



November 15, 2018

VIA ELECTRONIC MAIL

Freedom of Information Act Request
Office of General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
FOIA@ftc.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 Federal Trade Commission (FTC), American Oversight makes the following request for records.

Acting Attorney General Matthew G. Whitaker reportedly served on the advisory board of World Patent Marketing, a company that was investigated by the FTC for carrying out an invention-promotion scam.¹ Press reports indicate that Mr. Whitaker threatened a consumer complaint website for posting comments critical of World Patent Marketing.² The FTC settled its action against World Patent Marketing in an agreement that requires World Patent Marketing and an officer of the company to pay a monetary judgment and enjoins individuals associated with World Patent Marketing from engaging in further behavior that may deceive consumers.³

Several Ranking Members of committees in the House of Representatives have expressed concern over Mr. Whitaker's role in World Patent Marketing's unfair practices and have requested that the FTC produced documents related to Mr. Whitaker's involvement with World Patent Marketing.⁴

¹ Brittany Shammass, *A Miami Beach Scam Took Millions of Dollars from Thousands of Inventors, Feds Say UPDATED*, MIAMI NEW TIMES (Aug. 22, 2017, 8:00 AM), <https://www.miaminewtimes.com/news/world-patent-marketing-scam-took-millions-of-dollars-from-inventors-9605870>.

² Tom Hamburg et al., *He Was Yelling?: Whitaker Pushed Back Against Early Fraud Complaints About Company He Advised*, WASH. POST (Nov. 14, 2018, 7:27 PM), https://www.washingtonpost.com/politics/he-was-yelling-whitaker-pushed-back-against-early-fraud-complaints-about-company-he-advised/2018/11/14/53e5cbc6-e78f-11e8-a939-9469f1166f9d_story.html?utm_term=.75f31dea9912.

³ *Federal Trade Comm'n v. World Patent Marketing*, No. 17-cv-20848 (S.D. Fla., filed 2017).

⁴ Ltr. from Reps. Cummings, Nadler, Pallone, & Schiff to FTC Chairman Simons, Nov. 14, 2018, <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/2018-11->



American Oversight seeks records with the potential to shed light on the FTC's actions in countering fraudulent practices and the FTC's interactions with Mr. Whitaker.

Requested Records

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

1. All email communications between FTC and Matthew G. Whitaker, or any lawyer or representative of Mr. Whitaker, from January 1, 2014, to May 9, 2018.
2. All transcripts and summaries of depositions or interviews of Mr. Whitaker, World Patent Marketing Inc. founder Scott Cooper, or any other employee or representative of World Patent Marketing or Desa Industries, Inc.
3. All records relating or referring to Mr. Whitaker's actions or role in associating with, advising, working for, or taking actions on behalf of World Patent Marketing Inc. or Desa Industries Inc., including records related to Mr. Whitaker's threats of legal action against critics, receipt of compensation, receipt of campaign contributions, or formation of a political action committee or fundraising entity.
4. All records produced or deemed responsive to the November 14, 2018 letter from Representatives Cummings, Nadler, Pallone, and Schiff to FTC Chairman Simons.⁵
5. All records reflecting FTC communications (including emails, email attachments, text messages, messages on messaging applications, calendar entries or invitations, and notes or summaries of meetings) concerning FTC's response to the November 14, 2018 letter from Representatives Cummings, Nadler, Pallone, and Schiff to FTC Chairman Simons.⁶

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

[14.EEC%20Nadler%20Pallone%20Schiff%20to%20Simons-FTC%20re%20Whitaker%20Document%20Request.pdf](#).

⁵ *Id.*

⁶ *Id.*

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 are subject to the Federal Records Act and FOIA.⁷ **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.**⁸

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 your agency’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.**⁹ Furthermore, agencies that have adopted the National Archives and 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 your agency’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that your agency 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

⁷ 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).

⁸ 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)).

⁹ 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>.

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.”¹⁰ 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.”¹¹ 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.”¹² 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.’”¹³

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.¹⁴ 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, you are 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 hopes to 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

¹⁰ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹¹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹² *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

¹³ *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)).

¹⁴ *Mead Data Central*, 566 F.2d at 261.

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 your agency's implementing regulations, 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 public understanding of those operations. 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 activities of the government. The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how the FTC addressed a reportedly fraudulent marketing practice by World Patent Marketing. Specifically, the records requested here will shed light on whether and to what extent now-Acting Attorney General Matthew G. Whitaker, an advisory board member of World Patent Marketing, was contacted and interviewed by the FTC. Given Mr. Whitaker's current role as the nation's chief law enforcement officer, there is heightened public interest in the FTC's actions related to World Patent Marketing.¹⁵ The American public deserves to know whether a cabinet official has financial interests that conflict with the interests of the public. And, as described below, American Oversight has the intention and ability to disseminate the records it receives to a broad audience.

This request is primarily and fundamentally not for commercial purposes, but rather the primary interest is in public disclosure of responsive records. 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 promotes their availability on social media platforms, such as Facebook and Twitter.¹⁶ 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,¹⁷ American

¹⁵ See Shammas, *supra* note 1.

¹⁶ American Oversight currently has approximately 11,900 page likes on Facebook and 45,800 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Nov. 15, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Nov. 15, 2018).

¹⁷ DOJ Civil Division Response Noel Francisco Compliance, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.¹⁸ 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.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 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

¹⁸ *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>.

¹⁹ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.