



March 2, 2018

VIA ONLINE PORTAL

Michael Toland, Ph.D.
Departmental Freedom of Information Officer
Office of Privacy and Open Government
14th and Constitution Avenue, N.W.
Mail Stop 52010FB
Washington, D.C. 20230

Bobbie Parsons
Immediate Office of the Secretary
Office of Privacy and Open Government
14th and Constitution Avenue, N.W.
Mail Stop 52010FB
Washington, D.C. 20230

Re: Freedom of Information Act Request

Dear Freedom of Information Act Officers:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Commerce (Commerce), 15 C.F.R. Part 4, American Oversight makes the following request for records.

President Trump recently reported that the U.S. would impose steep tariffs on steel and aluminum imports.¹ The decision was reportedly based at least in part on a report by the U.S. Department of Commerce (Commerce) advocating for increases in steel tariffs.² The report was overseen by Commerce Secretary Wilbur Ross, a former steel-industry board member and investor, with input from other trade officials, including USTR Ambassador Robert Lighthizer, who previously lobbied for the steel industry. These relationships raise questions about Trump administration's decision to impose these highly controversial tariffs.

¹ Jeremy Diamond, *Trump Says US Will Impose Steel and Aluminum Tariffs*, CNN (Mar. 1, 2018, 2:25 PM), <https://www.cnn.com/2018/03/01/politics/steel-aluminum-trade-trump-chaos/index.html>.

² Megan Cassella, *Commerce Sends Section 232 Steel Report to Trump*, POLITICO (Jan. 12, 2018 10:00 AM), <https://www.politico.com/newsletters/morning-trade/2018/01/12/commerce-sends-section-232-steel-report-to-trump-072717>; Press Release, *Secretary Ross releases Steel and Aluminum 232 Reports in Coordination with White House*, COMMERCE.GOV (Feb. 16, 2018), <https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination>.



Requested Records

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

All records reflecting communications (including emails, email attachments, text messages, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, talking points, or other materials reflecting communications) between Secretary Wilbur Ross or any other political appointee or career SES employee in the Office of the Secretary (or anyone acting on their behalf) and anyone acting on behalf of any of the following entities:

- a. U.S. Steel;
- b. the American Iron and Steel Institute;
- c. ArcelorMittal;
- d. International Steel Group;
- e. Aperam Steel; or
- f. Skadden, Arps, Slate, Meagher & Flom LLP.

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

In addition to the records requested above, American Oversight also requests records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If Commerce uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

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.³ **It is not adequate to rely on policies and procedures that**

³ 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).

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.⁴

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 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.⁵ Furthermore, agencies that have adopted the National Archives and 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.”⁶ 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

⁴ 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)).

⁵ 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>.

⁶ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

actually exempt under FOIA.”⁷ 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.”⁸ 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.’”⁹

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.¹⁰ 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 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 a 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

⁷ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁸ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

⁹ *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)).

¹⁰ *Mead Data Central*, 566 F.2d at 261.

significant way.¹¹ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹²

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 operations or activities.”¹³ There has been a significant amount of publicity surrounding the administration’s decision to increase tariffs on steel.¹⁴ At the same time, there has been a great deal of public interest in the administration’s approach to ethics and the decision to hire individuals with industry ties to work on matters directly or indirectly related to their prior employment.¹⁵ These concerns are directly implicated by the Section 232 report due to the prior employment of senior officials in USTR. Specifically, multiple administration officials involved in overseeing or advising the production of Commerce’s Section 232 report have had substantial ties to the steel industry. Until earlier this year, Commerce Secretary Wilbur Ross served on the board of ArcelorMittal, a steel company that could benefit significantly from increased tariffs, and also had a major equity stake in the company.¹⁶ Prior to that, Mr. Ross owned the International Steel Group and had reported a substantial amount of stock in Aperam Steel on his financial disclosure.¹⁷

Similarly, the administration’s top trade negotiator, USTR Ambassador Robert Lighthizer, as well as its top trade enforcement official, USTR General Counsel Stephen Vaughn, both served as lobbyists for numerous domestic steel producers and provided them legal representation in anti-dumping cases.¹⁸ Mr. Vaughn has represented the U.S. Steel Corporation as a lobbyist as recently

¹¹ 15 C.F.R. § 4.11(l)(1)(i).

¹² 15 C.F.R. § 4.11(l)(1)(ii).

¹³ 15 C.F.R. § 4.11(l)(1)(i), (2)(i)-(iv).

¹⁴ See, e.g., *supra* notes 1-2; Ana Swanson, *Trump Plans Tariffs on Steel and Aluminum and Markets Slump*, N.Y. Times, Mar. 1, 2018, <https://www.nytimes.com/2018/03/01/business/trump-tariffs.html>; John Ydstie & Avie Schneider, *Trump Says He Plans To Impose Tariffs on Steel, Aluminum Imports*, NPR (Mar. 1, 2018, 1:07 PM), <https://www.npr.org/sections/thetwo-way/2018/03/01/589839297/trump-says-he-plans-to-impose-tariffs-on-steel-aluminum-imports>; .

¹⁵ See, e.g., Eric Lipton & Danielle Ivory, *Lobbyists, Industry Lawyers Were Granted Ethics Waivers to Work in Trump Administration*, N.Y. TIMES, June 7, 2017, <https://www.nytimes.com/2017/06/07/us/politics/lobbyists-ethics-waivers-trump-administration.html>.

¹⁶ ArcelorMittal, *Wilbur Ross resigns from the ArcelorMittal Board as a consequence of his confirmation as US Commerce Secretary*, Mar. 1, 2017, <http://corporate.arcelormittal.com/news-and-media/press-releases/2017/mar/01-03-2017>.

¹⁷ Wilbur Ross 278 Disclosure Form, *available at* [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/88642A2CA81AA6C2852580AB00618C8C/\\$FILE/Ross Wilbur L. Final 278.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/88642A2CA81AA6C2852580AB00618C8C/$FILE/Ross%20Wilbur%20L.%20Final%20278.pdf).

¹⁸ Lobbying information available at the U.S. Senate Lobbying Disclosure Act Database.

as last year, but documents released by the Office of Government Ethics revealed that he had not received an ethics waiver to work on issues directly related to his former employer.¹⁹

The disclosures sought in this request are critical in order to assess whether decisions might have been influenced by conflicts of interest among the decisionmakers and whether officials have personal or private interests that affect their policy actions. Disclosure of the requested information will contribute to the public's understanding of these aspects of the operation of the federal government.

This request is primarily and fundamentally for non-commercial purposes.²⁰ 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 uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.²¹ American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a senior DOJ attorney,²² American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.²³ As another example, American Oversight has a project called "Audit the Wall," 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.²⁴

Accordingly, American Oversight qualifies for a fee waiver.

¹⁹ Eric Lipton & Danielle Ivory, *Lobbyists, Industry Lawyers Were Granted Ethics Waivers to Work in Trump Administration*, N.Y. TIMES, June 7, 2017, <https://www.nytimes.com/2017/06/07/us/politics/lobbyists-ethics-waivers-trump-administration.html>.

²⁰ 15 C.F.R. § 4.11(l)(1)(ii), (3)(i)-(ii).

²¹ American Oversight currently has approximately 11,800 page likes on Facebook and 40,100 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Feb. 28, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Feb. 28, 2018).

²² *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²³ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

²⁴ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

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 202.869.5244. 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