



Advocates for Government Accountability

A 501(c)(3) NONPROFIT CORPORATION

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October 31, 2011

VIA E-MAIL AND FIRST-CLASS MAIL

Alexander Morris
FOIA Officer
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585
Facsimile: 202-586-4403
E-mail: FOIA-Central@hq.doe.gov

RE: Freedom of Information Act Request

Dear Mr. Morris:

We write on behalf of Cause of Action, an independent 501(c)(3) public interest firm that uses public advocacy and legal reform strategies to ensure greater transparency in government, protect taxpayer interests, and promote economic freedom. We write to request information pursuant to the Freedom of Information Act (“FOIA”).

Under the Energy Policy Act of 2005 and the American Recovery and Reinvestment Act (“ARRA”), the Secretary of the Department of Energy (“DOE”) is authorized to make loan guarantees to companies investing in either innovative clean technologies or commercial-scale renewable energy projects.¹ Since 2009, the DOE has committed nearly \$36 billion in financing for loans or loan guarantees.²

¹ U.S. DEPARTMENT OF ENERGY: LOAN PROGRAMS OFFICE, *1705*, (2011), available at https://lpo.energy.gov/?page_id=41 (last accessed Oct. 25, 2011).

² U.S. DEPARTMENT OF ENERGY: LOAN PROGRAMS OFFICE, *The Financing Force Behind America’s Clean Energy Economy*, (2011), available at https://lpo.energy.gov/?page_id=45 (last accessed Oct. 25, 2011).

A recent news report suggests that there are possible connections between political donations and the receipt of loan guarantees from DOE.³ Significant concerns have already been raised about Solyndra, which allegedly received a loan guarantee from the DOE with the assistance of a DOE official who was a noted fundraiser for President Obama and whose wife worked for the law firm representing Solyndra.⁴

In addition to Solyndra, several other companies⁵ have received billions of dollars in loan guarantees from DOE to build renewable energy infrastructure.⁶ As with Solyndra, many individuals in key positions within these corporations have made political contributions to the President or the Democratic Party, raising the concern that these loan guarantees may have been granted through preferential treatment or undue influence—and therefore not to stimulate shovel-ready jobs.⁷

Information on the policies and procedures by which renewable energy companies received non-contractual awards is significant to the public understanding of the operations or activities of DOE. Information on the loan guarantee recipients and any communications on their behalf for obtaining a non-contractual award are also vital. So the public can better understand how its tax dollars are being spent, please respond to the following within 20 days, for the time period of January 1, 2007 to the present, as it applies to both direct expenditures and sub-awards:

Award Communications

1. All communications between DOE officials, staff, administrators, and employees relating to any non-contractual awards⁸ including those under the Energy Policy Act of 2005

³ John Rossomando, *More Solar Companies led by Democratic Donors received federal loan guarantees*, THE DAILY CALLER, (Sept. 29, 2011), available at <http://dailycaller.com/2011/09/29/more-solar-companies-led-by-democratic-donors-received-federal-loan-guarantees/>.

⁴ Matthew Mosk and Ronnie Greene, *Obama Fundraiser Pushed Solyndra Deal From Inside*, ABC NEWS, (Oct. 7, 2011), available at <http://abcnews.go.com/Blotter/obama-fundraiser-pushed-solyndra-deal-inside/story?id=14691618>.

⁵ For the purposes of this request, the term “any renewable energy non-contractual award recipient” shall include, but is not limited to: any participant of Programs 1703, 1705, ATVM, or any other recipient under the Energy Policy Act of 2005 and/or the American Recovery and Reinvestment Act. See “Definitions,” #8, *infra*.

⁶ *Supra* note 1 at *id*; Michael Catalini, *Besides Solyndra, Who Benefits From Government's Green Loan Program?—Pictures*, NATIONAL JOURNAL, (Sept. 28, 2011), available at <http://www.nationaljournal.com/pictures-video/besides-solyndra-who-benefits-from-government-s-green-loan-program-pictures-20110928>; Dawn McCarty, *Beacon Power, Backed by U.S. Loan Guarantees, Files Bankruptcy*, BLOOMBERG BUSINESSWEEK, (Oct. 31, 2011), available at <http://www.businessweek.com/news/2011-10-31/beacon-power-backed-by-u-s-loan-guarantees-files-bankruptcy.html>.

⁷ *Supra* note 3 at *id*.

⁸ For the purposes of this request, the term “non-contractual award” is to include grants; direct payments (for special or unrestricted use); loans; insured loans; loan guarantees; insurance; training; cooperative agreements; federal credit programs, including credit extensions, non-tax receivables, collateral agreements, service agreements, use of property, facilities or equipment; the sale, exchange or donation of property or goods; or any other type of spending agreement as well as any sub-awards thereof, including any agreements with states relating to any of the aforementioned categories. See “Definitions,” #7, *infra*.

and/or ARRA and/or Programs 1703, 1705, and/or Advanced Technology Vehicles Manufacturing (“ATVM”).

2. All communications between DOE officials, staff, administrators, and employees and recipients of non-contractual awards—including awardees under the Energy Policy Act of 2005 and/or ARRA and/or Programs 1703, 1705, and/or ATVM.
3. All communications between DOE officials, staff, administrators, and employees and the Department of the Treasury officials, staff, administrators, and employees relating to non-contractual awards.
4. All communications between DOE officials, staff, administrators, and employees and Executive Office of the President officials, staff, administrators, and employees—including but not limited to Office of Management and Budget and the President—relating to non-contractual awards.
5. All documents referring or relating to non-contractual award requests made prior to the formal solicitation of the recipient—including requests from Members of Congress, state or local governments, or any other governmental or non-governmental entity. For each document, produce all corresponding documents that:
 - a. Identify award recipients including subawardees;
 - b. Contain deliberations regarding the time and place of the award and the public announcement of the award;
 - c. Refer or relate to procedures to monitor the use of award funds by awardees and subawardees;
 - d. Standards of conduct maintained by awardees and subawardees; or
 - e. The names of agency officials overseeing the award.
6. All documents referring or relating to correspondence DOE received prior to issuance of a Funding Opportunity Announcement (“FOA”), recommending that funds should be awarded to specific awardees later named in the FOA. For any such award:
 - a. Produce all documents referring or relating to those awardees by name;
 - b. Produce all documents referring or relating to the impact such recommendations had on actual award decisions and produce all documents reflecting recommendation communications, including letters, being shared with members of the objective review panels.

Award Competition

7. All documents referring or relating to peer review or technical evaluations review panels. For each panel, produce documents referring or relating to:
 - a. Members of the panel;
 - b. Comments presented to the full panel;
 - c. Results of any vote to determine application approval, disapproval or deferment;

- d. All scores produced by the objective review panel as well as the criteria used for scores;
 - e. Whether applications were scored against each other;
 - f. The finality of a peer review or technical evaluations review panel's score decision;
 - g. Where scores were provided to an agency program official, all documents concerning whether these officials were authorized to make final funding decisions; or
 - h. Where program officials overrode the scores of an objective review panel, the rules and procedures relating to agency override of review panel determinations.
8. All documents referring or relating to the criteria considered for awarding each non-contractual award and the basis for selecting the recipient.
 9. All documents referring or relating to score ratings for DOE non-contractual award recipients.

Award Oversight

10. All documents referring or relating to procedures DOE uses for monitoring the use of non-contractual award funds by awardees and their subawardees. If these procedures include a risk mitigation plan coordinated with DOE, on-site reviews, or monthly performance monitoring, please disclose all documents referring or relating to the DOE's use of these procedures as it applies any renewable energy federal award recipients.
11. All documents referring or relating to policies or procedures between the award recipients and DOE concerning
 - a. Appropriate and careful management and oversight of fiscal expenditures;
 - b. Adherence to the implementation of a Performance Implementation Plan (PIP);
 - c. Adequate technical support and expertise necessary to achieve the goals of the program;
 - d. Adherence to ARRA reporting requirements;
 - e. Continuous analyses of established performance milestones; and
 - f. Provision of assistance in the identification of solutions to award recipient performance issues.
12. All documents referring or relating to instances in which any renewable energy non-contractual award recipient failed to report to federalreporting.gov on all sub-awards or vendor agreements.
13. All documents referring or relating to DOE policies and procedures referring to reporting on sub-awards or vendor agreements.
14. All documents referring or relating to DOE communications to any renewable energy non-contractual award recipients concerning the prohibition on using federal funds for

lobbying activity including but not limited to certifications pursuant to the Byrd Anti-Lobbying Amendment.⁹

15. All documents concerning non-contractual awards made by agency components that have non-contractual expenditure budgets of \$100 million or more. For each component, documents which identify
 - a. The employee or officer with decision-making authority over non-contractual spending;
 - b. The number of components; or
 - c. The awards made by each component, including the purposes of the awards and the entities which received awards.
16. All documents referring or relating to the DOE's use of investment ratios to evaluate profitability and growth concerning the DOE's investment, via non-contractual awards, in private renewable energy entities.
17. All communications referring or relating to the financial condition of any renewable energy non-contractual award recipient, including third-party audit reports expressing concern about any of the above entities' financial condition.
18. All documents referring or relating to Credit Subsidy Costs for any non-contractual award under the Energy Policy Act of 2005 and ARRA.

Cause of Action Qualifies Under the Non-Commercial Fee Category

Cause of Action requests a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii). Cause of Action is a 501(c)(3), not-for-profit, representative of the news media and has no commercial purpose in requesting information. Cause of Action has no commercial, trade, or profit interests and is organized and operated to publish or broadcast news to the general public. Cause of Action will use its editorial skills to turn raw materials into a distinct work.

Cause of Action Is Entitled to a Complete Waiver of Fees

Cause of Action requests a waiver of fees as a representative of the news media under 5 U.S.C. § 552(a)(4)(A)(ii)(II). The disclosure of the requested information is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). *See, e.g., Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 814 n.3 (2d Cir. 1994); *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 27 n.5 (D.D.C. 2006).

⁹ 10 CFR § 601.

The subject matter of the requested records specifically concerns identifiable “operations or activities of the government.” The disclosable portions of the requested information will be meaningfully informative in relation to this request. This disclosure will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Cause of Action has a dynamic and diverse staff whose range of expertise includes a combined 15 years of government oversight, investigative reporting, and federal public interest litigation experience.

Production of Documents and Contact Information

We call your attention to President Obama’s January 21, 2009 Memorandum concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA. . . . The presumption of disclosure should be applied to all decisions involving FOIA.¹⁰

If any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

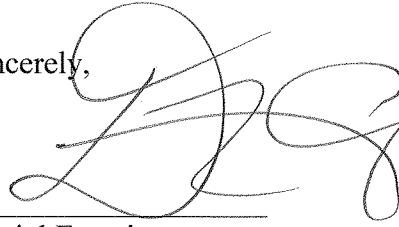
In an effort to facilitate record production within the statutory time limit, Cause of Action prefers to accept documents in electronic format (e.g. e-mail, .pdfs). When necessary, Cause of Action will accept the “rolling production” of documents.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately via Daniel Epstein (Daniel.Epstein@causeofaction.org) or Tyler Martinez (Tyler.Martinez@causeofaction.org) or at 703-875-8625. Please note that, for purposes of responding to this request, the terms “records,” “communications,” and “referring or relating” should be interpreted consistently with the attached Definitions of Terms. We look forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

¹⁰ PRESIDENT BARACK OBAMA, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act*, Jan. 21, 2009, available at <http://www.whitehouse.gov/the-press-office/freedom-information-act>.

Mr. Alexander Morris
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Sincerely,

A handwritten signature in black ink, appearing to be 'DE', written over a horizontal line.

Daniel Epstein
Executive Director

Encl. Responding to Document Requests, Definitions

Responding to Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Cause of Action.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Cause of Action's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. When you produce documents, you should identify the paragraph in the Cause of Action's request to which the documents respond.
5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
6. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Cause of Action Foundation staff to determine the appropriate format in which to produce the information.
7. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
8. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
9. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

10. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
11. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
12. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
13. All documents shall be Bates-stamped sequentially and produced sequentially.

Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmation, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, e-mail, regular mail, telexes, releases, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. For the purposes of this request, the term “non-contractual award” is to include grants; direct payments (for special or unrestricted use); loans; insured loans; loan guarantees; insurance; training; cooperative agreements; federal credit programs, including credit extensions, non-tax receivables, collateral agreements, service agreements, use of property, facilities or equipment; the sale, exchange or donation of property or goods; or any other type of spending agreement as well as any sub-awards thereof, including any agreements with states relating to any of the aforementioned categories.
8. For the purposes of this request, the term “any renewable energy non-contractual award recipient” shall include, but is not limited to: any participant of Programs 1703, 1705, the Advanced Technology Vehicles Manufacturing Program (“ATVM”) or any other recipient under the Energy Policy Act of 2005 and/or the American Recovery and Reinvestment Act.