

SOUTHERN ENVIRONMENTAL LAW CENTER

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October 10, 2019

VIA U.S. MAIL and foia@tva.gov

Denise Smith
Tennessee Valley Authority
Freedom of Information Officer
400 West Summit Hill Dr.
Knoxville, TN 37902-1401

**Re: Freedom of Information Act Request: Third Party Market Research
Conducted for Green Power Providers Program Replacement Draft
Environmental Assessment**

Dear Ms. Smith:

Under the Freedom of Information Act (FOIA),¹ the Southern Environmental Law Center (SELC) requests access to certain records related to the draft Environmental Assessment for Changes to the Green Power Providers Program (the draft EA). Specifically, we request copies (electronic copies, if possible) of the following documents that were created, received, or reviewed by the Tennessee Valley Authority (TVA):

The “market research conducted by a third party among Valley residents and solar installers” that TVA relies on in the draft EA.²

For the purposes of this request, the term “documents” includes all written, printed, recorded or electronic: materials, communications, correspondence, emails, memoranda, notations, copies, diagrams, charts, maps, photographs, tables, spreadsheets, formulas, directives, observations, impressions, contracts, letters, messages and mail in the possession or control of the Tennessee Valley Authority or its agents.

FOIA requires a responding agency to make a “determination” on any request within twenty (20) working days of receipt.³ The statute favors disclosure of records and instructs the agency to withhold information only in narrowly defined circumstances in which the agency can articulate a reasonably foreseeable harm protected by an exemption.⁴ FOIA also requires the

¹ 5 U.S.C. § 552, as amended.

² Tenn. Valley Auth., *Changes to Green Power Providers Program Draft Environmental Assessment 2* (Oct. 2019), <https://www.tva.com/Environment/Environmental-Stewardship/Environmental-Reviews/Changes-to-Green-Power-Providers-Program> [hereinafter “Draft EA”].

³ See 5 U.S.C. § 552(a)(6)(A)(i).

⁴ See *id.* § 522(a)(8)(A)(i).

release of all reasonably segregable portions of a document that are themselves not exempt.⁵ Should TVA refuse to provide the information requested, TVA must inform SELC of the grounds for its refusal and the specific administrative appeal rights which are available.⁶ SELC further requests preparation of a *Vaughn* index to facilitate evaluation of the completeness of TVA's response.⁷

FEE WAIVER REQUEST

SELC is requesting copies without charge, or at a reduced charge, because reduction or waiver of fees would be in the public interest. A disclosure is in the public interest if: (1) it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) it is not primarily in the commercial interest of the requester.⁸ The public interest standard of the fee waiver provision of the FOIA should be "liberally construed" in favor of waivers.⁹ The goal of the statute is to avoid the "roadblocks and technicalities which have been used by various Federal agencies to deny waivers."¹⁰

I. The requested information directly ties to TVA's reasoning and proposed actions to eliminate and/or replace the Green Power Providers program.

This request will contribute to the public's understanding of TVA's decision making on an important part of its operations: the Green Power Providers (GPP) program and its potential replacement. Four factors help determine whether a request is likely to contribute significantly to public understanding of the operations or activities of the government: (1) whether the requested records "concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote or attenuated";¹¹ (2) whether the requested information is "'likely to contribute' to an understanding of government operations or activities," which is judged by whether the requested information would be "meaningfully informative about government operations or activities";¹² (3) whether the requested information "contribute[s] to the understanding of a reasonably broad audience of persons interested in the subject" considering "[a] requester's expertise in the subject area and ability and intention to effectively

⁵ See *id.* § 552(b).

⁶ See *id.* § 552(a)(6)(A)(i).

⁷ See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) (holding that the index should include a detailed justification for claims of exemption, as well as specificity, separation, and indexing of the documents).

⁸ 18 C.F.R. § 1301.10(k)(1).

⁹ *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987); *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 855 (D. Colo. 1994); *Etlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984).

¹⁰ *Pederson*, 847 F. Supp. at 855.

¹¹ 18 C.F.R. § 1301.10(k)(2)(i).

¹² *Id.* § 1301.10(k)(2)(ii).

convey information to the public”;¹³ and (4) whether the disclosure is “likely to contribute ‘significantly’ to public understanding.”¹⁴

First, this request’s subject is market research on select citizens of the Tennessee Valley that serves as the basis for TVA’s preferred alternative in the draft EA.¹⁵ TVA explains that its proposed new offering would “be structured to include features and benefits identified as important by Valley residents and installers during market research conducted for TVA by a third party vendor.”¹⁶ This research is clearly and directly connected to a federal corporation—TVA—and its operations and activities—the proposed termination and/or replacement of the GPP program.¹⁷

Second, the requested research would be meaningfully informative about government operations or activities because that research underlies the preferred alternative in the draft EA.¹⁸ This information is not otherwise accessible to the public. TVA points to this research to support the features of the proposed replacement for the GPP program.¹⁹ The research would therefore meaningfully inform the public regarding the basis for TVA’s proposed replacement program.

Third, a reasonably broad audience of persons is interested in the draft EA.²⁰ The plan would affect the availability of residential solar programs for all residents of the Valley.²¹ Valley citizens are engaged on TVA’s electricity planning, as evidenced by the nearly 1,750 public comments on TVA’s 2018 Rate Change draft Environmental Assessment²² and 1,200 comments on TVA’s 2019 draft Integrated Resource Plan.²³

Additionally, SELC’s expertise in the subject area and ability and intention to effectively convey information to the public supports a fee waiver.²⁴ SELC is a 501(c)(3) non-profit organization with over thirty years of experience disseminating public information regarding

¹³ *Id.* § 1301.10(k)(2)(iii).

¹⁴ *Id.* § 1301.10(k)(2)(iv).

¹⁵ Draft EA at 13.

¹⁶ *Id.* at 13.

¹⁷ 18 C.F.R. § 1301.10(k)(2)(i).

¹⁸ *Id.* § 1301.10(k)(2)(ii).

¹⁹ Draft EA at 13.

²⁰ 18 C.F.R. § 1301.10(k)(2)(iii).

²¹ Draft EA at 17.

²² Tenn. Valley Auth., 2018 Rate Change, <https://www.tva.com/Environment/Environmental-Stewardship/Environmental-Reviews/2018-Rate-Change>.

²³ Tenn. Valley Auth., *2019 Integrated Resource Plan, Volume I—Final Resource Plan*, at 1-7 (2019),

https://www.tva.com/file_source/TVA/Site%20Content/Environment/Environmental%20Stewardship/IRP/2019%20Documents/TVA%202019%20Integrated%20Resource%20Plan%20Volume%20I%20Final%20Resource%20Plan.pdf.

²⁴ 18 C.F.R. § 1301.10(k)(2)(iii).

TVA regulatory and operations issues.²⁵ SELC maintains a website that includes both general and topic-specific information regarding the matters with which SELC is involved, including matters related to TVA.²⁶ Lawyers at SELC are interviewed by or otherwise provide information to the media to explain their work related to TVA and its significance.²⁷ SELC's website contains documents generated by SELC for the specific purpose of educating the public on particular issues. SELC speaks at community meetings on particular topics, including TVA electricity planning and solar policies. A broad audience is interested in the reasoning behind TVA's plans to terminate and/or replace the GPP program, and SELC is well-positioned to effectively convey this information to the public.

Fourth, disclosure would significantly contribute to public understanding because TVA has not yet released the marketing research that it relies upon in the draft EA.²⁸ As a public power entity, TVA's electricity system belongs to the citizens of the Tennessee Valley. The requested documents are directly concerned with TVA's plans for the GPP and its environmental impacts, and contain data that provide the basis for TVA's proposed replacement.²⁹ The public is justifiably interested in learning how TVA plans to incentivize or disincentivize residential solar generation in the Valley, and disclosure would further the public's understanding of those plans.

Therefore, disclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government.³⁰

²⁵ See 5 U.S.C. § 552(a)(4)(A)(iii); see also <https://www.southernenvironment.org/about-selc>.

²⁶ See, e.g., <https://www.southernenvironment.org/news-and-press/press-releases/southern-environmental-law-centers-statement-in-response-to-tvas-long-term-energy-plan> (Aug. 2019); <https://www.southernenvironment.org/news-and-press/news-feed/corporate-demand-for-clean-renewable-energy-stymied-by-tva-policies> (Oct. 2017); <https://www.southernenvironment.org/news-and-press/news-feed/new-tva-analysis-takes-first-step-toward-recognizing-the-value-of-solar> (Oct. 2015); <https://www.southernenvironment.org/news-and-press/press-releases/clean-energy-groups-respond-to-tvas-draft-integrated-resource-plan> (Mar. 2015); <https://www.southernenvironment.org/news-and-press/press-releases/tva-integrated-resource-plan-shows-clean-energy-is-cost-competitive-with-ga> (July 2015).

²⁷ See, e.g., <https://www.utilitydive.com/news/tva-board-approves-long-term-plan-adding-14-gw-solar-by-2038/561571/> (Aug. 2019); <https://fox17.com/news/local/tennessee-valley-authority-envisions-no-major-new-plants> (Aug. 2019).

²⁸ 18 C.F.R. § 1301.10(k)(2)(iv).

²⁹ Draft EA at 13.

³⁰ 18 C.F.R. § 1301.10(k)(1).

II. SELC has no commercial interest in the information requested.

SELC's request satisfies the second consideration used to determine whether a fee waiver is in the public interest: whether the request is primarily in the commercial interest of the requester.³¹ Two factors are evaluated for this determination: (1) "[t]he existence and magnitude of a commercial interest" for the requester;³² and (2) the requester's "primary interest in disclosure," considering whether "public interest is greater in magnitude than that of any identified commercial interest in disclosure."³³ First, SELC has no commercial interest in the information requested. Commercial interest is evaluated per the definition of commercial use request, which is a request from a person "who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests."³⁴ As explained above, SELC is a 501(c)(3) non-profit organization dedicated to protecting the environment of the Southeast.³⁵ It does not have commercial, trade, or profit interests in seeking these disclosures. Second, the public interest is greater than any commercial interest in disclosure because SELC does not have any commercial interest in these disclosures.³⁶

CONCLUSION

In conclusion, given SELC's role in disseminating information regarding TVA's electricity planning, disclosure would significantly contribute to public understanding of TVA's operations and would not be in SELC's commercial interest. The fee waiver request satisfies the two-factor test and should be granted.

Should our request for reduced or waived fees be denied, we are prepared to bear the reasonable duplication and search costs necessary to fulfill this request. However, I request you contact me before processing this request if the fee is expected to be in excess of \$100.00. SELC reserves our right to appeal a fee waiver or reduction denial.

If you have any questions regarding this request, please feel free to contact me at (615) 921-9470 or creichert@selctn.org. I appreciate your prompt attention to this matter and look forward to receiving the public records requested.

Sincerely,



Christina Reichert

³¹ *Id.* § 1301.10(k)(3).

³² *Id.* § 1301.10(k)(3)(i).

³³ *Id.* § 1301.10(k)(3)(ii).

³⁴ *Id.* § 1301.10(b)(1).

³⁵ See Section II.

³⁶ 18 C.F.R. § 1301.10(k)(3)(ii).