



May 11, 2017

VIA ONLINE PORTAL

Managing Director
Attn: FOIA Request
Federal Communications Commission
445 12th Street SW, Room 1-A836
Washington, DC 20554
Online Request via FOIAonline

Re: Freedom of Information Act Request

Dear Freedom of Information Act Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and Federal Communications Commission (FCC) implementing regulations, 47 C.F.R. Part 0, American Oversight makes the following request for records.

On February 6, 2015, Jason Chaffetz, the Chairman of the House Committee on Oversight and Government Reform, sent a letter to the FCC asking for documents related to the FCC's draft Open Internet Order circulated within the FCC on February 5, 2015.¹ Over a year and a half later, on September 14, 2016, the Ranking Member of the same committee sent a letter to the two Republican members of the Commission—Ajit Pai and Michael O'Rielly—asking why they had refused to provide any documents in response to that request, while the Democratic members of the commission had fully cooperated with the request.²

Shortly after taking office, President Donald J. Trump elevated Commissioner Ajit Pai to the post of Chairman of the FCC.³ Since that time, Mr. Pai has initiated an aggressive agenda, withdrawing or rolling back regulatory actions taken by the FCC during the previous administration, including suspending net neutrality transparency requirements for broadband providers with fewer than

¹ Letter from Jason Chaffetz, Chairman, House Committee on Oversight and Government Reform, to Tom Wheeler, Chairman, FCC (Feb. 6, 2015), <https://oversight.house.gov/wp-content/uploads/2015/05/2015-02-06-JEC-to-Wheeler-FCC-open-internet.pdf>.

² Letter from Elijah Cummings, Ranking Member, House Committee on Oversight and Government Reform, to Ajit Pai and Michael O'Rielly, Commissioners, FCC (Sept. 14, 2016), <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2016-09-14.EEC%20to%20Federal%20Communications%20Commissioners%20Pai%20and%20O'Rielly.pdf>.

³ See Ted Johnson, *President Trump Elevates Ajit Pai to FCC Chair*, VARIETY (Jan. 23, 2017, 2:59 PM), <http://variety.com/2017/biz/news/ajit-pai-fcc-donald-trump-2-1201967364/>.



250,000 customers¹ and closing an investigation into discriminatory practices by AT&T and Verizon, among other things.³ On April 26, Mr. Pai gave a speech outlining his plans to further alter the net neutrality rules established by the FCC during the prior administration,⁶ and has already begun implementing those plans by issuing a Notice of Proposed Rulemaking.⁷

American Oversight seeks to invigorate congressional oversight of agency activity by using the Freedom of Information Act to seek documents that agencies may have declined to produce to congressional committees for political reasons. Given that the debate over net neutrality rages on today, it is particularly important that the public understand the views of all of the commissioners at the time of the Open Internet Order rulemaking in 2015.

Requested Records

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

- (1) All communications between employees in the offices of Chairman Ajit Pai and Commissioner Michael O’Rielly and employees at the White House, the National Economic Council, the Office of Management and Budget, and the National Telecommunications and Information Administration relating to net neutrality.
- (2) All calendar entries, visitor logs, or meeting minutes referring or relating to any and all meetings between employees in the offices of Chairman Ajit Pai and Commissioner Michael O’Rielly and employees at the White House, the National Economic Council,

⁴ Marguerite Reardon, *FCC Chips Away at Net Neutrality Rules*, CNET (Feb. 23, 2017, 12:54 PM), <https://www.cnet.com/news/fcc-net-neutrality-ajit-pai-republican-transparency-rule/>.

⁵ Marguerite Reardon, *AT&T, Verizon Catch a Break Under Trump FCC*, CNET (Feb. 3, 2017, 2:32 PM), <https://www.cnet.com/news/trumps-fcc-net-neutrality-at-t-and-verizon-zero-rating-inquiry-pai/>; see also Cecilia King, *Ajit Pai, F.C.C. Chairman, Moves to Roll Back Telecom Rules*, N.Y. TIMES, Apr. 19, 2017, https://www.nytimes.com/2017/04/19/technology/ajit-pai-fcc-telecom-deregulation.html?_r=0; Tony Romm, *FCC Chairman Ajit Pai Is Expected to Unveil New Net Neutrality Plan on Wednesday*, RECODE (Apr. 24, 2017, 4:07 PM), <https://www.recode.net/2017/4/24/15412650/fcc-chairman-ajit-pai-new-net-neutrality-plans>; Margaret Harding McGill, *FCC Chief to Launch Net Neutrality Rewrite This Week, Sources Say*, POLITICO (Apr. 24, 2017, 6:22 PM), <http://www.politico.com/story/2017/04/24/net-neutrality-fcc-237543>; Jacob Kastrenakes, *FCC Chief Ajit Pai Really Sounds Like He Plans to End Title II Net Neutrality*, THE VERGE (Apr. 4, 2017, 2:28 PM), <http://www.theverge.com/2017/4/4/15177970/ajit-pai-keeps-hinting-at-title-ii-net-neutrality-reversal>; Jeff John Roberts, *FCC Chair Takes New Swipe at Net Neutrality Rules*, FORTUNE, Apr. 5, 2017, <http://fortune.com/2017/04/05/fcc-ajit-pai-net-neutrality/>.

⁶ Todd Shields, *FCC Chief Sets Up Telecom Clash with Call to End Net Neutrality*, BLOOMBERG TECHNOLOGY (Apr. 26, 2017, 1:28 PM), <https://www.bloomberg.com/news/articles/2017-04-26/fcc-chief-calls-for-net-neutrality-rollback-setting-off-clash>.

⁷ See Notice of Proposed Rulemaking, *Restoring Internet Freedom*, (proposed Apr. 27, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344614A1.pdf.

the Office of Management and Budget, the National Telecommunications and Information Administration, or other members of the Executive Branch relating to net neutrality.

- (3) Any and all documents in the offices of Chairman Ajit Pai and Commissioner Michael O’Rielly discussing, referring, or relating to the views, preferences, recommendations, or advice of the personnel working at the White House, the National Economic Council, the Office of Management and Budget, and the National Telecommunications and Information Administration or other Executive Branch agencies on net neutrality.
- (4) All documents and communications in the offices of Chairman Ajit Pait and Commissioner Michael O’Rielly relating to the recommendations or views of FCC personnel about net neutrality, including all draft or final versions of orders, memoranda, or written views concerning the approach the FCC should take with respect to net neutrality.

Your search should encompass other ways of referring to the concept known as “net neutrality,” including but not limited to discussions of open internet, Title II regulations, common carrier rules, “NN,” and the proper regulatory classification of internet service providers.

Please provide all responsive records from January 14, 2014, to March 12, 2015.

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 the FCC 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.⁸ 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.⁹

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 the FCC’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.**¹⁰ 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 the FCC’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that the FCC 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.”¹¹ 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

⁸ 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).

⁹ 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)).

¹⁰ 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>.

¹¹ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

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.”¹² 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.”¹³ 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.’”¹⁴

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.¹⁵ 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, the FCC 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 the FCC 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 47 C.F.R. § 0.470(e)(1), 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

¹² *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹³ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹⁴ *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)).

¹⁵ *Mead Data Central*, 566 F.2d at 261.

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

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 the operations or activities of the government.”¹⁶ As discussed above, there has been significant public reporting on FCC Chairman Ajit Pai’s plans to roll back the net neutrality provisions put in place by the FCC during the prior administration,¹⁷ including a recent proposed rulemaking.¹⁸ Moreover, the importance of this issue is evident from the fact that Congressmen on both sides of the political aisle have previously asked FCC to provide the requested records.¹⁹ It is undoubtedly in the public interest to shed additional light on the views of two of the current Commissioners—including the Chairman—with respect to an issue of such national interest as net neutrality.

This request is primarily and fundamentally not for 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 commercial 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 its website and promote their availability on social media platforms, such as Facebook and Twitter.²¹ One example of American Oversight’s demonstrated public disclosure of documents and creation 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.²²

¹⁶ 47 C.F.R. § 0.470(e)(2)(i)-(iii).

¹⁷ Reardon, *supra* note 2; King, *supra* note 3; Kastrenakes, *supra* note 3; Roberts, *supra* note 3; Romm, *supra* note 3; McGill, *supra* note 3; Shields, *supra* note 4.

¹⁸ See Notice of Proposed Rulemaking, *Restoring Internet Freedom*, (proposed Apr. 27, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344614A1.pdf.

¹⁹ See Letter from Jason Chaffetz, Chairman, House Committee on Oversight and Government Reform, to Tom Wheeler, Chairman, FCC (Feb. 6, 2015), <https://oversight.house.gov/wp-content/uploads/2015/05/2015-02-06-JEC-to-Wheeler-FCC-open-internet.pdf>; Letter from Elijah Cummings, Ranking Member, House Committee on Oversight and Government Reform, to Ajit Pai and Michael O’Rielly, Commissioners, FCC (Sept. 14, 2016), <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2016-09-14.EEC%20to%20Federal%20Communications%20Commissioners%20Pai%20and%20O’Rielly.pdf>.

²⁰ 47 C.F.R. § 0.470(e)(3)(i)-(ii).

²¹ American Oversight currently has over 10,800 page likes on Facebook, and over 32,300 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 11, 2017); American Oversight (@weareoversight), TWITTER (last visited May 11, 2017).

²² *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.auditthewall.org/>.

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 your agency 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 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 flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight