



November 27, 2018

**VIA ELECTRONIC MAIL**

Alexis R. Graves  
Departmental FOIA Officer  
U.S. Department of Agriculture  
1400 Independence Avenue SW  
South Building, Room 4104  
Washington, DC 20250-0706  
[USDAFOIA@ocio.usda.gov](mailto: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, 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.

Last year, USDA altered federal regulations governing use of flavored milks, whole grains, and sodium in the school lunch program. American Oversight seeks records to shed light on the role that industry—which has a large financial stake in the funds spent on school lunches—played in influencing these policy changes.

**Requested Records**

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

1. All calendar invitations or entries (or attachments to calendar invitations or entries) for any meeting related to the development or issuance of the memorandum issued on May 22, 2017 on the subject “School Meal Flexibilities for the School Year 2017-2018,” assigned the memo code SP 32-2017.
2. All calendar invitations or entries (or attachments to calendar invitations or entries) for any meeting related to the promulgation of the interim final rule entitled “Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements,” 82 FR 56703, published on November 30, 2017.
3. All records prepared or circulated in connection with the meetings described in Items 1 or 2, including but not limited to: agendas, lists of attendees, slide decks, briefing documents, read-aheads, or background materials.
4. All communications (including but not limited to email messages, email attachments, text messages, instant messages on platforms such as Lync, Slack, or Google



Hangouts) including at least one person identified in Column A below (or any person acting on their behalf) and at least one person or entity identified in Column B below and related to nutritional requirements, standards, or limitations for sodium, whole grains, sugar, or sweetened milk in Child Nutrition Programs. This request includes, but is not limited to, correspondence related to (a) the May 22, 2017 memorandum described in Item 1; (b) the interim final rule described in Item 2; or (c) the Healthy Hunger-Free Kids Act (or “HHFKA”).

Column A	Column B
<ul style="list-style-type: none"> <li>• Secretary Sonny Perdue</li> <li>• Under Secretary for Food, Nutrition, and Consumer Services</li> <li>• Chief of Staff to the Under Secretary for Food, Nutrition, and Consumer Services</li> <li>• Policy Advisor, Food, Nutrition, and Consumer Services</li> <li>• Administrator, Food and Nutrition Service</li> <li>• Deputy Administrator, Office of Policy Support, Food and Nutrition Service</li> <li>• Deputy Administrator, Child Nutrition Programs, Food and Nutrition Service</li> <li>• Director, Policy and Programs Development Division, Child Nutrition Programs</li> <li>• Any other political appointee or career SES employee in the Office of the Secretary, Food, Nutrition, and Consumer Services, the Food and Nutrition Service, or the Child Nutrition Programs</li> </ul>	<ul style="list-style-type: none"> <li>• School Nutrition Association (schoolnutrition.org)</li> <li>• Schwan’s Food Service (schwansfoodservice.com)</li> <li>• Conagra Brands (conagrabrands.com)</li> <li>• American Frozen Food Institute (affi.org)</li> <li>• Tyson Foods (tysonfoods.com)</li> <li>• Archer Daniels Midland Company (adm.com)</li> <li>• PepsiCo (pepsico.com)</li> <li>• Aramark (aramark.com)</li> <li>• Sodexo (sodexousa.com)</li> <li>• Compass Group (compass-usa.com)</li> <li>• Grocery Manufacturers Association (gmaonline.org)</li> <li>• Dean Foods (deanfoods.com)</li> <li>• Perdue (perduefoodservice.com)</li> <li>• Cargill (cargill.com)</li> <li>• National Dairy Council (nationaldairycouncil.org)</li> <li>• Snack Food Association (snacintl.org)</li> <li>• American Pizza Community (americanpizzacommunity.com)</li> <li>• Pilgrim’s Pride (pilgrims.com)</li> <li>• Kellogg’s (kelloggs.com)</li> <li>• General Mills (generalmills.com)</li> <li>• Uncle Ben’s (unclebens.com)</li> <li>• Mars, Inc. (mars.com)</li> <li>• International Dairy Foods Association (idfa.org)</li> </ul>

For both requests, the search should include individuals and entities in Category B as

search terms, and as entries in the to/from/cc/bcc fields of emails or calendar entries/invitations, and as participants in text, chat, or instant messages (including group texts, chats, or instant messages). The search should include any individuals serving in the roles listed above in either an acting or a permanent capacity.

American Oversight requests records from January 20, 2017, through December 31, 2017, for Items 1-3 of this request and records from January 20, 2017, through the date of the search for Item 4.

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 are 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; 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>2</sup>

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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-

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.**<sup>3</sup> 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 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>4</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>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>

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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, “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) (emphases 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)).

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.** 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 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 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. Disclosure of the requested information is in the public interest as it is likely to contribute significantly to public understanding of government operations and activities.<sup>9</sup> The disclosure of information sought under this request will document and reveal the operations of the federal government, including how USDA officials make policy affecting the health of American school children and the degree of influence companies with financial stakes in those policy outcomes have on USDA's decisions. This information is not currently publicly available, and its disclosure would be of interest to the general public—especially the millions of American families whose children attend public schools.

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

<sup>9</sup> 7 C.F.R. Part 1, Subpart A, Appendix A, Section 6(a)(1)(i)-(iv); see, e.g., *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

In addition, this request is primarily and fundamentally not for commercial purposes, but rather the primary interest is in public disclosure of responsive records.<sup>10</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 promotes their availability on social media platforms, such as Facebook and Twitter.<sup>11</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>12</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>13</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>14</sup>

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 Beth France at [foia@americanoversight.org](mailto:foia@americanoversight.org) or (202) 897-2465. Also, if American

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<sup>10</sup> 7 C.F.R. Part 1, Subpart A, Appendix A, Section 6(a)(1)(v)-(vi).

<sup>11</sup> American Oversight currently has approximately 12,000 page likes on Facebook and 49,000 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Nov. 27, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Nov. 27, 2018).

<sup>12</sup> *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

<sup>13</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>14</sup> *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

A handwritten signature in blue ink, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers  
Executive Director  
American Oversight