations or activities of the government, but that the other five factors counseled against fee waiver. *Id.*

30. On March 17, 2009, Mr. Martinez submitted on behalf of NRDC an appeal of the fee waiver denial. NRDC's Appeal Letter, including all of the attachments submitted to FMC in conjunction with the appeal, is attached as Exhibit 3.

31. On April 15, 2009, FMC denied NRDC's appeal. Martinez Decl. Ex. 4.

32. FMC's primary reasons for denying the appeal were that the requested material was already publicly available, primarily in FMC's court-filed documents, and that NRDC had a

commercial interest in the request as a result of its advocacy for the employee requirement aspect of the Clean Trucks Programs in coalition with labor unions. Martinez Decl. Ex. 4.

33. Of the documents FMC referenced as publicly available on FMC's website, numerous links were broken as of September 23, 2009, and those documents were not available on the website. Martinez Decl. ¶ 14.

NRDC's Intent to Disseminate the Requested Records

34. NRDC stated in its request that it intended to "disseminate summaries and analyses of any newsworthy information conveyed in the requested records." Martinez Decl. Ex. 1 at 3.

35. NRDC stated in its request that it intended to disseminate such information "to its member base and to the broader public" through one or more of its many communications channels. Martinez Decl. Ex. 1 at 7.

36. NRDC identified two issues about which it intended to inform the public based on the requested records. The first is FMC's reasons for deciding to investigate the Clean Trucks Programs, including any influence from private parties. The second is whether and how FMC acquired the necessary expertise to investigate these programs. Martinez Decl. Ex. 1 at 3-4.

37. NRDC provided FMC with a sworn statement that NRDC has no commercial interest in the production of records requested under FOIA related to FMC's review of the Clean Trucks Programs. Martinez Decl. Ex. G. ¶ 15.

NRDC's Ability to Disseminate Information to the Public

38. NRDC's website, which is updated daily, draws approximately 2.7 million page views and 800,000 visits per month. Martinez Decl. Ex. 1 at 4. Martinez Declaration Exhibit 1 Attachment 1 is a sample printout of NRDC's homepage.

39. NRDC publishes *OnEarth* magazine, a quarterly periodical dedicated to environmental news and analysis, which has approximately 450,000 readers and is available on newsstands and in bookstores. Martinez Decl. Ex. 1 at 4, 8. Martinez Declaration Exhibit 1 Attachment 2 is a sample issue of *OnEarth*.

40. NRDC publishes *Nature's Voice* newsletter on current environmental issues five times a year. *Nature's Voice* is distributed to NRDC's approximately 420,000 members nationwide and on its webpage. Martinez Declaration Ex. 1 at 4. Martinez Declaration Exhibit 1 Attachment 3 is a sample issue of *Nature's Voice*.

41. NRDC distributes urgent environmental information on a biweekly basis through its *Earth Action* email list, which has more than 145,000 subscribers, the content of which is available on its website. Martinez Decl. Ex. 1 at 4. Martinez Declaration Exhibit 1 Attachment 4 is a sample *Earth Action* email. Martinez Declaration Exhibit 1 Attachment 5 is a printout of the NRDC webpage where *Earth Action* is available.

42. NRDC publishes a *Legislative Watch* bulletin, which is issued to more than 35,000 people biweekly during Congressional sessions and which is available on NRDC's website. Martinez Decl. Ex. 1 at 4. Martinez Declaration Exhibit 1 Attachment 6 is a sample *Legislative Watch* email and Martinez Declaration Exhibit 1 Attachment 7 is a printout of the NRDC webpage where *Legislative Watch* is available.

43. NRDC publishes *This Green Life*, an electronic newsletter on environmentally sustainable living, which is distributed to more than 60,000 subscribers and made available on NRDC's webpage. Martinez Decl. Ex. 1 at 4. Martinez Declaration Exhibit 1 Attachment 8 is a sample *This Green Life* email and Martinez Declaration Exhibit 1 Attachment 9 is a printout of the NRDC webpage where *This Green Life* is available.

44. NRDC issues press releases and participates in press conferences. Martinez Decl. Ex. 1 at 4. NRDC employs over twenty staff members dedicated to communications work. Martinez Decl. Ex. 1 at 4 & Attach. 10.

45. NRDC staff members are engaged in a variety of other activities that inform the public about current and historical events. Martinez Decl. Ex. 1 at 4-5. A transcript of sample testimony by an NRDC staff member to Congress is attached as Martinez Declaration Exhibit 1 Attachment 11. Transcripts of two sample national radio interviews with NRDC staff members are attached as Martinez Declaration Exhibit 1 Attachments 12 & 13. A transcript of a sample conference presentation outline made by an NRDC staff member is attached as Martinez Declaration Exhibit 1 Attachment 14. A sample editorial column co-authored by an NRDC staff member is attached as Martinez Declaration Exhibit 1 Attachment 15. A cover of a sample book authored by an NRDC staff member is attached as Martinez Declaration Exhibit 1 Attachment 16.

NRDC's History of Disseminating Information Obtained Under FOIA

46. NRDC obtained through a court-enforced FOIA request records of the operations of the Bush Administration's Energy Task Force, headed by Vice President Dick Cheney. Martinez Decl. Ex. 1 at 5. It made those records available, along with analysis of selected excerpts and links to the administration's index of withheld documents, on NRDC's website at <<http://www.nrdc.org/air/energy/taskforce/tfinx.asp>>, a copy of which is attached as Martinez Declaration Exhibit 1 Attachment 17. NRDC's efforts helped to inform the public about an issue that, even before the records' release, had attracted considerable attention. Martinez Decl. Ex. 1 at 5. Two newspaper articles exhibiting such attention are attached as Martinez Declaration Exhibit 1 Attachments 18 and 19.

47. NRDC obtained through a FOIA request a memorandum by ExxonMobil advocating the replacement of a highly respected atmospheric scientist, Dr. Robert Watson, as the head of the Intergovernmental Panel on Climate Change. Martinez Decl. Ex. 1 at 5. NRDC used this memorandum to help inform the public about what may have been behind the decision by the Bush administration to replace Dr. Watson. *Id.* A press release issued by NRDC on this subject, with the ExxonMobil memorandum included, is attached as Martinez Declaration Exhibit 1 Attachment 20. A newspaper article covering this story is attached as Martinez Declaration Exhibit 1 Attachment 21.

48. NRDC incorporated information obtained through FOIA into a 2005 report, published and provided free of charge at NRDC's website at <<http://www.nrdc.org/wildlife/marine/sound/contents.asp>>, on the impacts of military sonar and other industrial noise pollution on marine life. Martinez Decl. Ex. 1 at 5. The report is attached as Martinez Declaration Exhibit 1 Attachment 22. Since the report's publication, the sonar issue has continued to attract widespread public attention. Martinez Decl. Ex. 1 at 5. The transcript of a national radio program on this topic, in which an NRDC staff member was interviewed, is attached as Martinez Declaration Exhibit 1 Attachment 13.

49. NRDC scientists have used information obtained through FOIA to publish analyses of the United States' and other nations' nuclear weapons programs. Martinez Decl. Ex. 1 at 6. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States' plans to deploy a ballistic missile system and the implications for global security. *Id.* The article is attached as Martinez Declaration Exhibit 1 Attachment 23.

50. NRDC has used White House documents obtained through FOIA to inform the public about EPA's failures to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. Martinez Decl. Ex. 1 at 6. An NRDC report on this subject can be found on its website <<http://www.nrdc.org/health/pesticides/natrazine.asp>>, and is attached as Martinez Declaration Exhibit 1 Attachment 24. A periodical publication discussing the records obtained by NRDC is attached as Martinez Declaration Exhibit 1 Attachment 25.

51. NRDC has obtained through FOIA information on the levels of arsenic in drinking water supplies across the country. Martinez Decl. Ex. 1 at 6. NRDC incorporated much of the information into a report, *Arsenic and Old Laws* (2000), printed and made available online through NRDC's website at <<http://www.nrdc.org/water/drinking/arsenic/aolinx.asp>>, and attached as Martinez Declaration Exhibit 1 Attachment 26. In this report, NRDC also provided analysis describing its significance and guiding interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.* A newspaper article referencing this report is attached as Martinez Declaration Exhibit 1 Attachment 27.

52. In 2000, NRDC used information obtained through FOIA to publish a report analyzing the impacts of manure pollution from large livestock feedlots on human health, fish and wildlife. Martinez Decl. Ex. 1 at 6. The report is attached as Martinez Declaration Exhibit 1 Attachment 28.

53. In 1999, NRDC obtained through FOIA a Defense Department document, *History of the Custody and Deployment of Nuclear Weapons: July 1945 through September 1977*. Martinez Decl. Ex. 1 at 6. The document attracted significant press attention once it was disclosed. *Id.* One newspaper article discussing the document is attached as Martinez Declaration Exhibit 1

Attachment 29. One of NRDC's nuclear scientists, Robert Norris, published a detailed analysis of this document explaining its significance to the public, which is attached as Martinez Declaration Exhibit 1 Attachment 30.

54. In 1996, NRDC obtained through FOIA test results regarding lead levels in the District of Columbia's drinking water supplies. Martinez Decl. Ex. 1 at 6. NRDC made the test results public along with analysis explaining the significance of the results. *Id.* A newspaper article covering this topic is attached as Martinez Declaration Exhibit 1 Attachment 31.

55. In 1989, NRDC obtained through FOIA testimony, previously suppressed by the first Bush administration, by federal experts who opposed oil drilling off the coasts of California and Florida. Martinez Decl. Ex.1 at 7. A newspaper article on this topic is attached as Martinez Declaration Exhibit 1 Attachment 32.

56. In 1988, NRDC obtained through FOIA a report by the U.S. Fish and Wildlife Service that declared that the government's review of offshore oil drilling in Northern California was incomplete and overly optimistic. Martinez Decl. Ex. 1 at 7. Reagan Administration officials had tried to keep the report secret and then repudiated it upon its release. *Id.* A newspaper article on this topic is attached as Martinez Declaration Exhibit 1 Attachment 33.

57. In 1982, NRDC obtained through a FOIA request an EPA memorandum stating that most air pollution monitors have repeatedly underestimated levels of toxic lead in the air. Martinez Decl. Ex. 1 at 7. NRDC used the memorandum to inform the public about the consequences of EPA's proposal to relax restrictions on lead in gasoline. *Id.* A newspaper article on this topic is attached as Martinez Declaration Exhibit 1 Attachment 34.

58. Information obtained by NRDC by making FOIA requests has resulted in many other newspaper articles and press coverage. Martinez Decl. Ex. 1 at 7 & n.2. Three such articles that

appeared in the *New York Times* are attached as Martinez Declaration Exhibit 1 Attachments 35, 36, and 37.

Respectfully Submitted,

/s/ Margaret B. Kwoka

Margaret B. Kwoka (D.C. Bar No. 988255)
Adina H. Rosenbaum (D.C. Bar No. 490928)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-7733

Adriano Martinez (CA Bar No. 237,152)
NATURAL RESOURCES DEFENSE COUNCIL
1314 Second St.
Santa Monica, CA 90401
(310) 434-2300

Counsel for Natural Resources Defense Council

Dated: September 28, 2009