



October 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, and Federal Communications Commission (FCC) implementing regulations, 47 C.F.R. Part 0, American Oversight makes the following request for records.

On October 11, 2017, President Trump suggested via tweet that the licenses of certain networks should be challenged if they continue to air journalistic reports critical of him, or what he terms “Fake News.” American Oversight submits this FOIA request to uncover whether and to what extent the FCC is complicit in the president’s attack on the First Amendment.¹

Requested Records

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

- (1) All communications between the FCC and anyone in the White House Office (including anyone with an email address ending in @who.eop.gov) regarding or related to (1) how the news networks (including but not limited to ABC, CBS, CNN, Fox, MSNBC, and NBC) cover the Trump Administration and/or how that coverage does or could affect broadcast licensing of individual affiliate television stations or (2) the consideration of any application for, or renewal of, any television station broadcast license.
- (2) All emails within the offices of the Commissioners and the Office of Media Relations containing the phrase “fake news” or “@realdonaldtrump” or “equal time.”

¹ Donald J. Trump (@realdonaldtrump), TWITTER (Oct. 11, 2017, 9:55 AM), <https://twitter.com/realDonaldTrump/status/918112884630093825>; see also Louis Nelson & Margaret Harding McGill, *Trump Suggests Challenging NBC’s Broadcast License*, POLITICO (Oct. 11, 2017, 12:07 PM), http://www.politico.com/story/2017/10/11/trump-nbc-broadcast-license-243667?lo=ap_a1.



- (3) All memoranda, reports, emails, or other communications addressing, considering, or suggesting a change to how the FCC evaluates the allocation of the broadcast spectrum and/or the issuance or renewal of licenses for television to news broadcast stations based on the content and/or perspective of the news coverage of the Trump administration aired by that station.
- (4) All emails within the office of the Commissioners referencing or related to President Trump's October 11 tweets, including the one that read "With all of the Fake News coming out of NBC and the Networks, at what point is it appropriate to challenge their License? Bad for country!"²

All searches for responsive records should include a search of any personal email accounts that agency officials may be using to conduct agency business, as well as searching the agency's Extra-Secure Network (ESN), cloud system, and any local exchange servers.

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

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

² See Trump, *supra* note 1.

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).

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

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.

American Oversight requests a waiver of fees because disclosure of the requested information is in the public interest as it is likely to contribute significantly to public understanding of the operations or activities of the government.¹¹ The subject of this request relates directly to how the FCC conducts a basic operation of the agency: the licensing of television stations.¹² President Trump has continuously attacked television stations for what he sees as unfavorable coverage of his administration.¹³ This is either a systemic attack on the First Amendment by the President of the United States,¹⁴ a deliberate effort to undermine the integrity of the news media (perhaps to provide cover for the scandals that have plagued the less-than-nine-month-old administration),¹⁵ or a cynical ploy to rally his base for campaign donations to his legal defense fund.¹⁶ Whatever the

¹¹ See 47 C.F.R. § 0.470(e)(2)(i)-(iii).

¹² See *Media*, FED. COMM’NS COMM’N, <https://www.fcc.gov/media> (“The Media Bureau oversees broadcast radio and television, as well as cable and satellite services on behalf of consumers. It also administers licensing and policy matters for broadcast services and cable, and handles post-licensing matters for satellite services.”).

¹³ See Trump, *supra* note 1 (“With all of the Fake News coming out of NBC and the Networks, at what point is it appropriate to challenge their License? Bad for country!”); Donald J. Trump (@realdonaldtrump), TWITTER (Oct. 4, 2017, 10:47 AM), <https://twitter.com/realdonaldtrump/status/915589297096536065> (“NBC news is #FakeNews and more dishonest than even CNN. They are a disgrace to good reporting. No wonder their news ratings are way down!”); Donald J. Trump (@realdonaldtrump), TWITTER (Aug. 20, 2017, 7:22 PM), <https://twitter.com/realdonaldtrump/status/899411254061694979> (“Heading back to Washington after working hard and watching some of the worst and most dishonest Fake News reporting I have ever seen!”); Donald J. Trump (@realdonaldtrump), TWITTER (July 1, 2017, 6:08 PM), <https://twitter.com/realdonaldtrump/status/881273362454118400> (“I am thinking about changing the name #FakeNews CNN to #FraudNewsCNN!”).

¹⁴ See Michael J. Abramowitz & Arch Puddington, *How Trump Is Undermining Press Freedom Around the World*, WASH. POST, May 2, 2017, https://www.washingtonpost.com/news/democracy-post/wp/2017/05/02/how-trump-is-undermining-press-freedom-around-the-world/?utm_term=.d94dea403148; David Frum, *How to Build an Autocracy*, THE ATLANTIC, Mar. 2017, <https://www.theatlantic.com/magazine/archive/2017/03/how-to-build-an-autocracy/513872/>.

¹⁵ See Sarah Holder, *13 Trump Scandals You Forgot About*, POLITICO, July 26, 2017, <http://www.politico.com/magazine/story/2017/07/26/13-trump-scandals-you-forgot-about-215420>; David Leonhardt, *Trump’s Scandals, a List*, N.Y. TIMES, Oct. 5, 2017, <https://www.nytimes.com/2017/10/05/opinion/trumps-scandals-a-list.html>; Brian Mann, *Amid Russia Scandals, Conservative Media Provides Air Cover For President Trump*, NPR (July 28, 2017, 6:26 AM), <http://www.npr.org/2017/07/28/539764567/amid-russia-scandals-conservative-media-provides-air-cover-for-president-trump>.

¹⁶ See Jessica Estepa, *President Trump’s Campaign Offers ‘Fake News’ Bumper Stickers*, USA TODAY (July 20, 2017, 3:14 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/07/20/donald-trump-campaign-offers-fake-news-bumper-stickers/496436001/>; Maggie Severns, *Trump Campaign Paid \$50,000 to Trump Jr.’s Attorney*, POLITICO (July 15, 2017, 6:07 PM),

motivation, these records will reveal how the FCC is exercising its regulatory authority in the face of a president who has regularly expressed hostility toward free speech. The requested records will contribute to public understanding of government operations by informing the public of the extent to which the president's hostile tweets are (or are not) influencing what should be independent regulatory decisionmaking.

This request is primarily and fundamentally for non-commercial purposes.¹⁷ 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.¹⁸ 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,¹⁹ 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.²⁰ As another example, American Oversight's 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.²¹

Accordingly, American Oversight qualifies for a fee waiver.

<http://www.politico.com/story/2017/07/15/trump-campaign-paid-jr-attorney-240592>; John Wagner, *Trump Campaign Ad Says His 'Enemies' Are Trying to Undermine His Progress*, WASH. POST, Aug. 13, 2017, https://www.washingtonpost.com/news/post-politics/wp/2017/08/13/trump-campaign-ad-says-his-enemies-are-trying-to-undermine-his-progress/?utm_term=.2aa385b2a3f1 ("The 30-second [campaign ad], produced six months into Trump's term, targets Democrats and the news media, and touts what the campaign says are successes that the president has managed to achieve, including a low unemployment rate and record stock-market closes.").

¹⁷ See 47 C.F.R. § 0.470(e)(3)(i)-(ii).

¹⁸ American Oversight currently has approximately 11,600 page likes on Facebook, and over 35,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Oct. 11, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight>, (last visited Oct. 11, 2017).

¹⁹ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²⁰ *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>.

²¹ *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 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 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 flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight