



February 12, 2018

**VIA ELECTRONIC MAIL**

USDA, Agricultural Marketing Service  
Shelly Busky  
FOIA Officer  
1400 Independence Avenue SW  
South Building, Rm. 2095  
Stop 0203  
Washington, DC 20250  
[AMS.FOIA@usda.gov](mailto:AMS.FOIA@usda.gov)

**Re: Freedom of Information Act Request**

Dear Freedom of Information Officer:

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

American Oversight is seeking information to determine the extent to which industry and trade groups may have engaged with USDA officials concerning pesticides and the USDA's Pesticide Data Program.

**Requested Records**

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

All records reflecting communications (including emails, email attachments, text messages, telephone call logs, calendars invitation/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, or other materials) regarding USDA's Pesticide Data Program (PDP), between the USDA's Agriculture Marketing Service's officials and employees (including, but not limited to, Secretary Sonny Perdue, Heidi Green, Chris Young, Brian Klippenstein, Kristi Boswell, Rebeckah Adock, Bruce Summers, Diana Haynes, David Nadrchal, Erin Morris, Charles W. Parrott) and the following organizations' employees or members:

- a. Alliance for Food and Farming, Inc. (domain: foodandfarming.info), including, but not limited to, Tim York, Chris Zanobini, Teresa Thorne, and Rosi Gong;
- b. California Pear Advisory Board (domain: calpear.com), including, but not limited to, Chris Zanobini;
- c. California Strawberry Commission (domain: calstrawberry.org), including but not limited to, Rick Tomlinson;



- d. California Table Grape Commission (domain: grapesfromcalifornia.com), including, but not limited to, Kathleen Nave;
- e. California Carrot Advisory Board (domain@grimmway.com), including but not limited to, John Guerard;
- f. Produce Marketing Association (domain: pma.com), including but not limited to, Johnna Hepner, Joe Watson, Kathy Means, Jimmy Corny, Gina Jones, and Brucy Taylor;
- g. Western Growers Association (domain: wga.com), including but not limited to, Matt McInerney;
- h. Taylor Farms (domain: taylorfarms.com) including, but not limited to, Bruce Taylor;
- i. Florida Fruit and Vegetable Association (domain: ffva.com), including but not limited to, Mike Stewart and Butch Calhoun;
- j. United Fresh Produce Association (domain: unitedfresh.org), including, but not limited to, Tom Stengel;
- k. US Apple Association (domain: usapple.org), including but not limited to, Jim Bair, Diane Kurrie, and Mark Seetin;
- l. US Highbush Blueberry Council (domain: blueberrycouncil.org), including but not limited to, Chris Barnhill, Bo Slack, and Mark Villata;
- m. California Citrus Mutual (domain: cacitrusmutual.com), including but not limited to, Alyssa Houtby;
- n. Northwest Horticultural Council (domain: nwhort.org), including but not limited to, Kate Woods and Mark Powers;
- o. CA Citrus Quality Council (domain: ccqc.org), including but not limited to, James Cranney and Carleen Price;
- p. California Cherry Board (domain: calcherry.com), including but not limited to, Chris Zanobini;
- q. CA Farm Bureau Federation (domain: cfbf.com), including but not limited to, Rich Matteis;
- r. US Potato Board (domain: potatoesusa.com), including but not limited to, Blair Richardson, Alexander Grimm and Christopher Valadez;
- s. California Fresh Fruit Association (domain: cafreshfreuit.com), including but not limited to, George Radanovichl;
- t. Markon Cooperative (domain: markon.com), including but not limited to, Tim York;
- u. California Giant (calgiant.com), including but not limited to, Cindy Jewell; and
- v. Crop Life America (croplifeamerica.org), including but not limited to, Jay Vroom, Janet Collins, Beau Greenwood, Rachel Lattimore, Mary Jo Tomalewski, Amanda Maizel, Fred Bosco, Kellie Bray, Jeff Case, and Ethan Matthews.

In addition to the records requested above, we also request 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 USDA 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.<sup>1</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; we have 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>2</sup>

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’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>3</sup> Furthermore, agencies that have adopted the National Archives and

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<sup>1</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>2</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 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>3</sup> 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,

**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, we insist 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. We are 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>4</sup> If it is your position that any portion of the requested records is exempt from disclosure, we request 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>5</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>6</sup> 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.’”<sup>7</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>8</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.** We intend 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.

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“Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

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

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

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

<sup>7</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>8</sup> *Mead Data Central*, 566 F.2d at 261.

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, we welcome 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, we 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, 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 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.<sup>9</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<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 government operations and activities.<sup>11</sup> The documents at issue in this request reflect the extent to which industry and trade groups may have engaged with USDA officials concerning pesticides and the USDA's PDP. This request seeks information that will shed light on which interests are shaping our agriculture policy. Disclosure of the requested information will contribute to the public understanding; as discussed below American Oversight has both the ability and the intention to effectively convey the information received to the public.

This request is primarily and fundamentally for non-commercial purposes.<sup>12</sup> 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

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<sup>9</sup> 7 C.F.R. Part 1, Subpart A, Appendix A, Section 6(a).

<sup>10</sup> *Id.*

<sup>11</sup> 7 C.F.R. Part 1, Subpart A, Appendix A, Section 6(a)(1)(i)-(iv).

<sup>12</sup> 7 C.F.R. Part 1, Subpart A, Appendix A, Section 6(a)(1)(v)-(vi).

promotes their availability on social media platforms, such as Facebook and Twitter.<sup>13</sup> 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,<sup>14</sup> 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.<sup>15</sup> As another example, American Oversight 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.<sup>16</sup>

Accordingly, this request qualifies for a fee waiver.

### Conclusion

We share a common mission to promote transparency in government. We look forward to working with USDA 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](mailto:foia@americanoversight.org) or 202.869.5245. Also, if our 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>13</sup> American Oversight currently has approximately 11,800 page likes on Facebook and 39,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Feb. 12, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Feb. 12, 2018).

<sup>14</sup> *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

<sup>15</sup> *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>.

<sup>16</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).