



June 22, 2017

VIA ELECTRONIC MAIL

Office of General Counsel
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314
FOIA@ncua.gov

Re: Freedom of Information Act Request

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the National Credit Union Administration (NCUA) implementing regulations, 12 C.F.R. Part 792, American Oversight makes the following request for records.

On May 9, 2017, American Oversight filed a FOIA request with NCUA seeking, broadly speaking, records related to communications between NCUA and the House Financial Services Committee. NCUA assigned that request tracking number #17-FOI-00053.

On June 21, 2017, NCUA provided an interim response to FOIA request #17-FOI-00053, in which NCUA provided two pages of responsive records and stated that it was withholding other records on the basis that “they are not agency records subject to disclosure under FOIA and Congress has indicated intent to retain control over the documents.”

Earlier today, American Oversight filed an administrative appeal challenging the agency’s withholding of certain documents as not “agency records.” American Oversight now also submits this supplemental FOIA request to better understand the agency’s position that the records requested in FOIA request #17-FOI-00053 are not “agency records” under FOIA.

Requested Records

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

All external communications regarding FOIA request #17-FOI-00053 submitted by Austin Evers of American Oversight on May 9, 2017, including any communications related to any administrative appeal or subsequent litigation related to that request. By “external” communications, we mean any communications with any entity outside the NCUA.



Please provide all responsive records from May 9, 2017, to the date the search is conducted. As with our initial FOIA request, if NCUA withholds any records responsive to this request on the grounds that they are congressional records and not subject to disclosure under FOIA, please inform us that you have withheld the records on that basis, as we intend to litigate whether that is a proper basis for withholding records.

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.¹ **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.**²

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 NCUA’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**

¹ 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).

² 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)).

custodian-driven searches.³ 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 NCUA's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that NCUA 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.”⁴ 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.”⁵ 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.”⁶ 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.’”⁷

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.⁸ Claims of nonsegregability must be made with the same degree of detail as required for

³ 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>.

⁴ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁵ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁶ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

⁷ *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)).

⁸ *Mead Data Central*, 566 F.2d at 261.

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, NCUA 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 NCUA 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 12 C.F.R. § 792.27, 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.

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.”⁹ The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how officials conduct the public’s business.

The requested records will shed light on the various forces that affect the agency’s decisions on whether and how to respond to FOIA requests. More specifically, the requested records would allow the public to evaluate whether Congress or any other outside groups are instructing or advising agencies on how to fulfill their statutory obligations under the FOIA. In addition, as with American Oversight’s initial FOIA request, it will be highly informative regarding governmental operations to see the extent to which NCUA follows the House Financial Services Committee’s request to classify responsive records as congressional records outside the purview of FOIA, rather than the “agency records” that they clearly are. The public deserves to know whether NCUA will be

⁹ 12 C.F.R. § 792.27(a)(1)-(4).

complying with its statutory obligations under FOIA, and whether the executive branch is collaborating with Congress to conceal information about which the public has a right to know.

This request is primarily and fundamentally not for commercial purposes.¹⁰ 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 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 website and promotes their availability on social media platforms, such as Facebook and Twitter.¹¹ 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.¹²

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,



Austin R. Evers
Executive Director
American Oversight

¹⁰ 12 C.F.R. § 792.27(b)(1)-(2).

¹¹ American Oversight currently has over 10,900 page likes on Facebook, and over 32,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited June 22, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited June 22, 2017).

¹² *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.auditthewall.org/> (last visited June 22, 2017).