



March 8, 2017

VIA ELECTRONIC MAIL

FOIA Officer  
Office of Government Ethics  
Suite 500  
1201 New York Avenue, N.W.  
Washington, DC 20005-3917  
usoge@oge.gov

**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 the Office of Government Ethics (OGE)'s implementing regulations, 5 C.F.R. Part 2604, American Oversight makes the following request for records.

American Oversight promotes accountability in government through transparency, informing the public's right to know what the government is up to. With scores of new individuals joining the government in key, senior positions, it is essential to understand who they are and the backgrounds they bring to their work. Without such transparency, the public cannot have confidence that government decisions are shaped by the interests of the American people, not personal or professional allegiances.

Press reports indicate that at least two prospective nominees have withdrawn their names from consideration as a result of difficulties in disentangling themselves from their personal and business interests.<sup>1</sup> This is heartening; however, other nominees have continued to pursue employment with the federal government despite their significant, complex business ties and large and diverse financial interests. It is imperative to understand what actual or potential allegiances and interests nominees bring to their positions. To understand and inform the public regarding how these nominees will purport to separate themselves from their private interests when acting in the public trust, American Oversight is seeking communications between prospective senior Trump administration and White House officials and OGE.

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<sup>1</sup> See Ryan Browne & Eli Watkins, *Vincent Viola Withdraws from Secretary of Army Nomination*, CNN (Feb. 4, 2017, 12:01 AM), <http://www.cnn.com/2017/02/03/politics/vincent-viola-withdraws-from-secretary-of-army-nomination/>; Jeremy Herb, *Nominee for Navy Secretary Withdraws*, POLITICO (Feb. 26, 2017, 6:24 PM), <http://www.politico.com/story/2017/02/nominee-for-navy-secretary-to-withdraw-235418>.

## Requested Records

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

1. Records containing or reflecting communications between OGE and individuals nominated, or anticipated to be nominated, by President Trump for Senate-confirmed positions in the federal government, including communications with attorneys or agents acting on behalf of such nominees or prospective nominees, as well as members of the Trump administration, the Trump transition team, or the Trump campaign about such nominees or prospective nominees.
2. Records containing or reflecting communications between OGE and individuals appointed, or anticipated to be appointed, by President Trump for positions in the Executive Office of the President in the White House, including communications with attorneys or agents acting on behalf of such appointees or prospective appointees, as well as members of the Trump administration, the Trump transition team, or the Trump campaign about such appointees or prospective appointees.

Please provide all responsive records through the date the search is conducted.

For purposes of this request, OGE should construe “individuals nominated, or anticipated to be nominated” and “individuals appointed, or anticipated to be appointed” to capture individuals who would be covered as of the date of OGE’s search, not the date 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.<sup>2</sup> **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.**<sup>3</sup>

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<sup>2</sup> 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).

<sup>3</sup> 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

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 OGE’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.**<sup>4</sup> 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 OGE’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that you 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.”<sup>5</sup> 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.”<sup>6</sup> 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.”<sup>7</sup> Further, “the withholding agency must supply ‘a relatively detailed

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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)).

<sup>4</sup> Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), *available at* <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 & Agencies & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), *available at* <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

<sup>5</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>6</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>7</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

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.”<sup>8</sup>

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.<sup>9</sup> 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, OGE 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 OGE 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 15<sup>th</sup> 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 5 C.F.R. § 2604.503(c), 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. 5 U.S.C. § 552(a)(4)(A)(iii).<sup>10</sup>

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

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<sup>8</sup> *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)).

<sup>9</sup> *Mead Data Central*, 566 F.2d at 261.

<sup>10</sup> *See, e.g., McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

government operations and is not “primarily in the commercial interest of the requester.”<sup>11</sup> The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how public funds are spent and how officials conduct the public’s business.

Disclosure of the sources of potential conflicts of interest for senior executive branch officials, and the approach adopted by such officials with the intent to avoid taking actions that might implicate potential conflicts of interest, is critically important to permit the public to evaluate the conduct of senior public servants and the federal government. There is clear public interest in this information. For example, reports indicate that a senior adviser to the president with a broad portfolio may not have fully divested his interest in private business enterprises that may be affected by matters he is working on as a presidential adviser.<sup>12</sup> The information sought by this request—the communications between senior administration and White House officials and OGE—will help the public understand what potential sources of conflicts of interests these senior officials have, and how the officials plan to address those potential conflicts.

This request is primarily and fundamentally for non-commercial purposes. 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 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 our public website.

Accordingly, American Oversight qualifies for a fee waiver.

We share a common mission to promote transparency in government. American Oversight looks forward to working with OGE 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 us at [foia@americanoversight.org](mailto:foia@americanoversight.org). 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

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<sup>11</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 5 C.F.R. § 2604.503(c).

<sup>12</sup> See Charles Clark, *Jared Kushner’s Conflict of Interest Issues*, GOVERNMENT EXECUTIVE, Mar. 1, 2017, <http://www.govexec.com/management/2017/03/jared-kushners-conflict-interest-issues/135790/?oref=river>.