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April 29, 2015

*By: U.S. Mail, Certified Return Receipt Requested & Facsimile*

Chairman, Appeals Review Panel,  
c/o Information and Privacy Coordinator/Appeals Officer,  
U.S. Department of State,  
A/GIS/IPS/PP, SA-2,  
Washington, DC 20522-8100  
(202) 261-8582 (facsimile)

**Re: FREEDOM OF INFORMATION ACT APPEAL –  
FOIA CONTROL NUMBER F-2015-05580**

Dear Chairman:

Friends of the Earth hereby submits this constructive denial appeal pursuant to 5 U.S.C. § 552(a)(6), concerning the U.S. Department of State's refusal to timely provide records responsive to Friends of the Earth's March 18, 2015 FOIA Request. That Request explained the then-recent discovery that Secretary of State Hillary Clinton used a non-government email account to conduct State Department business, and sought:

All email records, including email attachments, sent to or from Secretary Clinton's email account (or accounts should, there be more than one account) between January, 2009 and February 1, 2013, that discuss, refer to, or in any manner mention Paul Elliot, Anita Dunn, TransCanada, or Keystone.

*See* Attachment 1 (Mar. 18, 2015 FOIA Request). The Request also sought expedited processing in light of the fact that the State Department may at any time finalize a National Interest Determination to grant TransCanada a Presidential Permit to build the Keystone XL pipeline. *Id.* at 2. Friends of the Earth also requested a fee waiver and offered to receive responsive records on a rolling basis. *Id.* at 2-3.

On April 2, 2015, Friends of the Earth received a letter *granting expedited processing*, and a fee waiver. Attachment 2 at 2. However, the letter did not explain when Friends of the Earth's request would be processed, or when Friends of the Earth might expect to receive responsive records. *Id.* at 1.

Rather, the letter stated that the agency intended to review the *entire* collection of Clinton records she provided from her non-government email account, and to make them available on a government website. Only once that process is completed would State review Friends of the Earth's specific request. *Id.*

To date the State Department has neither made *any* of the Clinton emails available on a website, nor has the agency provided Friends of the Earth with *any* records responsive to this FOIA Request.

The FOIA requires an agency to make a FOIA "determination" within twenty working days, 5 U.S.C. § 552(a)(6)(A)(i), and further provides that, "[u]pon any determination by an agency to comply with a request for records, the records shall be made *promptly available* to such person making such request." *Id.* § 552(a)(6)(C)(i) (emphasis added).

The agency has complied with neither of these requirements here.

First, a "determination" response under 5 U.S.C. § 552(a)(6)(A)(i) must include, among other things: "(1) a statement of what the agency will release and will not release, including a list of the documents that are releasable and withheld; (2) a statement of the reasons for not releasing the withheld records; and (3) a statement notifying the requester of her right to appeal to the head of the agency or seek judicial review of any adverse determination." *Shermco Industries v. Secretary of the United States Air Force*, 452 F. Supp. 306, 317 (N.D.Tex.1978); *Oglesby v. United States Dep't of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990). The April 2, 2015 letter does not fulfill these criteria, but rather simply states that records will be released at some point in the future.

Second, particularly given that the agency granted expedited processing, the requested records certainly have not been provided promptly. Although it has been more than thirty-five days since the FOIA request, and Friends of the Earth expressly offered to receive records on a rolling basis, *none* have been provided. Nor has State even *suggested* a date by which Friends of the Earth may expect to even *start* receiving responsive records.

The Department of State is also wrong in assuming that it will be "more efficient" to review *all* the Clinton emails and release *all* exempt portions, rather than search them for the specific information requested. With more than 50,000 pages of records, it could take the agency *years*

to process them all, which means Friends of the Earth may wait years to obtain the requested records.<sup>1</sup>

On the other hand, Friends of the Earth has asked for a very discrete subset of these records, narrowly limiting its request only to those that mention Paul Elliot, Anita Dunn, TransCanada, or Keystone. It is obvious that were the agency to run searches on those terms, it would quickly have a relatively small number of records that would require processing for any exemptions. In sum, rather than fostering efficiency, the agency's approach appears intended to *delay* the release of these vital government records as long as possible.

Indeed, the agency's approach also runs directly contrary to the D.C. Circuit's recent admonition, in connection with the *specific universe of Secretary Clinton's records at issue here*, that while the State Department "may choose of its own accord to release the emails to the public at large, it has a statutory duty to search for and produce documents responsive to FOIA requests 'in the shortest amount of time.'" *Freedom Watch, Inc. v. NSA*, No. 14-5174 (D.C. Cir. April 24, 2015) (slip op. at 6-7) (emphasis added).

The fact that Secretary Clinton improperly failed to even *provide* these records to State until long after she left office only further exacerbates the degree to which the FOIA is being undermined here. As noted in the original FOIA Request (at n.1), the Clinton emails were covered by earlier Friends of the Earth FOIA requests, and thus would have been processed years ago had Secretary Clinton properly put them in the agency's control at the time they were created. These unique circumstances also counsel in favor of immediate processing and release of these particular records.

In conclusion, because the Department of State has neither made the determination required by the statute, nor promptly provided the required records, Friends of the Earth hereby appeals the agency's constructive denial of the March 18, 2015 FOIA Request. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), we expect to receive a response to this FOIA appeal within 20 working days.

Please feel free to contact me directly should you have any questions.

Sincerely,



Howard M. Crystal  
(202) 588-5206  
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<sup>1</sup> For example, in response to another FOIA request from Friends of the Earth concerning similar matters, the agency has been processing less than 1,500 pages each month. *See FOE v. State*, No. 13-1086 (CRC) (D.D.C.). At even 2,000 pages per month, it will take State *more than two years* to process all the Clinton email records.

## **ATTACHMENT 1**

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March 18, 2015

Office of Information Programs and Services  
A/GIS/IPS/RL  
U. S. Department of State  
Washington, D.C. 20522-8100  
Facsimile: (202) 261-8579

**Re: *Freedom of Information Act Request – Expedited Processing Requested***

Dear Freedom of Information Act Officer:

It has recently come to light that Secretary of State Hillary Clinton used a non-government email account to conduct State Department business, and that over 50,000 pages of such emails have been delivered to the agency.<sup>1</sup> Under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, I write on behalf of Friends of the Earth to request the following records within the custody and control of the State Department:

All email records, including email attachments, sent to or from Secretary Clinton's email account (or accounts should, there be more than one account) between January, 2009 and February 1, 2013, that discuss, refer to, or in any manner mention Paul Elliot, Anita Dunn, TransCanada, or Keystone.

For purposes of this request, "email records, records, and attachments" should be interpreted to include the full text of any emails, and the full text of any attachments to any of those emails.

**Expedited Processing Request**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(i) and 22 C.F.R. § 171.12(b), *Friends of the Earth requests expedited processing of this FOIA request due to its compelling need for the information requested*. A "compelling need" exists where the requester is "primarily engaged in disseminating information" and can demonstrate that "[t]he information is urgently needed ... in

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<sup>1</sup> All, or some, of these records are covered by previous FOIA requests from Friends of the Earth, which will be addressed with the agency separately. However, in the unlikely event the agency were to refuse to provide these records under those prior requests, at bare minimum they must be provided in response to this request.

order to inform the public concerning actual or alleged Federal Government activity.” 22 C.F.R. § 171.12(b)(2); *see also* 5 U.S.C. § 552(a)(6)(E)(v). Friends of the Earth is a non-profit organization primarily engaged in information dissemination, public education and advocacy on environmental issues. Friends of the Earth will be taking numerous steps to disseminate the requested information to the public, and has a demonstrated and longstanding capacity to do so. Friends of the Earth typically disseminates similar information through direct communication to journalists and other members of the media, through press releases, through newsletters to all of its members, through its web sites, through public meetings, and through other legislative and executive fora. The “[a]ctual or alleged Federal Government activity” to which the requested information pertains is the State Department’s decision whether to grant a Presidential Permit for the Keystone XL project.

Friends of the Earth urgently needs this information because the particular value of the information “will be lost if not disseminated quickly.” 22 C.F.R. § 171.12(b)(2)(i). The State Department could imminently finalize a National Interest Determination to grant TransCanada a Presidential Permit to build the Keystone XL pipeline across the U.S.-Canada border. The information requested will lose value to Friends of the Earth if Friends of the Earth does not receive it in time to disseminate it to the public for its use in participating in the National Interest Determination process. Friends of the Earth seeks to use this information in comments pertaining to the approval of the Keystone XL pipeline during the final phases of the Presidential permit review and approval. The State Department’s permitting decision is an action “taken, contemplated or alleged by or about” the State Department, an agency of the U.S. Government. 22 C.F.R. § 171.12(b)(2)(ii). Friends of the Earth reserves the right to appeal any denial of the request for expedited processing of this request.

Friends of the Earth asks that State’s response comply with the Attorney General’s March 2009 FOIA memorandum, reiterating President Obama’s directive that in “the face of doubt, openness prevails.” Attorney General, Memorandum for Heads of Executive Departments and Agencies at 1 (March 19, 2009) (Attorney General Memorandum). Accordingly, Friends of the Earth expects that State will apply a presumption in favor of disclosure and consider that it “should not withhold information simply because it may do so legally.” *Id.*; *see also* 40 C.F.R. § 1506.6(f) (noting the intersection of the National Environmental Policy Act and FOIA). Friends of the Earth also expects that State will act promptly, in keeping with the Attorney General’s admonition that the timely disclosure of information “is an essential component of transparency.” Attorney General Memorandum at 3.

### **Fee Waiver Request**

As a non-profit organization, Friends of the Earth also requests a waiver of all fees incurred in providing these records. Disclosure of the requested information “is in the public interest because it is likely to contribute significantly to the public understanding of the operation 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)). If the request for a fee waiver is denied and any expenses associated with this request are in excess of \$25.00, please obtain approval before any such charges are incurred. Disclosure of the requested information would inform the public of governmental activities affecting their safety, health and environment. Friends of the Earth is a not-for-profit charitable

organization with no commercial interest in the information requested and has relevant expertise in the areas of environment and human health and environmental law. Friends of the Earth has a long and active history in addressing threats to human health and the environment posed by the development, production, shipment and processing of oil and gas, including tar sands oil. Friends of the Earth also has additional relevant experience with the proper implementation of the National Environmental Policy Act and other relevant statutes governing the Obama administration's consideration of the Keystone XL pipeline project request.

Because of the non-profit, public interest nature of Friends of the Earth, the organization has extremely limited financial resources with which to cover the copying and search expenses of this request. The main purpose in requesting the documents is to increase public knowledge and participation in the government process so fundamental to the effective working of a democracy.

**Timely Response and Request for Rolling Release**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(ii)(I), Friends of the Earth expects a response within ten (10) working days of your receipt of this request. If this request is denied in whole or in part, Friends of the Earth expects a detailed justification for withholding the records. Friends of the Earth also requests any segregable portions of records that are otherwise not expected to be disclosed by State in response to this request. **Finally, Friends of the Earth requests that any documents responsive to this request be released by State to Friends of the Earth on a rolling basis** rather than State holding all of the documents for a one-time release. Friends of the Earth reserves the right to appeal any denial of this request.

Please contact me at the number or email below with any questions you may have about the materials requested. Thank you for your immediate attention to this matter.

Sincerely,



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## **ATTACHMENT 2**





United States Department of State

Washington, D.C. 20520

APR 02 2015

Dear Requester,

RE: All email records to or from Secretary Clinton's email  
between January 2009 + February 2013 re: Paul Elliot, Anita  
Dunn, TransCanada, or Keystone

This is in response to your request dated 3/18/2015. We have assigned Case Control Number F-2015-05580 and will begin the processing of your request based upon the information provided in your communication.

Given the considerable public interest generally in the e-mails provided by former Secretary Clinton to the Department of State, the Department plans to review the collection for public release and to make the documents available to the public by posting them on a Department website. This will make the maximum number of records available in the shortest amount of time, and will be considerably more efficient than reviewing the documents piecemeal in response to subject-specific FOIA requests.

Once the collection has been posted, the Department will review your request to determine whether further action is needed.

The cut-off date is the date the search is initiated unless you have provided a specific timeframe.

Unusual circumstances (including the number and location of Department components involved in responding to your request, the volume of requested records, etc.) may arise that would require additional time to process your request.

We will notify you as soon as responsive material has been retrieved and reviewed.

Should you have any questions, you may call our FOIA Requester Service Center at (202) 261-8484 or send an email to FOIAstatus@state.gov. Please refer to the Case Control Number in any communication.

Sincerely,

Requester Communications Branch  
Office of Information Programs & Services

### **Expedited Processing**

After consideration of your request for expedited processing under the Department's rules governing Freedom of Information Act requests, we have determined that your request does warrant expedited processing.

### **Fee Waiver**

Your request for a fee waiver has been granted; therefore, your request will be processed at no charge to you.