



March 31, 2017

VIA ELECTRONIC MAIL

Michael Toland, Ph.D.
Departmental Freedom of Information Officer
Office of Privacy and Open Government
U.S. Department of Commerce
14th and Constitution Avenue NW
Mail Stop 52010FB
Washington, DC 20230
mtoland@doc.gov

Re: Freedom of Information Act Request

Dear Dr. Toland:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of the Department of Commerce (Commerce), 15 C.F.R. Part 4, American Oversight makes the following request for records. The records requested herein reside in multiple agencies and/or offices within Commerce. Because of the nature of the request, however, we do not currently possess the information as to which specific agencies are affected. We ask that you coordinate this request across Commerce in your role as Commerce's FOIA contact.¹

Ivanka Trump has long served professional roles in her father's endeavors. She is involved with his real estate empire and appeared on his reality shows, *The Apprentice* and *The Celebrity Apprentice*.² She was an influential resource during her father's presidential campaign.³ She has

¹ U.S. DEP'T OF COMMERCE, *Freedom of Information Act and Privacy Acts Contacts - Department of Commerce Contact*,

http://www.osec.doc.gov/opog/FOIA/FOIA_foiacontacts.html#doc (last visited Mar. 31, 2017).

² Kris Ruby, *Ivanka Trump and the Art of Being Underestimated*, FORBES (Oct. 11, 2010, 5:50

PM), <https://www.forbes.com/2010/10/11/ivanka-trump-donald-business-forbes-woman-entrepreneurs-style.html>;

see Jory Heckman, *GSA Official: Trump Must Give Up Stake in DC Hotel Before Inauguration*, FEDERAL NEWS RADIO (Dec. 14, 2016, 1:52 PM),

<http://federalnewsradio.com/management/2016/12/gsa-official-trump-must-give-stake-dc-hotel-inauguration/> ("... GSA's primary point of contact in carrying out the [Old Post Office] lease has been Ivanka Trump, the President-elect's daughter.").

³ See MJ Lee et al., *Corey Lewandowski Out as Trump Campaign Manager*, CNN (June 21, 2016, 6:49 AM), <http://www.cnn.com/2016/06/20/politics/corey-lewandowski-out-as-trump-campaign-manager/> ("Ivanka Trump, the candidate's daughter, played a pivotal role in convincing Trump to take action against Lewandowski.").



attended official meetings, both during the transition period after the election⁴ and since the president has taken office.⁵ As her role is reported to evolve again,⁶ it is important to understand the role she has had in shaping the administration’s policies to date from the outside.

Requested Records

American Oversight requests that Commerce produce the following within twenty business days:

1. All emails or text messages regarding agency business, whether conducted on government or personal accounts, between Ms. Trump—or anyone acting on behalf of Ms. Trump, such as an assistant or scheduler—and the individuals below, or anyone acting on behalf of the individuals below:
 - a) Any non-career member of the Senior Executive Service (SES) in the Office of the Secretary, or career employee detailed to a position eligible to be filled by a non-career member of the SES.
 - b) Any Schedule C employee in the Office of the Secretary.
 - c) Any employee appointed by the President, with or without Senate confirmation (PAS and PA).
 - d) Any employee serving in an “Acting” PAS or PA capacity.

2. All calendar entries reflecting meetings between Ms. Trump and the individuals below, or anyone acting on behalf of the individuals below:
 - a) Any non-career member of the Senior Executive Service (SES) in the Office of the Secretary, or career employee detailed to a position eligible to be filled by a non-career member of the SES.
 - b) Any Schedule C employee in the Office of the Secretary.
 - c) Any employee appointed by the President, with or without Senate confirmation (PAS and PA).

⁴ Eric Lipton, *Ivanka Trump’s Presence at Meeting with Japan’s Leader Raises Questions*, N.Y. TIMES, Nov. 18, 2016, <https://www.nytimes.com/2016/11/19/us/politics/ivanka-trump-shinzo-abe.html>.

⁵ Sonam Sheth, *Ivanka Trump’s New White House Position Could Be an Ethical Minefield*, BUSINESS INSIDER (Mar. 25, 2017, 9:28 AM) <http://www.businessinsider.com/ivanka-trump-white-house-west-wing-donald-trump-ethics-legal-2017-3> (“Before her arrival in the West Wing, Ivanka participated in a number of events with the president, including meetings with German Chancellor Angela Merkel, Canadian Prime Minister Justin Trudeau, and Japanese Prime Minister Shinzo Abe; trips with the president and his cabinet members; bill signings in the Oval Office; and meetings in the West Wing.”).

⁶ Annie Karni, *Ivanka Trump Set to Get West Wing Office as Role Expands*, POLITICO (Mar. 20, 2017, 5:56 PM), <http://www.politico.com/story/2017/03/ivanka-trump-white-house-236273>; Jackie Northam & Marilyn Geewax, *Ivanka Trump’s Move to the White House Raises Questions About Ethics*, NPR (Mar. 21, 2017, 4:58 PM), <http://www.npr.org/sections/thetwo-way/2017/03/21/520965076/ivanka-trumps-move-to-the-white-house-raises-questions-about-ethics>.

- d) Any employee serving in an “Acting” PAS or PA capacity.

Please provide all responsive records from January 20, 2017, to the date the search is conducted.

American Oversight seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.⁷ **It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.**⁸

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered Commerce’s prior FOIA practices unreasonable. **In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.**⁹ Furthermore, agencies that have adopted the National Archives and

⁷ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

⁸ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

⁹ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians' files. For example, a custodian may have deleted a responsive email from his or her email program, but Commerce's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that Commerce use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”¹⁰ If it is your position that any portion of the requested records is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”¹¹ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”¹² Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”¹³

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹⁴ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should institute a preservation hold on information responsive to this request. American Oversight intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, Commerce is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or

¹⁰ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹¹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹² *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹³ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹⁴ *Mead Data Central*, 566 F.2d at 261.

duplication costs. By working together at the outset, American Oversight and Commerce can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street, NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 15 C.F.R. § 4.11(l), American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way.¹⁵ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁶

American Oversight requests a waiver of fees because disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding” of government.¹⁷ Public statements have been inconsistent about Ms. Trump’s role in her father’s administration, first during the Trump campaign, then during the transition, and since President Trump took office. In August 2016, Ms. Trump told a journalist she “most definitely would have a role in a Trump White House.”¹⁸ Then, in the weeks leading up to the election, Ms. Trump said she did not “intend to be a part of the government.”¹⁹ She has been a highly visible presence in the first two months of her father’s administration, attending meetings with heads of state—including German Chancellor Angela Merkel and Canadian Prime Minister Justin Trudeau—and business leaders.²⁰ Her role is now evolving to one where she has an office in the West Wing, a government-issued communications device, and is receiving a security clearance. While initially claiming that

¹⁵ 15 C.F.R. § 4.11(l)(1)(i).

¹⁶ 15 C.F.R. § 4.11(l)(1)(ii).

¹⁷ 15 C.F.R. § 4.11(l)(1)(i); 15 C.F.R. § 4.11(l)(2)(i)-(iv).

¹⁸ Lisa DePaulo, *Growing Up Trump: Ivanka Trump Tells All*, HARPER’S BAZAAR, Aug. 8, 2016, <http://www.harpersbazaar.com/culture/features/a16971/ivanka-trump-interview-donald-trump/>.

¹⁹ Politico Staff, *Ivanka Trump Says No Plans to Work in Her Dad’s Administration*, POLITICO (Oct. 18, 2016, 9:27 AM), <http://www.politico.com/story/2016/10/will-ivanka-trump-work-in-trump-white-house-229923>.

²⁰ Catherine Lucey, *Ivanka Trump Plans to Attend Economic Summit in Germany*, WASH. POST, Mar. 26, 2017, https://www.washingtonpost.com/politics/ivanka-trump-plans-to-attend-economic-summit-in-germany/2017/03/26/6663b708-128f-11e7-833c-503e1f6394c9_story.html?utm_term=.b7bd9c5879b9; Danielle Paquette, *What Exactly Is Ivanka Trump Doing?*, WASH. POST, Feb. 14, 2017, https://www.washingtonpost.com/news/wonk/wp/2017/02/14/what-exactly-is-ivanka-trump-doing/?utm_term=.d8e763a3f03d.

she was “not technically serving as a government employee at this time,”²¹ Ms. Trump recently announced her intention to become an unpaid employee.²²

Regardless of the status she has claimed, what has remained clear is that Ms. Trump has been actively engaging in promoting the work of the federal government, including policy priorities related to Commerce. For example, on February 22, Ms. Trump participated in a round-table discussion with minority-owned small businesses.²³

The requested email correspondence will meaningfully inform the public’s understanding of the nature of Ms. Trump’s role in the administration as a purported outsider, a subject that has been of significant interest to the American people.²⁴

This request is primarily and fundamentally for non-commercial purposes.²⁵ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight’s financial interest. American Oversight’s mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight will also make materials it gathers available on our public website and promote their availability on social media platforms, such as Facebook and Twitter.²⁶ One example of American Oversight’s demonstrated public disclosure of documents and creation

²¹ Caroline Hallemann, *Ivanka Trump’s Evolving Role in her Father’s White House*, TOWN & COUNTRY, Mar. 20, 2017, <http://www.townandcountrymag.com/society/politics/news/a9473/ivanka-trump-white-house-news/>.

²² Maggie Haberman & Rachel Abrams, *Ivanka Trump, Shifting Plans, Will Become a Federal Employee*, N.Y. TIMES, Mar. 29, 2017, <https://www.nytimes.com/2017/03/29/us/politics/ivanka-trump-federal-employee-white-house.html>.

²³ Catherine Lucey, *Ivanka Trump Visits Center for Minority-owned Businesses*, SALON (Feb. 22, 2017, 6:15 PM), <http://www.salon.com/2017/02/22/ivanka-trump-visits-center-for-minority-owned-businesses/>.

²⁴ Julie Bykovicz, *Ivanka Trump: A White House Force, Just Not an ‘Employee,’* RICHMOND TIMES-DISPATCH, Mar. 24, 2017, http://www.richmond.com/news/national-world/government-politics/ap/ivanka-trump-a-white-house-force-just-not-an-employee/article_681a7a6d-3f69-52fd-8281-d04d0414c162.html; Editorial, *Ivanka’s Murky White House Role*, S.F. CHRON., Mar. 21, 2017, <http://www.sfchronicle.com/opinion/editorials/article/Ivanka-s-murky-White-House-role-11018295.php>; Catherine Lucey, *Ivanka Trump Lays Groundwork for Policy Role in Washington*, SALT LAKE TRIBUNE, Jan. 16, 2017, <http://www.sltrib.com/home/4826518-155/story.html>; Catherine Lucey, *Ivanka Trump Navigating Washington Social, Political Worlds*, DES MOINES REGISTER, Feb. 12, 2017, <http://www.desmoinesregister.com/story/life/2017/02/12/ivanka-trump-navigating-washington-social-political-worlds/97744248/>.

²⁵ 15 C.F.R. § 4.11(l)(1)(i); 15 C.F.R. § 4.11(l)(2)(i)-(iv).

²⁶ American Oversight currently has over 10,400 page likes on Facebook, and over 8,100 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Mar. 31, 2017); American Oversight (@weareoversight), TWITTER (last visited Mar. 31, 2017).

of editorial content is in its recently launched “Audit the Wall” effort, where the organization is gathering and analyzing information and commenting on public releases of information related to the administration’s proposed construction of a barrier along the U.S.-Mexico border.²⁷

Accordingly, American Oversight qualifies for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with Commerce on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Cerissa Cafasso at foia@americanoversight.org or 202.869.5246. Also, if American Oversight’s request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

A handwritten signature in blue ink that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal line extending to the left.

Austin R. Evers
Executive Director
American Oversight

²⁷ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.