



November 29, 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 and Environmental Working Group (EWG) make the following request for records.

President Trump recently nominated Michael Dourson to be the Assistant Administrator of the Office of Chemical Safety and Pollution Prevention at the EPA. Despite the fact that he has not yet been confirmed by the Senate, it has been reported that Mr. Dourson has begun work at the EPA as an advisor to EPA Administrator Scott Pruitt.¹ Prior to joining the EPA, Mr. Dourson headed an organization called Toxicology Excellence for Risk Assessment (TERA), which produced reports on hazardous chemicals. In that capacity, Mr. Dourson's clients included many major players in the chemical industry, including Dow Chemical, Monsanto, and others.²

¹ Deirdre Shesgreen, *A Controversial Nominee, Not Yet Confirmed, Is Already Working at Trump's EPA*, USA TODAY (Oct. 18, 2017, 7:08 PM),

<https://www.usatoday.com/story/news/nation-now/2017/10/18/controversial-nominee-not-yet-confirmed-already-working-trumps-epa/778310001/>; Corbin Hiar, *Controversial Chemicals Nominee Already at Agency*, E&E NEWS, Oct. 18, 2017, <https://www.eenews.net/stories/1060063925>.

² See, e.g., Suzy Khimm, *Democrats Target Trump EPA Pick with Chemical Industry Ties*, NBC NEWS (Sept. 19, 2017, 7:13 PM), <https://www.nbcnews.com/politics/congress/trump-pick-epa-chemical-safety-under-fire-industry-ties-n802776>; Scott Faber, *Chemical Safety Nominee Weakened Standards for 'Popcorn Lung' Food Additive*, EWG, Sept. 27, 2017, <https://www.ewg.org/planet-trump/2017/09/chemical-safety-nominee-weakened-standards-popcorn-lung-food-additive#.Wh29ArT81MM>; Sonya Lunder, *How Trump's Chemical Safety Nominee Greenwashed Toxic Pesticides for Monsanto, Dow*, EWG, Sept. 26, 2017, <https://www.ewg.org/planet-trump/2017/09/how-trump-s-chemical-safety-nominee-greenwashed-toxic-pesticides-monsanto-dow#.Wh3BRbT81MM>; Sheila Kaplan & Eric Lipton, *Chemical Industry Ally Faces Critics in Bid for Top E.P.A. Post*, N.Y. TIMES, Sept. 19, 2017,



American Oversight and EWG are seeking additional information to investigate whether and how Mr. Dourson is complying with his government ethics obligations.

Requested Records

American Oversight and EWG request that EPA produce the following within twenty business days and seek expedited review of this request for the reasons identified below:

All communications between Michael Dourson (or anyone acting on his behalf) and any individual assisting Mr. Dourson with his Senate confirmation process (i.e., a “Sherpa”), including individuals who are employed by or represent outside companies.

Please provide all responsive records from July 15, 2017, to the date the search is conducted.

In addition to the records requested above, we also request 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 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 and EWG seek 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 require officials to move such information to official systems within a certain period of time; we have a**

<https://www.nytimes.com/2017/09/19/science/epa-chemical-industry-dourson.html>; *Michael Dourson’s Work for Chemical Industry Sponsors*, N.Y. TIMES, Oct. 16, 2017, <https://www.nytimes.com/interactive/2017/10/16/science/document-Michael-Dourson-Research-Papers-on-Chemicals.html>; Michael Biesecker, *GOP Senators from NC Come Out Against Trump EPA Nominee*, THE NEWS & OBSERVER (Nov. 15, 2017, 10:23 PM), <http://www.newsobserver.com/news/politics-government/national-politics/article184889358.html>.

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).

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 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.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 EPA’s archiving tools would capture that email under Capstone. Accordingly, American Oversight and EWG insist 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. We are 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, we request 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.”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

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).

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

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 and EWG intend 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.

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, we welcome 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, we 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, 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 and EWG request 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.¹¹ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹²

American Oversight and EWG request a waiver of fees because disclosure of the requested information is in the public interest because it is likely to contribute significantly to public

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.

¹¹ 40 C.F.R. § 2.107(l)(1).

¹² *Id.*

understanding of government operations and activities.¹³ The disclosure of information sought under this request will document and reveal the operations of the federal government, including how officials (nominated or otherwise) approach applicable ethics requirements, and what outside interests might influence officials' decisionmaking on policy matters of interest to the public.

Mr. Dourson—like many other individuals nominated to government positions by President Trump—previously worked on behalf of the industry he has been nominated to oversee. It is imperative that the public have a thorough understanding of the potential conflicts of interest Mr. Dourson may possess and how, if at all, he is addressing those conflicts. This request seeks to shed light on how Mr. Dourson is comporting himself in his unofficial advisor role, including whether and to what extent he is following the ethics rules that will ultimately attach to the position for which he is nominated, and what issues he has worked on to date.

This request is primarily and fundamentally for non-commercial purposes.¹⁴ 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.¹⁵ 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,¹⁶ 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.¹⁷ 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.¹⁸

EWG's interest in the disclosure of the requested records is purely non-commercial. EWG is a 501(c)(3) non-profit public interest organization dedicated to using the power of information to protect public health and the environment. EWG will use the information gathered in furtherance of this mission. EWG has long studied the public health and environmental impacts of pesticides

¹³ *Id.*; see also 40 C.F.R. § 2.107(l)(2)(i)-(iv).

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

¹⁵ American Oversight currently has approximately 11,700 page likes on Facebook and 37,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Nov. 28, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Nov. 28, 2017).

¹⁶ *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

¹⁷ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

¹⁸ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

and other toxic chemicals, particularly with regards to children’s health. As part of this work, EWG publishes reports and creates consumer-facing resources to educate the public and advocate for health-protective standards. For example, every year EWG releases its Shopper’s Guide to Pesticides in Produce to educate consumers about pesticide residues found on conventional produce samples. Like American Oversight, EWG plans to use the information gathered from this request, and its analysis of it, to educate the public through various media including reports, blogs, and press releases.

Accordingly, this request qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E) and 40 C.F.R. § 2.104(e), American Oversight and EWG request that EPA expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief, that there is an urgent need to inform the public about the federal government activity that is the subject of this request. As noted above, Michael Dourson has been nominated for one of the top posts at the EPA, but his prior employment history has raised significant concerns about his qualification for the job.¹⁹ Mr. Dourson’s nomination remains pending before the Senate. It is imperative that the public—and the U.S. senators who will vote on Mr. Dourson’s confirmation—receive the information sought in this request before the Senate holds its vote.

I further certify that American Oversight is primarily engaged in disseminating information to the public. 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. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,²⁰ American Oversight “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.”²¹ American Oversight uses the information it gathers, and its analysis of it, to educate the public through reports, press releases, and 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.²² 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,²³ American

¹⁹ See *supra* note 2.

²⁰ See *ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 30-31 (D.D.C. 2004); *EPIC v. Dep’t of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

²¹ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

²² American Oversight currently has approximately 11,700 page likes on Facebook and 37,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Nov. 28, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Nov. 28, 2017).

²³ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.²⁴ 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.²⁵

I further certify that EWG is primarily engaged in disseminating information to the public. EWG is a 501(c)(3) non-profit public interest organization dedicated to using the power of information to protect public health and the environment. EWG will use the information gathered in furtherance of this mission. EWG has long studied the public health and environmental impacts of pesticides and other toxic chemicals, particularly with regards to children's health. As part of this work, EWG publishes reports and creates consumer-facing resources to educate the public and advocate for health-protective standards. For example, every year EWG releases its Shopper's Guide to Pesticides in Produce to educate consumers about pesticide residues found on conventional produce samples. Like American Oversight, EWG plans to use the information gathered from this request, and its analysis of it, to educate the public through various media including reports, blogs, and press releases.

Accordingly, this request satisfies the criteria for expedition.

Conclusion

We share a common mission to promote transparency in government. American Oversight and EWG look 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 Sara Creighton at foia@americanoversight.org or 202.869.5246. Also, if our 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



Melanie Benesh
Legislative Attorney
Environmental Working Group

²⁴ *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>.

²⁵ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.