

November 15, 2013

Attn: Dionne Hardy, FOIA Officer
Office of Management and Budget
725 17th Street, NW, Room 9026
Washington, DC 20503

Re: Freedom of Information Act Request

Dear Ms. Hardy:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and corresponding U.S. Office of Management and Budget regulations, 5 C.F.R. § 1303, the Environmental Working Group requests copies of the following located within OMB:

1. All records¹ containing, mentioning, or evidencing correspondence and communications among OMB staff concerning the “TSCA Chemicals of Concern List Under Section 5(b)(4) of the Toxic Substances Control Act” (RIN: 2070-AJ70), from January 1, 2010, to September 30, 2013;
2. All records containing, mentioning, or evidencing correspondence and communications between OMB and U.S. Environmental Protection Agency, United States Trade Representative, Small Business Administration, congressional, or White House staff, including staff from the Council on Environmental Quality and the Office of Science and Technology Policy, concerning the “TSCA Chemicals of Concern List Under Section 5(b)(4) of the Toxic Substances Control Act,” from January 1, 2010, to September 30, 2013; and
3. All records containing, mentioning, or evidencing correspondence and communications between staff of OMB and representatives from, or of, the following trade associations, corporations, and entities, including their members or subsidiaries:
 - Alphagary Corporation (<http://www.alphagary.com>);
 - American Chemistry Council (<http://www.americanchemistry.com>);
 - American Cleaning Institute (<http://www.cleaninginstitute.org>);
 - American Renolit Corporation (<http://www.renolit.com>);
 - BASF (<http://www.basf.com>);
 - Beveridge & Diamond PC (<http://www.bdlaw.com>);
 - Boron Specialties LLC (<http://www.boron.com>);
 - DOW Chemical Company (<http://www.dow.com>);

¹ For purposes of this request, “records” means information of any kind, including writings, memoranda, e-mails, text messages, letters, notes, minutes of meetings, documents, drawings, graphs, charts, photographs, electronic and magnetic recordings of meetings, records of telephone conversations, including cell phone records, and any other compilation of data from which information can be obtained.

- DuPont (<http://www.dupont.com>);
- Eastman Chemical Company (<http://www.eastman.com>);
- Ecological and Toxicological Association of Dyes and Organic Pigments Manufacturers (ETAD) (<http://www.etad.com>);
- ExxonMobil (<http://www.exxonmobil.com>);
- Flexible Vinyl Alliance (<http://www.flexvinylalliance.com>);
- Harman Corporation (<http://www.harmancorp.com>);
- International Fragrance Association (IFRA) (<http://www.ifraorg.org>);
- Lakeside Plastics Inc. (<http://www.lakesideplastics.net>);
- Latham and Watkins LLP (<http://www.lw.com>);
- Mannington Mills (<http://www.mannington.com>);
- Resilient Floor Covering Institute (RFCI) (<http://rfci.com>);
- Rivendall Consultants (<http://www.rivendellconsultants.com>);
- RJF International Corporation (<http://www.rjfinternational.com>);
- Saudi Basic Industries Corporation (SABIC) (<http://www.sabic.com>);
- Sika Sarnafil (<http://usa.sarnafil.sika.com>);
- Society of the Plastics Industry (SPI) (Plastics Industry Trade Association) (<http://www.plasticsindustry.org>);
- Society of Chemical Manufacturers and Affiliates (SOCMA) (<http://www.socma.com>);
- Venable LLP (<http://www.venable.com>);
- Vi-Chem Corporation (<http://www.vichem.com>);
- The Vinyl Institute (<http://vinylinfo.org>); and
- Winston and Strawn LLP (<http://winston.com>)

concerning “TSCA Chemicals of Concern List Under Section 5(b)(4) of the Toxic Substances Control Act,” from January 1, 2010, to September 30, 2013.

EWG respectfully requests that OMB make every effort to provide the requested records within the twenty business day limit required by your regulations, 5 C.F.R. § 1303.10(c). Responsive copies should be mailed within twenty business days of receipt of this letter to:

Thomas Cluderay
 General Counsel
 Environmental Working Group
 1436 U Street NW, Suite 100
 Washington, DC 20009

If you determine that portions of the records requested are exempt from disclosure, please segregate the exempt portions and mail the remaining records within the statutory time limits. For any records or portions of records that you determine to be exempt, please provide a specific description of the record or portion of the record exempted along with a particularized description of the exemption.

EWG is a 501(c)(3) nonprofit organization that uses the power of information to inform the public about environmental health issues. EWG and its supporters are particularly concerned with protecting children and other vulnerable populations from exposure to toxic chemicals. In furtherance of this mission, EWG is engaged in public education and the review of the government's implementation of its statutory mandates. As both an environmental advocacy and scientific organization, EWG clearly falls into the U.S. Department of Justice FOIA category of "news media, educational, or scientific requester." See U.S. Dep't Justice, Freedom of Information Act Guide (May 2004), <http://www.usdoj.gov/oip/fees.htm#walver>.

EWG will use the requested records to investigate why OMB required more than two years to review a rule proposed by EPA, "TSCA Chemicals of Concern List Under Section 5(b)(4) of the Toxic Substances Control Act" (the rule); whether OMB ever intended to approve the rule; and whether and how OMB and White House staff and special interests of chemical manufacturers contributed to EPA's decision to withdraw the rule from OMB in September 2013. Therefore, EWG's request is consistent with the purposes of the Freedom of Information Act, namely a citizen's right to know the actions of the government. See U.S. Dep't Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 772 (1989).

Further, EWG seeks a fee waiver due to the fact that "disclosure of the information is in the public interest because it is likely to contribute significantly to the public understanding of the operations of government." See 5 U.S.C. § 552(a)(4)(A)(iii). This request fits squarely into the factors outlined in DOJ's FOIA guide to determine whether fee waivers are appropriate. See DOJ, supra.

The subject matter of the requested records is OMB's deliberations and communications regarding the rule. Under authority provided in the Toxic Substances Control Act, EPA proposed to add a category of eight phthalates, a category of polybrominated diphenyl ethers (PBDEs), and bisphenol A (BPA) to a list of chemical substances that EPA finds present or may present an unreasonable risk of injury to human health or the environment. EPA was "concerned that the hazards of these substances and the magnitude of human and/or environmental exposure indicates that they may" present such a risk. Office of Info. & Regulatory Affairs, View Rule: TSCA Chemicals of Concern List Under Section 5(b)(4) of the Toxic Substances Control Act, <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=2070-AJ70>.

EPA submitted the proposed rule to OMB on May 5, 2010. OMB met with many special interests to discuss the rule, including representatives of companies that produce these chemicals. Although OMB received a great deal of input from the chemical industry, the agency never completed its review, denying the public the opportunity to be heard through the rulemaking process. Stymied by OMB for more than two years, EPA finally decided to withdraw the rule on September 6, 2013, a decision which raises serious questions about whether the Obama Administration is willing to allow special interests in the chemical industry to block efforts to protect public health, particularly that of our most vulnerable populations, such as children.

Moreover, OMB's failure to complete its review of the rule and EPA's ensuing retreat are particularly relevant to the ongoing debate over TSCA reform. The Chemical Safety

Improvement Act of 2013 (CSIA), proposed legislation widely backed by the chemical industry, would eliminate the provision in TSCA that was the basis for the rule. In addition to removing the provision that allows EPA to propose a list of chemicals of concern, the CSIA is comprised of a large number of discretionary clauses that would open the door to future agency inaction on other fronts. Legislation that would truly protect human health and the environment must guarantee that the law will be effectively enforced regardless of the inclinations of a future EPA that may be reluctant to use its full authority under federal toxics law. An understanding of what really happened to the rule will inform the public debate over agency discretion in proposed TSCA reform bills, particularly the CSIA, which would leave an unacceptable level of discretion to EPA.

EWG seeks the requested records for their informative value with respect to understanding why OMB required over two years to review the rule and understanding EPA's eventual decision to withdraw the rule, despite EPA's concern that these substances may present an unreasonable risk of harm to human health. Therefore, this FOIA request clearly relates to "identifiable operations or activities of the government." DOJ, supra (DOJ fee waiver factor No. 1).

The requested records are "likely to contribute" to an understanding of OMB operations because the documents may reveal the chemical industry's hand in blocking efforts to protect public health from potentially harmful chemical exposures. These documents are therefore "meaningfully informative" concerning the actions of federal officials in response to pressure by chemical industry lobbyists to obstruct an important rule. When pressure from outside special interests affects OMB decision making, the public has a right to know. Furthermore, the records are not otherwise publicly available, because complete records of communications and meetings between outside parties and OMB are not generally accessible other than through a FOIA request. Id. (DOJ fee waiver factor No. 2).

Disclosure of the information requested will contribute to the understanding of the "public at large," as opposed to that of a narrow segment of interested persons. EWG disseminates the information it receives in response to FOIA requests through releases to the media, as well as by direct distribution through mailings, posting on EWG's website, and e-mailing the organization's more than one million supporters and like-minded interested parties nationally. As DOJ guidance indicates, distribution through media channels alone is presumptively sufficient to satisfy this requirement. In addition, EWG disseminates information through congressional testimony, comments to administrative agencies, and, where necessary, through the judicial system.

EWG unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner outlined above and to do so in a manner that contributes to the understanding of the public at large. EWG has a long-standing interest in chemical safety and maintains an active environmental health program toward this end. EWG has demonstrated beyond question that the information requested in this case will contribute to the public at large's understanding of the rule and what its withdrawal means for public health. Id. (DOJ fee waiver factor No. 3).

Disclosure of the information requested also will contribute “significantly” to the public’s understanding of why OMB conducted an extremely protracted review of the rule proposed by EPA and why EPA eventually abandoned its list of chemicals of concern. The particular records requested are identified for further examination precisely because they involve serious questions of how OMB conducts its reviews of proposed rules. The disclosure of the requested FOIA records will help the public evaluate whether OMB and EPA conduct has been affected by chemical industry pressure to drop proposed regulations affecting toxic chemicals. The requested records also will reveal the efforts of special interests such as the American Chemistry Council to obstruct evaluation of a rule designed to protect the public from dangers associated with toxic chemicals. Id. (DOJ fee waiver factor No. 4).

Finally, the disclosure of this information is not in the commercial interest of EWG. EWG has no intention of using this information in a manner that “furthers a commercial, trade, or profit interest as those terms are commonly understood.” Any publication of any analysis of the requested information would be for the sole purpose of dissemination to the public to educate and to advocate transparency regarding the chemical industry’s influence on efforts to protect the public from potentially harmful chemical exposures. (DOJ commercial interest factor).

For the foregoing reasons, it is clear that the disclosure of the information requested is in the public interest because it is likely to contribute significantly to the public’s understanding of factors leading to EPA’s withdrawal of the rule. Therefore, please waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4) and 40 C.F.R. § 2.107. The request for a fee waiver should not be construed as an extension of time in which to reply to this FOIA request.

Thank you for your consideration. If you have any questions, please do not hesitate to call me at (202) 667-6982.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Cluderay', written in a cursive style.

Thomas Cluderay
General Counsel
Environmental Working Group