



April 11, 2017

VIA ELECTRONIC MAIL

Alexis Graves
U.S. Department of Agriculture
1400 Independence Avenue SW
Room 428-W, Whitten Building
Washington, DC 20250-0706
USDAFOIA@ocio.usda.gov

Re: Freedom of Information Act Request

Dear Ms. Graves:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations for the U.S. Department of Agriculture (USDA), 7 C.F.R. Part 1, American Oversight makes the following request for records.

During his tenure as Oklahoma's Attorney General, Scott Pruitt reportedly served as a conduit for industry interests to provide input into government decisionmaking, regularly consulting directly with fossil fuel firms regarding regulations affecting that industry, among other examples.¹ On March 29, 2017, with Mr. Pruitt at its helm, the EPA announced that it had denied a petition to ban the pesticide chlorpyrifos, despite concluding during the Obama administration that the pesticide could pose risks to consumers, including nervous-system birth defects.² The EPA's press

¹ See, e.g., Coral Davenport & Eric Lipton, *The Pruitt Emails: E.P.A. Chief Was Arm in Arm with Industry*, N.Y. TIMES, Feb. 22, 2017, <https://www.nytimes.com/2017/02/22/us/politics/scott-pruitt-environmental-protection-agency.html>; Brady Dennis & Steven Mufson, *Thousands of Emails Detail EPA Head's Close Ties to Fossil Fuel Industry*, WASH. POST, Feb. 22, 2017, https://www.washingtonpost.com/news/energy-environment/wp/2017/02/22/oklahoma-attorney-generals-office-releases-7500-pages-of-emails-between-scott-pruitt-and-fossil-fuel-industry/?utm_term=.187c5a8084fb; Natasha Geiling, *Scott Pruitt's Record Reveals a Long History of Industry Favoritism*, THINKPROGRESS, Jan. 18, 2017, <https://thinkprogress.org/scott-pruitt-epa-oklahoma-record-386f13c8cc1d#.kfhqkxuw>; Eric Lipton & Coral Davenport, *Scott Pruitt, Trump's E.P.A. Pick, Backed Industry Donors Over Regulators*, N.Y. TIMES, Jan. 14, 2017, <https://www.nytimes.com/2017/01/14/us/scott-pruitt-trump-epa-pick.html>.

² Environmental Protection Agency [EPA-HQ-OPP-2007-1005; FRL-9960-77], *Chlorpyrifos; Order Denying PANNA and NRDC's Petition to Revoke Tolerances*, Mar. 29, 2017, https://www.epa.gov/sites/production/files/2017-03/documents/chlorpyrifos3b_order_denying_panna_and_nrdc27s_petition_to_revoke_tolerances.pdf; see also Eric Lipton, *E.P.A. Chief, Rejecting Agency's Science, Chooses Not to Ban Insecticide*, N.Y. TIMES, Mar. 29, 2017, https://www.nytimes.com/2017/03/29/us/politics/epa-insecticide-chlorpyrifos.html?_r=0; Brady Dennis, *EPA Chief, Rejecting Agency's Own Analysis,*



release on the action cited support from Sheryl Kunickis, director of the Office of Pest Management Policy at the USDA.³ It remains unclear, however, whether and to what extent the USDA was involved in the EPA's decision-making process.

American Oversight is seeking information to determine the extent to which industry and trade groups, and others with a stake in this pesticide decision, may have engaged with the EPA and/or USDA prior to this decision.

Requested Records

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

1. All communications between any of the individuals listed in Appendix A and any agricultural or other trade group with an interest in pesticides, including but not limited to CropLife, the American Farm Bureau, the American Soybean Association, the American Sugarbeet Growers Association, the National Corn Growers, or the Oklahoma Farm Bureau, regarding any environmental issue related to the use of pesticides.
2. All communications between any of the individuals listed in Appendix A and any pesticide manufacturer, including but not limited to Dow Chemical or Dow AgroSciences, regarding any environmental issue related to the use of pesticides.
3. All communications between any of the individuals listed in Appendix A and any think tanks, including but not limited to the Heritage Foundation, regarding any environmental issue related to the use of pesticides.
4. All communications between any of the individuals listed in Appendix A and any member of Congress or anyone acting on behalf of a member of Congress (including both personal and committee staff) regarding chlorpyrifos.
5. All communications between any of the individual listed in Appendix A and anyone at EPA regarding chlorpyrifos.

Please provide all responsive records from January 20, 2017, to the date the search is conducted. Please note that American Oversight does not wish to obtain copies of any news or press clippings

Declines to Ban Pesticide Despite Health Concerns, WASH. POST, Mar. 29, 2017, https://www.washingtonpost.com/news/energy-environment/wp/2017/03/29/trump-epa-declines-to-ban-pesticide-that-obama-had-proposed-outlawing/?utm_term=.e5f6153a7536; Geoffrey Mohan, *Trump Administration Reverses Course on Nerve-Agent Pesticide*, CHICAGO TRIBUNE, Mar. 30, 2017, <http://www.chicagotribune.com/business/ct-epa-pesticide-chlorpyrifos-20170330-story.html>.
³ See News Release, *EPA Administrator Pruitt Denies Petition to Ban Widely Use Pesticide*, Mar. 29, 2017, <https://www.epa.gov/newsreleases/epa-administrator-pruitt-denies-petition-ban-widely-used-pesticide-0>.

regarding these issues that are otherwise publicly available; accordingly, you may omit press clippings from the documents provided in response to this request unless the record includes commentary on the press coverage.

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 your agency 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.⁴ **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.**⁵

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 USDA prior FOIA practices unreasonable. **In light of the government-wide requirements to manage**

⁴ 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).

⁵ 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)).

information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.⁶ 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 USDA's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that USDA 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."⁷ 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."⁸ 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."⁹ 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.'"¹⁰

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.¹¹ 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.

⁶ 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>.

⁷ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁸ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁹ *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹⁰ *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)).

¹¹ *Mead Data Central*, 566 F.2d at 261.

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, USDA 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 USDA 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 7 C.F.R. Part 1, Subpart A, Appendix A, Section 6, 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.¹² Moreover, the request is primarily and fundamentally for non-commercial purposes.¹³

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 government.”¹⁴ The interest in how Mr. Pruitt is running the EPA given his conduct as Oklahoma Attorney General is plentiful.¹⁵ The recent decision to reverse course on the use of a controversial pesticide notwithstanding the EPA’s own prior conclusions regarding the scientific evidence raises serious questions about the motivations of top EPA officials.¹⁶ The American people deserve to know which outside individuals and groups are communicating with our nation’s top environmental regulators, including indirect communications through other federal agencies like the USDA. This request seeks information that will shed light on which interests are shaping our environmental policy.

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

¹² 7 C.F.R. Part 1, Subpart A, Appendix A, Section 6(a).

¹³ 7 C.F.R. Part 1, Subpart A, Appendix A, Section 6(a).

¹⁴ 7 C.F.R. Part 1, Subpart A, Appendix A, Section 6(a)(1)(i)-(iv).

¹⁵ See *supra* note 1.

¹⁶ See *supra* note 2.

¹⁷ 7 C.F.R. Part 1, Subpart A, Appendix A, Section 6(a)(1)(v)-(vi).

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 and promote their availability on social media platforms, such as Facebook and Twitter.¹⁸ 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.¹⁹

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

¹⁸ American Oversight currently has over 10,400 page likes on Facebook, and over 13,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Apr. 11, 2017); American Oversight (@weareoversight), TWITTER (last visited Apr. 11, 2017).

¹⁹ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

Appendix A

In connection with the above FOIA request, American Oversight requests that USDA search the records of the following individuals:

1. Sheryl H. Kunickis, Director of Pest Management;
2. Teung F. Chin, Biologist;
3. Alexander R. M. Domesle, Regulatory Risk Assessor;
4. David L. Epstein, Entomologist;
5. Julius E. Fajardo, Plant Pathologist;
6. Dianne M. Fowler, Program Analyst;
7. Elizabeth Hill, Economist;
8. Michael Schechtman, Biotechnology Coordinator;
9. Jill Schroeder, Agronomist/Weed Scientist;
10. Samuel Clovis, White House Representative;
11. Turner Bridgnorth;
12. Heidi Green, Senior Adviser;
13. Brenton McNeely, White House Liaison;
14. Thomas Midweek, White House Liaison;
15. George Dunlop, Special Assistant;
16. Russell Laird, Special Assistant;
17. Dino LaVerghetta, Special Assistant;
18. Aura McAlicher, Special Assistant;
19. Cameron Quinn, Special Assistant;
20. James Renne, Special Assistant;
21. Michawn Rich, Special Assistant;
22. Thayer Verschoor, Special Assistant;
23. Donald Gutman, Senior Advisor to OCFO;
24. Brian Klippenstein, leader of the USDA Transition Team;
25. Joe Alexander, Special Assistant.