



March 7, 2019

VIA ONLINE PORTAL

Michael Toland, Ph.D.
Departmental FOIA Officer
Office of Privacy and Open Government
U.S. Department of Commerce
14th and Constitution Avenue NW
Mail Stop 52010FB
Washington, DC 20230
Via FOIAOnline

National Oceanic and Atmospheric
Administration
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, MD 20910
Via FOIAOnline

Re: Freedom of Information Act Request

Dear Freedom of Information Officers:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and Department of Commerce (Commerce) implementing regulations, 15 C.F.R. Part 4, American Oversight makes the following request for records from Commerce and the National Oceanic and Atmospheric Administration (NOAA).

The Fourth National Climate Assessment—an interagency, congressionally-mandated report by the U.S. Global Change Research Program—was released on November 23, 2018 and confirmed the scientific consensus¹ that “Earth’s climate is now changing faster than at any point in the history of modern civilization, primarily as a result of human activities. The impacts of global climate change are already being felt in the United States and are projected to intensify in the future—but the severity of future impacts will depend largely on actions taken to reduce greenhouse gas emissions and to adapt to the changes that will occur.”² Noting that the “fundamental physics of climate change” have been long understood, the report affirms that “carbon dioxide [is] the largest

¹ See, e.g., *Scientific Consensus: Earth’s Climate Is Warming*, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, <https://climate.nasa.gov/scientific-consensus/>; J. Cook et al., *Consensus on Consensus: A Synthesis of Consensus Estimates on Human-Caused Global Warming*, Environmental Research Letters, Vol. 11 No. 4 (Apr. 13, 2016), available at <http://iopscience.iop.org/article/10.1088/1748-9326/11/4/048002>; *Human-Induced Climate Change Requires Urgent Action*, AMERICAN GEOPHYSICAL UNION (adopted 2003; revised and reaffirmed Aug. 2013), available at https://sciencepolicy.agu.org/files/2013/07/AGU-Climate-Change-Position-Statement_August-2013.pdf; *Climate Change*, THE GEOLOGICAL SOCIETY OF AM. (adopted Oct. 2006, revised Apr. 2015), available at <https://www.geosociety.org/gsa/positions/position10.aspx>.

² *Fourth National Climate Assessment 2*, Ch. 1, U.S. GLOBAL CHANGE RESEARCH PROGRAM (Nov. 23, 2018), available at <https://nca2018.globalchange.gov/chapter/1/> (last visited Mar. 5, 2019).



contributor to human-caused warming.”³ Similarly, the 2019 Worldwide Threat Assessment of the U.S. Intelligence Community found that human security is threatened by climate change, which, along with general environmental degradation, is “likely to fuel competition for resources, economic distress, and social discontent through 2019 and beyond.”⁴

Despite the scientific consensus and urgency surrounding the climate crisis, the White House intends to establish a Presidential Committee on Climate Security in order to subject federal scientists’ climate research to “adversarial scientific peer review.”⁵ The proposed committee will be spearheaded by Dr. William Happer, a physicist with no formal climate science training.⁶ Dr. Happer “holds the radical view that carbon dioxide, the main greenhouse gas responsible for global warming, is a boon to the planet, not a threat,”⁷ and has claimed that the “demonization of carbon dioxide is just like the demonization of the poor Jews under Hitler.”⁸ Dr. Happer is also the founder of the CO₂ Coalition, an advocacy organization that “promotes the notion that the world needs more carbon dioxide,” including through the use of “cartoons designed for children.”⁹

American Oversight submits this request to shed light on Dr. Happer’s involvement with federal activity relating to studying, communicating, or mitigating the harms caused by anthropogenic climate change.

³ *Id.*

⁴ *Worldwide Threat Assessment of the US Intelligence Committee* at 23, Statement for the Record, SENATE SELECT COMMITTEE ON INTELLIGENCE (Jan. 29, 2019), available at <https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR--SSCI.pdf>.

⁵ Juliet Eilperin & Missy Ryan, *White House Prepares to Scrutinize Intelligence Agencies’ Finding that Climate Change Threatens National Security*, WASH. POST, Feb. 20, 2019, https://www.washingtonpost.com/national/health-science/white-house-readies-panel-to-assess-if-climate-change-poses-a-national-security-threat/2019/02/19/ccc8b29e-3396-11e9-af5b-b51b7ff322e9_story.html.

⁶ *Id.*

⁷ Andrew Revkin, *Does the U.S. Need a ‘Presidential Climate Security Committee’?*, NAT’L GEOGRAPHIC, Feb. 22, 2019, <https://www.nationalgeographic.com/environment/2019/02/trump-presidential-climate-security-committee/>.

⁸ Jennifer A. Dlouhy & Ari Natter, *Meet the CO₂-Praising Physicist Behind the Latest Trump Climate Push*, BLOOMBERG (Feb. 22, 2019, 4:00 AM), <https://www.bloomberg.com/news/articles/2019-02-22/meet-the-co2-praising-physicist-behind-latest-trump-climate-push>.

⁹ Scott Waldman, *Physicist Leading Trump’s ‘Adversarial’ Climate Review Also Led Group Touting Carbon Emissions*, SCIENCE MAG. (Feb. 28, 2019, 10:55 AM), <https://www.sciencemag.org/news/2019/02/physicist-leading-trump-s-adversarial-climate-review-also-led-group-touting-carbon>; see also CO₂ COALITION, <https://co2coalition.org/>.

Requested Records

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

1. All email communications and associated attachments between any of the custodians listed below and Dr. William (Will) Happer, including any communications on which a custodian and/or Dr. Happer were copied (cc) or blind copied (bcc). This search should include all communications involving Dr. Happer, including but not limited to the email addresses happer@princeton.edu and whapper@nsc.eop.ic.gov.
2. All email communications and associated attachments between any of the custodians listed below and any email address ending in @co2coalition.org, including any communications on which an @co2coalition.org email address is copied (cc) or blind copied (bcc).
3. All records reflecting any payments or gratuities (e.g., government-provided travel or meals) provided to Dr. William (Will) Happer for any purpose.

Please provide all responsive records from January 20, 2017, through the date the search is conducted.

American Oversight requests that Commerce search the records of all political appointees* in the Office of the Secretary.

American Oversight requests that NOAA search the records of the following individuals:

- Timothy Gallaudet, former Acting Under Secretary of Commerce and Administrator for Oceans and Atmosphere
- Neil Jacobs, Acting Under Secretary of Commerce and Administrator for Oceans and Atmosphere
- Samuel Rauch, Deputy Assistant Administrator for Regulatory Programs
- Cisco Warner, Director of Scientific Programs and Chief Science Advisor

*“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, 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.¹⁰ **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.**¹¹

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.**¹² 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

¹⁰ 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).

¹¹ 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)).

¹² 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>.

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.”¹³ 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.”¹⁴ 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.”¹⁵ 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.’”¹⁶

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.¹⁷ 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 your agency undertakes a search or incurs search or duplication costs. By working together at the outset, we can decrease the likelihood of costly and time-consuming litigation in the future.

¹³ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹⁴ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁵ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphases in original).

¹⁶ *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)).

¹⁷ *Mead Data Central*, 566 F.2d at 261.

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 15 C.F.R. § 4.11(l), 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.¹⁸ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁹

Disclosure of the requested information is in the public interest because it is “likely to contribute to public understanding” of “the operations or activities of the Federal government.”²⁰ The government has a duty to care for the general welfare of its citizens, and its action on climate change is a critical government activity, as confirmed by the federal government’s own scientific assessments²¹ as well as the most recent report issued by the United Nations Intergovernmental Panel on Climate Change.²² There are few—if any—matters of greater public concern than anthropogenic climate change, as illustrated both by the scientific consensus²³ and media reporting²⁴ on the necessity of urgent action. The public deserves to know whether and to what extent the federal government’s response to an imminent crisis is being undermined for political purposes. And, as described in more detail below, American Oversight will disseminate the information to a reasonably broad audience of persons through its social media accounts and its website.

¹⁸ 15 C.F.R. § 4.11(l)(1)(i).

¹⁹ 15 C.F.R. § 4.11(l)(1)(ii).

²⁰ 15 C.F.R. § 4.11(l)(1)(i), (2)(i)-(iv).

²¹ See note 2, *supra*.

²² United Nations, Intergovernmental Panel on Climate Change, Report, *Global Warming of 1.5° C*, Oct. 8, 2018, available at <http://www.ipcc.ch/report/sr15/> (last visited Mar. 5, 2019).

²³ See note 1, *supra*.

²⁴ See, e.g., Justin Worland, *Wildfires, Flooding and Droughts Could Make Climate Change an Issue in 2020. Some Are Pushing for It to Be the Top One*, Time (Mar. 5, 2019, 4:20 PM), <http://time.com/5543102/2020-election-climate-change/>; Spec. Report, *Climate Change and Population Growth Are Making the World’s Water Woes More Urgent*, The Economist, Feb. 28, 2019, <https://www.economist.com/special-report/2019/02/28/climate-change-and-population-growth-are-making-the-worlds-water-woes-more-urgent>; Sophie Aziakou, *Climate Change: Urgent Action Needed to Avert a Crisis for Children*, FORBES (Oct. 10, 2018, 4:07 PM), <https://www.forbes.com/sites/unicefusa/2018/10/10/climate-change-urgent-action-needed-to-avert-a-crisis-for-children>; Stephen Leahy, *Climate Change Impacts Worse Than Expected, Global Report Warns*, NAT’L GEOGRAPHIC, Oct. 7, 2018, <https://www.nationalgeographic.com/environment/2018/10/ipcc-report-climate-change-impacts-forests-emissions/>.

In addition, 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.²⁵ 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,²⁶ 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.²⁷ 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.²⁸

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 Hart Wood at foia@americanoversight.org or 202.873.1743. Also, if American

²⁵ American Oversight currently has approximately 12,200 page likes on Facebook and 51,000 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Mar. 5, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Mar. 5, 2019).

²⁶ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²⁷ *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>.

²⁸ *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 that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight