



August 30, 2018

VIA ELECTRONIC MAIL & ONLINE PORTAL

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FOIA Public Liaison
Office of the Secretary
U.S. Department of the Interior
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osfoia@ios.doi.gov

Charis Wilson, PhD
FOIA Officer
National Park Service
12795 W. Alameda Parkway
P.O. Box 25287
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303-969-2959
[Online Submission](#)

Re: Freedom of Information Act Request

Dear Ms. Julka & Dr. Wilson:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of the Interior (DOI), 43 C.F.R. Part 2, American Oversight makes the following request for records.

Numerous members of Congress—from both the U.S. House of Representatives and the U.S. Senate—have expressed concern at Interior’s reported practice of reassigning many members of the Senior Executive Service (SES), potentially for political reasons rather than on the basis of performance and qualifications.¹ In April 2018, DOI’s Inspector General (IG) issued a finding that the lack of documentation surrounding the reassignment of SES members prevented the IG from determining whether DOI’s SES reassignments complied with legal requirements.² After the IG’s report, DOI moved to reassign respected Yellowstone National Park Superintendent Dan Wenk, an action that many interpreted as motivated by DOI leadership’s expectation of political loyalty from SES members.³ And some reporting indicates that Dan Wenk may have been reassigned due

¹ Ltr. from Reps. Pallone, Cummings, and Grijalva and Sens. Carper, Cantwell, McCaskill, Udall, and Heitkamp to Comptroller General Gene L. Dodaro of the U.S. Gov’t Accountability Office, Mar. 28, 2018, <https://democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/GAO.2018.03.28.%20Letter%20re%20SES%20employees.pdf>.

² OFFICE OF THE INSPECTOR GENERAL, DEP’T OF THE INTERIOR, REPORT NO. 2017-ER-061, REASSIGNMENT OF SENIOR EXECUTIVES AT THE U.S. DEP’T OF THE INTERIOR (Apr. 2018), https://www.doioig.gov/sites/doioig.gov/files/FinalEvaluation_SESReassignments_Public.pdf.

³ Darryl Fears, *Facing Reassignment Under Trump, Top Yellowstone Official Instead Retires*, WASH. POST, June 1, 2018, https://www.washingtonpost.com/news/energy-environment/wp/2018/06/01/facing-reassignment-under-trump-a-well-regarded-national-park-service-official-will-instead-retire/?utm_term=.5a98f652dcb9.



to decisions he made that were opposed by The Montana Group and United Property Owners of Montana, which are reported to be political allies of Secretary Zinke.⁴

American Oversight seeks information with the potential to shed light on whether reassignments of SES members have been influenced by political considerations.

Requested Records

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

All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat, Lync, Skype, WhatsApp, Facebook messages, and Twitter Direct Messages), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between political appointees* in (a) the Office of the Secretary, (b) the Office of the Deputy Secretary, (c) the Office of the Assistant Secretary for Fish, Wildlife and Parks, and (d) the Office of the Director of the National Park Service, and

1. The Montana Group (including, but not limited to, Shelby DeMars, Chuck Denowh, Dennis Iverson, or anyone using an email ending @montanagroup.net), or
2. United Property Owners of Montana (including, but not limited to, Shelby DeMars, Mark Robbins, Deanna Robbins, Toby Dahl, Jody Dahl, Don Prue, Dave Abel, Cindy Abel, Chuck Denowh, or anyone using an email ending @upom.org).

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

*“Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a non-career SES, any Schedule C employees, or any persons hired under Temporary Non-Career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

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 DOI uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they

⁴ Todd Wilkinson, *Ryan Zinke Scores a Pyrrhic Victory in Yellowstone*, MOUNTAIN J., June 14, 2018, <http://mountainjournal.org/zinke-fires-head-of-yellowstone-and-faces-ethical-test>.

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.⁵ **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.**⁶

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 DOI’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.**⁷ Furthermore, agencies that have adopted the National Archives and

⁵ 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).

⁶ 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)).

⁷ 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>.

Records Administration (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 DOI's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DOI 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.”⁸ 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.”⁹ 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.”¹⁰ 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.’”¹¹

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.¹² 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, DOI 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

⁸ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁰ *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphases in original).

¹¹ *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)).

¹² *Mead Data Central*, 566 F.2d at 261.

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 DOI 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 43 C.F.R. § 2.45(a), 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.¹³ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁴

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 or activities.”¹⁵ The requested records are records reflecting communications that have the potential to shed light on whether there were political motivations for reassigning a highly regarded career SES member.¹⁶ As noted above, this issue has raised concerns for numerous members of Congress.¹⁷ The American people deserve to know if DOI is using reassignment against highly-regarded career civil servants as a method of punishment for political reasons rather than on the basis of qualifications and performance. As discussed below American Oversight has both the ability and the intention to effectively convey the information it receives to the public, and disclosure of the requested records to American Oversight will result in “contribute significantly to public understanding of government operations or activities.”¹⁸

This request is primarily and fundamentally for non-commercial purposes.¹⁹ 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

¹³ 43 C.F.R. § 2.45(a)(1).

¹⁴ 43 C.F.R. § 2.45(a)(2).

¹⁵ 43 C.F.R. § 2.45(a)(1); *see also* 43 C.F.R. § 2.48(a)(1)–(4).

¹⁶ *See* Fears *supra* note 3, Wilkinson *supra* note 4.

¹⁷ *See supra* note 1.

¹⁸ 43 C.F.R. § 2.48(a)(1).

¹⁹ 43 C.F.R. § 2.45(a)(2); 43 C.F.R. § 2.48(b)(1)–(3).

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.²⁰ 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, American Oversight promptly posted the records to its website²¹ and published an analysis of what the records reflected about DOJ's process for ethics waivers.²² Additionally, 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.²³

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 DOI 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 Dan McGrath at foia@americanoversight.org or 202.897.4213. 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

²⁰ American Oversight currently has approximately 11,900 page likes on Facebook and 45,000 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Aug. 30, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Aug. 30, 2018).

²¹ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²² *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>.

²³ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.