



October 19, 2017

VIA ELECTRONIC MAIL

Records, FOIA, and Privacy Branch
Office of Environmental Information
Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
hq.foia@epa.gov

Re: Expedited Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 and the implementing regulations of the Environmental Protection Agency (EPA), 40 C.F.R. Part 2, American Oversight makes the following request for records.

Since taking office, Administrator Pruitt has shown a troubling tendency to give ample time to industry lobbyists without affording similar attention to public interest advocates.¹ This lopsided access appears to be part of Mr. Pruitt's ongoing "war on the EPA," which began long before he took office and continues even as he has assumed responsibility for the agency,² and which has led to industry-friendly actions at the expense of critical protections for the environment.³ American Oversight seeks records that will shed light on how senior EPA officials allocate their time, including the access they grant to industry representatives and lobbyists.

¹ Eric Lipton & Lisa Friedman, *E.P.A. Chief's Calendar: A Stream of Industry Meetings and Trips Home*, N.Y. TIMES, Oct. 3, 2017, <https://www.nytimes.com/2017/10/03/us/politics/epa-scott-pruitt-calendar-industries-coal-oil-environmentalists.html>.

² James Warren, *The Climate Change Skeptic Leading Trump's 'War on the EPA,'* VANITY FAIR (Oct. 11, 2017, 2:00 PM), <https://www.vanityfair.com/news/2017/10/scott-pruitt-war-on-the-epa>.

³ Timothy Cama, *EPA Launches Industry Partners Program for Regulating*, THE HILL (Oct. 3, 2017, 4:40 PM), <http://thehill.com/policy/energy-environment/353703-epa-launches-industry-partnership-program-for-regulating>; Meghan Keneally, *Coal Industry Supporters Celebrate EPA Repeal of Clean Power Plan*, ABC NEWS (OCT. 11, 2017, 5:30 PM), <http://abcnews.go.com/US/coal-industry-supporters-celebrate-epa-repeal-clean-power/story?id=50389885>.



Requested Records

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

1. All calendars or calendar entries for any of the following individuals from May 18, 2017, to the date a search is conducted, including any calendars maintained on behalf of these individuals (e.g., by an administrative assistant):
 - Administrator Scott Pruitt
 - Acting Deputy Administrator Mike Flynn

2. All calendars or calendar entries for any of the following individuals from February 17, 2017, to the date a search is conducted, including any calendars maintained on behalf of these individuals (e.g., by an administrative assistant):⁴
 - Ryan Jackson, Chief of Staff
 - Reginald Allen, Acting Deputy Chief of Staff
 - Byron R. Brown, Deputy Chief of Staff for Policy
 - Kevin Chmielewski, Deputy Chief of Staff for Operations
 - Nancy Beck, Deputy Assistant Administrator for Chemical Safety and Pollution Prevention
 - Brittany Bolen, Senior Deputy Associate Administrator for Policy

EPA should provide all calendar entries *in existence* as of the date of the search, including entries that have been created as of the search date but reflect events planned for later dates. For calendar entries created in Outlook or similar programs, the documents should be produced in “memo” form to include all invitees, any notes, and all attachments. Please do not limit your search to Outlook calendars—we request the production of any calendar—paper or electronic, whether on government-issued or personal devices—used to track or coordinate how these individuals allocate their time on agency business.

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

⁴ On April 5, 2017, American Oversight submitted a request for calendar entries for any political appointee or SES appointees in the Office of the Administrator. This request, which was assigned the tracking number EPA-HQ-2017-005777, is now the subject of litigation and ongoing production. As of this time, American Oversight has not received calendars for any of the individuals listed in Item 2 of the present request. To the extent EPA produces calendars for these individuals in response to American Oversight’s previous request and the related litigation, EPA need to reproduce those calendars in response to this request. However, EPA should still produce additional calendars for these individuals for the time period from May 18, 2017 (the cut-off date EPA and American Oversight have agreed to for request EPA-HQ-2017-005777 in the course of litigation on that request) forward.

request. If EPA 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.⁵ **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.**⁶

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 EPA’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.**⁷ Furthermore, agencies that have adopted the National Archives and

⁵ 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).

⁶ 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)).

⁷ 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,

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 EPA's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that EPA 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.”⁸ 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.”⁹ 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.”¹⁰ 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.’”¹¹

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.¹² 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, EPA is on notice that litigation is reasonably foreseeable.

“Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

⁸ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁰ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹¹ *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)).

¹² *Mead Data Central*, 566 F.2d at 261.

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 EPA 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 40 C.F.R. § 2.107(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.¹³ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁴

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 and activities.¹⁵ Conducting meetings on official time and to discuss official agency business clearly concerns “identifiable operations or activities of the Federal government.”¹⁶ Records providing information about these meetings—which are not currently available through public documents—will be “meaningfully informative” about EPA’s operations, activities, and priorities and will contribute significantly to the public’s understanding of them.¹⁷ The EPA’s activities affect, among other things, air and water quality for all Americans, so information regarding undue influences on these activities would be of interest to “a reasonably broad audience of persons,” and, as described further below, American Oversight has demonstrated its “ability and intention to effectively convey” this information to the public.¹⁸

This request is primarily and fundamentally for non-commercial purposes.¹⁹ 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

¹³ 40 C.F.R. § 2.107(l)(1).

¹⁴ *Id.*

¹⁵ *Id.*; see also 40 C.F.R. § 2.107(l)(2)(i)-(iv).

¹⁶ 40 C.F.R. § 2.107(l)(2)(i).

¹⁷ 40 C.F.R. § 2.107(l)(2)(ii), (iv).

¹⁸ 40 C.F.R. § 2.107(l)(2)(iii).

¹⁹ 40 C.F.R. § 2.107(l)(1); 40 C.F.R. § 2.107(l)(3)(i)-(ii).

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.²⁰ 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,²¹ 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.²² 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.²³

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 EPA 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 Beth France 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,



Austin R. Evers
Executive Director
American Oversight

²⁰ American Oversight currently has over 11,500 page likes on Facebook, and over 35,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Oct. 19, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Oct. 19, 2017).

²¹ *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

²² *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

²³ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.