

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF COMMERCE

Defendant.

Case No. 1:15-cv-02088-CRC

**MOTION OF CLIMATE SCIENCE LEGAL DEFENSE FUND, AMERICAN
METEOROLOGICAL SOCIETY, AND UNION OF CONCERNED SCIENTISTS FOR
LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT**

Climate Science Legal Defense Fund (CSLDF), American Meteorological Society (AMS), and Union of Concerned Scientists (UCS) respectfully move pursuant to Local Rule 7(o) for leave to file the attached brief as amici curiae in support of Defendant U.S. Department of Commerce. Proposed amici are nonprofit organizations committed to ensuring robust, independent scientific research into critically important but politically charged subjects like climate change. They have a strong interest in this Freedom of Information Act (FOIA) case because the release of materials like those requested here would significantly damage government scientists' ability and willingness to perform this vital work. Further, amici can assist the Court in resolving this case by sharing their relevant expertise about the scientific endeavor, first-hand knowledge of how scientists approach their work, and familiarity with how

other courts have recently handled similar issues regarding public records requests involving scientific research.

Proposed amici have consulted with the parties on the filing of this motion. Defendant consents to the filing of an amicus brief. Plaintiff Judicial Watch, Inc. reserves the right to file an opposition to the motion. A proposed order accompanies the motion.

1. This Court has “broad discretion” to permit participation by amici and routinely grants leave to file amicus briefs when it “may benefit from their input.” *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 237 (D.D.C. 2011); *see also Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007) (same); *Ellsworth Assocs. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996) (same).

The Court will generally allow participation by amici who have “a special interest in th[e] litigation as well as a familiarity and knowledge of the issues raised therein that could aid in the resolution of th[e] case.” *Ellsworth Assocs.*, 917 F. Supp. at 846; *see also Potomac Elec. Power*, 826 F. Supp. 2d at 237 (granting leave to file amicus brief where amicus has “relevant expertise and a stated concern for the issues at stake in th[e] case”). Assistance from amici can take many forms, including presenting “ideas, arguments, theories, insights, facts or data that are not to be found in the parties’ briefs.” *Northern Mariana Islands v. United States*, No. 08-cv-1572-PLF, 2009 WL 596986, at *1 (D.D.C. Mar. 6, 2009); *see also Hard Drive Prods., Inc. v. Does 1-1*, 495, 892 F. Supp. 2d 334, 337 (D.D.C. 2012) (amicus briefs are “normally appropriate” if they provide “unique information or perspective that can help the court”).

This Court has thus granted participation by amici in a variety of cases, including those where amici “seek[] to support the government’s arguments.” *Nat’l Ass’n of Home Builders*, 519 F. Supp. 2d at 93. Indeed, the Court has previously authorized the filing of amicus briefs in

support of the government's decision to withhold documents in other FOIA cases. *See, e.g., ACLU v. Dep't of Justice*, No. 1:10-cv-0436-RMC (D.D.C. Oct. 19, 2010) (granting leave to file amicus brief in support of CIA's motion for summary judgment).

Under these standards, proposed amici should be granted leave to file the attached brief.

2. Proposed amici CSLDF, AMS, and UCS have a special interest in this case. Each organization is committed to ensuring robust, independent scientific research into vitally important subjects like climate change. They know such research requires an intellectual environment where scientists feel free to explore new ideas and provide candid feedback to each other. That can only occur where scientists feel comfortable that their confidential correspondence and preliminary drafts will not later be subject to indiscriminate public disclosure. Proposed amici are thus deeply concerned about the possible implications of releasing the sorts of confidential correspondence and research materials at issue in this case. That outcome could significantly damage government scientists' ability and willingness to conduct research into politically charged subjects like climate change.

CSLDF was founded in 2011 in response to the increasing incidence of public records requests targeting climate scientists; it educates researchers about their legal rights and, when necessary, helps defend them in court. AMS was founded in 1919 and is dedicated to advancing the atmospheric and related sciences for the benefit of society. It accomplishes this goal by, among other things, publishing several peer-reviewed scientific journals. UCS was founded in 1969 and is supported by an alliance of 500,000 citizens and scientists dedicated to using science to foster a healthy environment and safe world. It believes that a crucial ingredient in achieving that goal is maintaining research institutions within the federal government that foster an environment of independent and rigorous scientific inquiry free from political interference.

Proposed amici's interest in this particular case is further demonstrated by their public opposition to earlier attempts to obtain some of the same privileged research materials via a congressional subpoena. As described in greater detail in the attached brief, AMS and UCS were among several scientific organizations that wrote letters in support of Defendant's decision to protect the scientists' privileged correspondence in response to that subpoena.¹ The concerns raised in those letters apply just the same whether the requested materials are released via congressional subpoena or via a FOIA request instead.

Proposed amici thus have a demonstrated interest in ensuring that public records laws—and the deliberative process privilege of FOIA Exemption 5, in particular—continue to apply in a manner that appropriately protects the confidential correspondence and preliminary work of government scientists.

3. Proposed amici also have relevant expertise and familiarity with the issues presented that could benefit the Court's consideration of the case.

AMS, as a publisher of several peer-reviewed scientific journals, has expertise and direct knowledge about the importance of collaboration among scientists (both inside and outside the government), including the need for preserving the confidentiality of the peer-review process.

CSLDF and UCS have participated in other public records cases that sought correspondence and research materials from climate scientists. Indeed, CSLDF's initial project was assisting Dr. Michael Mann in defending against litigation that sought to obtain his

¹ See Letter from Am. Meteorological Soc'y to Lamar Smith, Chairman, H. Comm. on Sci., Space, and Tech. (Nov. 4, 2015), <http://tinyurl.com/h9fze9l>; Letter from Am. Ass'n for the Advancement of Sci. (AAAS) et al., to Lamar Smith, Chairman, H. Comm. on Sci., Space, and Tech. (Nov. 24, 2015), <http://tinyurl.com/zdpwrn>; Letter from Union of Concerned Scientists to Lamar Smith, Chairman, H. Comm. on Sci., Space, and Tech. (Feb. 26, 2016), <http://tinyurl.com/jb7ucua>.

privileged research materials at the University of Virginia, *see Am. Tradition Inst. (“ATI”) v. Rector & Visitors of Univ. of Va.*, 756 S.E.2d 435 (Va. 2014), and it later participated as amicus in a similar public records case elsewhere. UCS filed an amicus brief in the *ATI* case, and has also participated as amicus in other cases involving climate science or potential threats to the independence of government scientists. *See, e.g., Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *rev’d in part on other grounds by Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *NASA v. Nelson*, 562 U.S. 134 (2011).

Consistent with this prior amicus participation, proposed amici have also been monitoring the increased frequency of attempts (like those in this case) to use public records laws to obtain scientists’ privileged research materials, and thus have developed knowledge and expertise about the issue. UCS has published a publicly available report about the growing trend of such public records requests. *See* Michael Halpern, *Freedom to Bully: How Laws Intended to Free Information Are Used to Harass Researchers*, Ctr. for Sci. & Democracy, Union of Concerned Scientists (Feb. 2015), <http://tinyurl.com/hjzyq6g>. And CSLDF has prepared a pocket guide for scientists advising them how to prepare for and respond to public records requests and other legal issues. *See* Elizabeth Kolbert, *Why Scientists Are Scared of Trump: A Pocket Guide*, *The New Yorker*, Dec. 8, 2016, <http://tinyurl.com/zc6z9x8>.

As noted above, proposed amici also have familiarity with the underlying events that led to this litigation. That familiarity could benefit the Court because the concerns raised in response to the congressional subpoena—about, for example, the potential chilling effect on government scientists’ preliminary deliberations—are the same types of concerns recognized by courts in cases applying the deliberative process privilege of FOIA Exemption 5.

4. The attached brief, while supporting Defendant, is primarily for the purpose of assisting the Court. Based on proposed amici’s relevant experience and expertise, the attached brief presents the Court with a unique perspective that includes many ideas, arguments, and facts that are not found in Defendant’s brief. Proposed amici discuss analogous disclosure rules regarding federally funded research, *see* OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, 64 Fed. Reg. 54,926 (Oct. 8, 1999), as well as several cases not cited or emphasized in Defendant’s brief—including, in particular, recent state court cases that address similar issues in the context of state public records statutes, *see ATI*, 756 S.E.2d at 442; *Highland Mining Co. v. W. Va. Univ. Sch. of Med.*, 774 S.E.2d 36, 52-54 (W. Va. 2015); *Humane Soc’y v. Super. Ct. of Yolo Cnty.*, 155 Cal. Rptr. 3d 93, 113-14 (Cal. Ct. App. 2013).

The attached brief also provides the Court with useful context about some of the underlying events that led to this litigation and the increasing frequency of these types of public records requests more generally. This perspective is important because, among other things, it reveals the potentially broad implications of a ruling in Plaintiff’s favor, and the magnitude of the chilling effect that could occur if the privileged research materials and correspondence at issue here are released.²

² To the extent the Court chooses to use any information discussed in the sources cited in the attached brief as adjudicative rather than background legislative facts, the Court may take judicial notice of the facts referenced therein. *See* Fed. R. Evid. 201(c); *Neonatology Assocs., P.A. v. Comm’r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (observing that an amicus brief can be helpful inasmuch as it “collect[s] background or factual references that merit judicial notice”); *see also, e.g., Smith v. Henderson*, 54 F. Supp. 3d 58, 65-66 (D.D.C. 2014) (taking judicial notice of “publicly available reports from policy groups”); *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 67-68 (D.D.C. 2014) (“judicial notice may be taken of public records and government documents available from reliable sources,” including “congressional documents”); *Peart v. Latham & Watkins LLP*, 985 F. Supp. 2d 72, 81 (D.D.C. 2013) (taking

5. Finally, the instant motion is timely because it would not “unduly delay the Court’s ability to rule on any pending matter.” LCvR 7(o)(2). The summary-judgment briefing schedule currently runs through mid-April, so granting leave to file the attached brief would not in any way alter that schedule.

Nor would the filing of the attached brief cause any prejudice or undue burden to either party. While neither party is required to respond to the points raised by proposed amici, they each have the opportunity to do so under the Court’s briefing schedule. Indeed, in light of the recent extension requested by Plaintiff, its cross-motion for summary judgment and opposition to Defendant’s summary judgment motion is not due for another three weeks. That gives Plaintiff ample time to address any points raised in the attached brief in that filing, if it so desires. Moreover, both parties will still have yet another opportunity to address the attached brief in their respective reply briefs.

This Court has routinely granted leave to file amicus briefs that left the parties with even less opportunity to respond to points raised by amici. *See, e.g., Feldman v. Bowser*, No. 1:15-cv-01967-KBJ (D.D.C. April 7, 2016) (granting leave to file amicus brief submitted one day before defendants’ reply briefs were due); *NACS v. Bd. Of Governors of Fed. Reserve Sys.*, No. 11-cv-02075-RJL (D.D.C. May 11, 2012) (granting leave to file amicus brief several weeks after defendant’s opposition and cross-motion for summary judgment was filed); *id.* (D.D.C. May 22, 2012) (same). Indeed, in *Washington Alliance of Technology Workers v U.S. Dep’t of Homeland Security*, the Court granted a request from Judicial Watch (Plaintiff in this case) to file an amicus

judicial notice of government letters); *Wash. Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (taking judicial notice of facts known as a result of newspaper articles).

brief on the same day that the parties filed their oppositions to each other's cross-motions for summary judgment. *See* No. 1:14-cv-529-ESH (D.D.C. April 6, 2015).

6. In sum, the Court should allow proposed amici to file the attached brief because “the information offered is timely and useful.” *Ellsworth Assocs.*, 917 F. Supp. at 846 (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, CSLDF, AMS, and UCS should be granted leave to file the attached brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 27, 2017 I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia through the CM/ECF system, which caused the following counsel of record to be served by electronic means.

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