AMERICAN OVERSIGHT

April 18, 2019

VIA ELECTRONIC MAIL

FOIA Requester Service Center
U.S. Consumer Product Safety Commission
4330 East West Highway, Room 820
Bethesda, MD 20814
CPSCFOIARequests@cpsc.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. Consumer Product Safety Commission (CPSC or the Commission), 16 C.F.R. Part 1015, American Oversight makes the following request for records.

On March 29, 2019, chairs of the House of Representatives Energy and Commerce Committee and Consumer Protection and Commerce Subcommittee wrote to Acting Chair of the Commission, Ann Marie Buerkle, expressing concerns about a report indicating that Ms. Buerkle had coordinated with industry to delay or impede the CPSC's action on unsafe portable generators.[1]

American Oversight seeks records with the potential to shed light on whether and to what extent private industry interests are exerting influence over the Commission's work.

Requested Records

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

> All email communications between any person outside the federal government (such as anyone communicating from an email address ending in .com/.net/.org/.edu/.mail) and the following individuals:
>
> 1. Commissioner and Acting Chair Ann Marie Buerkle

[1] Ltr. from Rep. Frank Pallone Jr., Energy & Comm. Chair & Rep. Jan Schakowsky, Consumer Protection and Commerce Subcommittee Chair to Ann Marie Buerkle, Acting Chair, U.S. Consumer Product Safety Commission, Mar. 29, 2019, https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/CPSC.2019.3.29.%20Letter%20to%20AC%20concerning%20impeded%20actions%20on%20portable%20generators.CPC_.pdf.

2. Chief of Staff Nancy Lowery
3. Chief Counsel to the Chairman John "Gib" Mullan
4. Executive Assistant Katelyn Costello

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

In an effort to accommodate CPSC and reduce the number of potentially responsive records, American Oversight agrees that the search for responsive email communications may be limited to emails sent by Ms. Buerkle, Ms. Lowery, Mr. Mullan, and Ms. Costello. Despite this search accommodation, American Oversight still requests that complete email chains be produced, displaying both sent and received messages.

American Oversight does not object to the withholding of trade secret or confidential commercial information, as required by Section 6 of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2055. However, general communications with individuals or entities regulated by the Commission, absent trade secrets, detailed product specifications, or confidential commercial information, as described in 15 U.S.C. § 2055(a)(2) or 18 U.S.C. § 1905—for instance, communications concerning a proposed regulation—are not exempt from disclosure and we expect such information to be disclosed, subject, as necessary, to the procedures established by Section 6(b) of the CPSA. Furthermore, as required by FOIA, to the extent any responsive records contain trade secret or confidential commercial information that cannot be disclosed, please disclose any reasonably segregable non-exempt portions of such records.

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 CPSC 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.[2] **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.**[3]

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 CPSC'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.**[4] **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 CPSC's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that CPSC 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"

---

[2] *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).

[3] *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)).

[4] 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.

or "disclosure is prohibited by law."[5] 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."[6] 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."[7] 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.'"[8]

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.[9] 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, CPSC 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 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 CPSC 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.

---

[5] FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).
[6] *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).
[7] *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).
[8] *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)).
[9] *Mead Data Central*, 566 F.2d at 261.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 16 C.F.R. § 1015.9(f), American Oversight requests a waiver of fees associated with processing this request for records. First, 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.[10] Second, the request is primarily and fundamentally for non-commercial purposes.[11]

Under the public interest requirement, FOIA requesters must satisfy four factors.[12] American Oversight has met these four factors for the reasons set forth below. The subject matter of the requested records specifically relates to the operations or activities of the government, because it concerns Ms. Buerkle's activities as the Acting Chair of the Commission, including whether and to what extent she has interacted with industry subject to the Commission's regulations. The requested documents will be "likely to contribute" to an understanding of specific government operations because of their potential to shed light on the extent to which private industry interests are exerting influence over the Commission's work. In an administration apparently committed to deregulation,[13] and one in which a number of officials have been accused of ethics violations by allowing industry to influence their regulatory decisions,[14] the requested records will provide the public vital information to assess the work of a body charged with protecting consumers.

Increasing the likelihood that disclosure of these records will contribute significantly to public understanding, there is currently little information available concerning whether and to what extent

---

[10] 16 C.F.R. § 1015.9(f)(4).
[11] *Id.*
[12] 16 C.F.R. § 1015.9(f)(4)(i)-(iv).
[13] *See, e.g.*, Charles S. Clark, *The Trump Administration's War on Regulations*, GOVERNMENT EXECUTIVE, https://www.govexec.com/feature/trump-administrations-war-regulations/; *Interactive, Tracking Deregulation in the Trump Era*, BROOKINGS, https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/ (last visited Apr. 17, 2019).
[14] *See, e.g.*, Darryl Fears, *Interior's Watchdog Opens an Ethics Probe Into Bernhardt Four Days After His Senate Confirmation*, WASH. POST, Apr. 15, 2019, https://www.washingtonpost.com/climate-environment/2019/04/15/interiors-watchdog-opens-an-ethics-probe-into-bernhardt-four-days-after-his-senate-confirmation/?utm_term=.09eaecbc770e; Alan Rappeport, *U.S. Ethics Office Declines to Certify Mnuchin's Financial Disclosure*, N.Y. TIMES, Apr. 4, 2019, https://www.nytimes.com/2019/04/04/us/politics/steven-mnuchin-ethics-office.html; Oliver Milman, *A Scandal for all Seasons: Scott Pruitt's Ethics Violations in Full*, THE GUARDIAN (Jun 10, 2018, 6:00 AM), https://www.theguardian.com/environment/2018/jun/10/scott-pruitt-epa-administrator-scandal-list; Sam Sacks, *Education Secretary Betsy DeVos Unfazed by Conflict of Interest Charges*, POLITICO, May 23, 2018, https://truthout.org/articles/education-secretary-betsy-devos-unfazed-by-conflict-of-interest-charges/.

private industry interests are influencing the Commission's work. In addition, American Oversight's objective is to reveal to the public at large any information it receives related to this FOIA request. American Oversight has the capacity to disseminate this information as it posts all records to its public websites and publishes analyses of its records. In the past, the organization has successfully informed the public of specific government activities and operations. As an example, American Oversight obtained Education Secretary DeVos's calendar entries, which revealed Secretary DeVos's frequent absences from office and the influence of charter schools and for-profit colleges on the Education Department.[15] The *New York Times* and CNN relied on American Oversight's analyses to report on Secretary DeVos's priorities within the Department of Education.[16]

American Oversight's request is also primarily and fundamentally for non-commercial purposes.[17] 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 our public website and promotes their availability on social media platforms, such as Facebook and Twitter.[18] 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 website[19] and published an analysis of what the records reflected about DOJ's process for

---

[15] *See Influence & Access at the Department of Education*, AMERICAN OVERSIGHT (Oct. 27, 2017), https://www.americanoversight.org/investigation/influence-access-at-the-department-of-education; *Unexcused Absences: DeVos Calendars Show Frequent Days Off*, AMERICAN OVERSIGHT (Oct. 27, 2017), https://www.americanoversight.org/unexcused-absences-devos.

[16] Eric Lipton, *Betsy DeVos's School Schedule Shows Focus on Religious and Nontraditional Schools*, N.Y. TIMES, Oct. 27, 2017, https://www.nytimes.com/2017/10/27/us/politics/betsy-devos-work-schedule-education.html; Gregory Wallace et al., *What Betsy DeVos's Schedule Tells Us About Her Agenda*, CNN (Oct. 29, 2017, 12:22 PM), http://www.cnn.com/2017/10/28/politics/devos-schedules-education/index.html.

[17] 22 C.F.R. § 171.16(a)(2)(i)-(iii).

[18] American Oversight currently has approximately 12,200 page likes on Facebook and 54,100 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight (last visited Apr. 17, 2019); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited Apr. 17, 2019).

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

ethics waivers.[20] As an additional 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.[21]

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 CPSC 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 Katherine Anthony at foia@americanoversight.org or 202.897.3918. 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] *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.
[21] *Audit the Wall*, AMERICAN OVERSIGHT, https://www.americanoversight.org/investigation/audit-the-wall.