AMERICAN OVERSIGHT

April 9, 2019

VIA EMAIL

Clarice Julka
Office of the Secretary
U.S. Department of the Interior
MS-7328, MIB
1849 C Street NW
Washington, DC 20240
osfoia@ios.doi.gov

Re: Freedom of Information Act Request

Dear Ms. Julka:

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

On March 23, 2019, the Center for Investigative Reporting reported on a previously undisclosed recording from a June 2017 gathering of the Independent Petroleum Association of America (IPAA), in which an official from the group boasted of the organization's "direct access" to David Bernhardt, who was then President Trump's nominee to be Deputy Secretary of the Interior. A DOI spokeswoman said that Mr. Bernhardt, now serving as Acting Secretary and President Trump's nominee to hold the position permanently, "has had no communication or contact" with either of the two IPAA officials captured on the recording.[1] American Oversight seeks to shed light on what if any relationship Bernhardt has had with IPAA since joining DOI and the accuracy of DOI's assertions about that relationship.

Requested Records

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

1. All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar invitations, calendar entries, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between (a) David Bernhardt and (b) Barry Russell,

[1] Lance Williams, *Recording Reveals Oil Industry Execs Laughing at Trump Access*, REVEAL, Mar. 23, 2019, https://www.revealnews.org/article/oil-executives-predicted-expanded-influence-in-trumps-interior-department/.

Dan Naatz, or any employee or representative of the Independent Petroleum Association of America (IPAA), including but not limited to any person communicating from an email address ending in ipaa.org.

American Oversight believes that Interior is in the best position to identify the custodians of responsive records. However, we request that Interior search, at a minimum, records maintained by Acting Secretary David Bernhardt, his chief of staff, and any schedulers or assistants communicating on his behalf.

Please produce all responsive records from August 1, 2017 through the date of search.

2. All records reflecting the content and attendees of the meeting on or about October 11, 2017, with the Independent Petroleum Association of America (IPAA) Land and Royalty Committee that appears on the calendar for the conference room of the Deputy Secretary of the Interior, released via a FOIA request to American Oversight.[2] Responsive records could include any calendar entries, written communications about the meeting, agendas, lists of meeting attendees, minutes, summaries, handwritten notes, or materials exchanged during the meeting.

   American Oversight believes that Interior is in the best position to identify the custodians of responsive records. However, we request that Interior search, at a minimum, records maintained by all political appointees in the Office of the Deputy Secretary.

   Please produce all responsive records from September 11, 2017 through November 11, 2017.

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

[2] See *DOI Calendars for Deputy Chiefs of Staff Downey Magallanes and Michel Argo and COS Scott Hommel* at 850, AMERICAN OVERSIGHT, *available at* https://www.documentcloud.org/documents/4502304-Calendars-of-Interior-Department-Deputy-Chiefs.html#search/p850/.

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.[3] **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.**[4]

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.**[5] **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.**

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[3] *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).

[4] *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)).

[5] 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.

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."[6] 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."[7] 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."[8] 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.'"[9]

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.[10] 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.

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

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

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 43 CFR § 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 public understanding of those operations in a significant way.[11] Moreover, the request is primarily and fundamentally for non-commercial purposes.[12]

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 the operations or activities of the federal government.[13] The disclosure of the information sought will has the potential to reveal whether and to what extent private energy interests possess undue access to and influence over the highest ranking official within DOI. The public has the right to be assured that the Acting Secretary is discharging his official duties free from conflicts or improper preferential treatment, and the public cannot be fully informed about DOI's decisions relating to energy issues without knowing which entities and individuals are influencing government decisions. 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.[14]

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.[15] 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,[16] 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.[17] As another example, American Oversight has a project called "Audit the Wall," where the organization is gathering and analyzing information and

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[11] 43 CFR § 2.45(a)(1).
[12] 43 CFR § 2.45(a)(2).
[13] 43 C.F.R. § 2.48(a)(1)-(4).
[14] 43 C.F.R. § 2.48(a)(2)(iii)-(v).
[15] American Oversight currently has approximately 12,200 page likes on Facebook and 54,200 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited Apr. 8, 2019); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited Apr. 8, 2019).
[16] *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance.
[17] *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.

commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.[18]

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