

June 26, 2019

VIA ELECTRONIC MAIL

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Re: Freedom of Information Act Request

Dear FOIA Officers:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Transportation (DOT), 49 C.F.R. Part 7, American Oversight makes the following request for records.

Secretary of Transportation Elaine Chao re-entered government service on January 31, 2017, with significant personal and financial ties to private entities working in the industries she would be overseeing.¹ Prior to her confirmation, Secretary Chao affirmed

¹ See, e.g., Michael Forsythe & Eric Lipton, *For the Chao Family, Deep Ties to the World's 2 Largest Economies*, N.Y. TIMES, June 2, 2019, <https://www.nytimes.com/2019/06/02/us/politics/transportation-secretary-elaine-chao.html>; Eric Lipton, *Transportation Secretary Failed to Sever Financial Ties to Construction*

that she was “committed to the highest standards of ethical conduct for government officials” and promised to take steps “to avoid any actual or apparent conflict of interest.”² Among other commitments, Secretary Chao committed to resigning from the board of Vulcan Materials Company (Vulcan)—one of the nation’s largest producer of construction aggregates and a major producer of aggregates-based construction materials—and cashing out her stock in the company. Specifically, Secretary Chao stated the following:

Pursuant to the terms of the company’s Directors’ Deferred Stock Unit Plan, I will receive a cash payout for all of my vested deferred stock units in April of the year following the year of my separation from service. . . . Until I receive the cash payment of my vested deferred stock units, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of Vulcan Materials, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1).³

According to the *Wall Street Journal*, a May 2018 financial disclosure likewise stated that Secretary Chao “would receive a cash payout for the Vulcan shares.”⁴

Notwithstanding her repeated pledge to divest from Vulcan, Secretary Chao continued to retain company stock more than a year later, netting a gain of more than \$40,000 as the company’s shares rose 13% during this period.⁵ Indeed, according to *American Public Media Reports*, Vulcan’s share price reached a 10-year high after the 2016 election due to “investors’ optimism that the company’s business and the construction sector will benefit from a federally funded infrastructure package” and has since spiked whenever Secretary Chao or the president speak publicly about infrastructure.⁶ Furthermore, records indicate that Vulcan has continued to lobby DOT since Secretary Chao took office, although Vulcan

Company, N.Y. TIMES, May 28, 2019,

<https://www.nytimes.com/2019/05/28/us/politics/elaine-chao-stock-divest.html>.

² Ltr. from Elaine Chao to Judith Kaleta, Designated Agency Ethics Official, U.S. Dep’t of Transp. at 1, Jan. 5 2017, *available at*

[https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/00E7BDF991DEEA3B852580C1002C7A31/\\$FILE/Chao,%20Elaine%20L.%20%20finalAMENDEDEA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/00E7BDF991DEEA3B852580C1002C7A31/$FILE/Chao,%20Elaine%20L.%20%20finalAMENDEDEA.pdf).

³ *Id.*

⁴ Ted Mann & Brody Mullins, *Transportation Secretary Still Owns Stock She Pledged to Divest*, WALL ST. J. (May 28, 2019, 1:19 PM), <https://www.wsj.com/articles/transportation-secretary-still-owns-stock-she-pledged-to-divest-11559035921>.

⁵ *Id.*

⁶ Tom Scheck, *Elaine Chao, Champion of Trump’s Infrastructure Plan, Chose to Keep Stock in a Building Company*, AM. PUB. MEDIA REPORTS, Sept. 29, 2017,

<https://www.apmreports.org/story/2017/09/29/elaine-chao-vulcan-stock>.

disputes that such lobbying has occurred.⁷ Secretary Chao sold her Vulcan shares on June 3, 2019.⁸

American Oversight seeks records with the potential to shed light on Secretary Chao's efforts to comply with her ethical obligations, and the extent of her, her office's, and certain other DOT political appointees' communications with Vulcan while Secretary Chao owned Vulcan stock.

Requested Records

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

All communications (including email messages, email attachments, text messages, calendar invitations, letters, and memoranda) between the officials specified below, and any of the following:

1. Any employee or representative of Vulcan Materials Company (including, but not limited to, individuals with email addresses ending in @vmcmail.com).
2. Any employee or representative of Ice Miller Strategies, LLC (including, but not limited to, individuals with email addresses ending in @icemiller.com).

American Oversight requests the search include the following individuals:

- a. Secretary Chao or any persons communicating on her behalf, such as anyone acting as her chief of staff or any schedulers or assistants
- b. Geoffrey Burr, former Chief of Staff/Senior Advisor
- c. Grover Burtney, former Deputy Assistant Secretary for Transportation Policy
- d. Finch Fulton, Deputy Assistant Secretary for Transportation Policy/Special Assistant for Transportation Policy
- e. Melissa E. Fwu, former Special Assistant to the Secretary
- f. J. Todd Inman, former Deputy Chief of Staff and current Chief of Staff
- g. Derek Kan, Under Secretary of Transportation for Policy/Senior Advisor to the Secretary
- h. Matthew Kopko, Counselor to the Deputy Secretary
- i. Monica Kuo, Special Assistant to the Under Secretary
- j. Caryn Moore Lund, Associate Director for Public Engagement

⁷ Kim Slowey, *USDOT Secretary Elaine Chao Made \$40K from Vulcan Materials Despite Promise to Divest Shares*, CONSTRUCTION DIVE, May 29, 2019, <https://www.constructiondive.com/news/usdot-secretary-elaine-chao-made-40k-from-vulcan-materials-despite-promise/555702/>.

⁸ Ted Mann & Brody Mullins, *Elaine Chao Sells Vulcan Stock Holdings*, WALL ST. J. (June 13, 2019, 7:05 PM), <https://www.wsj.com/articles/elaine-chao-sells-vulcan-stock-holdings-11560464226>.

- k. James Ray, Senior Advisor for Infrastructure
- l. Jeffrey Rosen, Deputy Secretary/Senior Advisor to the Secretary
- m. Mathew Sturges, Deputy Chief of Staff
- n. Christopher Brown, Assistant Administrator for Governmental and Industry Affairs (Federal Aviation Administration)
- o. Daniel Elwell, former Deputy Administrator (Federal Aviation Administration) and current Acting Administrator (Federal Aviation Administration)
- p. Elisabeth Smeda, Senior Advisor/Special Assistant for Aviation and International Affairs (Federal Aviation Administration)
- q. Brandye Hendrickson, Deputy Administrator (Federal Highway Administration)
- r. Mala Parker, Associate Administrator for Highway Policy and External Affairs (Federal Highway Administration)
- s. K. Jane Williams, Acting Administrator (Federal Transit Administration)
- t. Any other agency official known or discovered to have communicated with Vulcan or its representatives

This request includes all messages on which DOT officials appear (whether in the to, from, cc, or bcc field), as well as all prior messages (whether incoming or outgoing) reflected in the responsive correspondence and any attachments thereto.

Please provide all responsive records from January 20, 2017, through June 3, 2019.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 49 C.F.R. § 7.43(c), 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. 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 operations or activities of the government.⁹ Secretary Chao holds the highest-ranking post in DOT, and the public deserves to know whether she is complying with her ethical obligations. This is particularly so given that Secretary Chao's continued ownership of Vulcan stock departs from how other transportation secretaries—and even other current political appointees within DOT—have handled similar situations.¹⁰ The requested records have the potential to shed light on Secretary Chao's actions, including whether she has taken appropriate steps to avoid engaging in matters where she may have a conflict of interest. American Oversight is committed to transparency and makes the

⁹ See 49 C.F.R. § 7.43(c)(1)–(4); see also 5 U.S.C. § 552(a)(4)(A)(iii).

¹⁰ See Mann & Mullins, *supra* note 4.

responses agencies provide to FOIA requests publicly available, and the public's understanding of the government's activities would be enhanced through American Oversight's analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.¹¹ 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.¹²

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses posted to its website.¹³ Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to an ethics waiver received by a senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department's process for issuing such waivers;¹⁴ posting records received as part of American Oversight's "Audit the Wall" project to gather and analyze information related to the administration's proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;¹⁵ posting records regarding potential self-dealing at the Department of Housing &

¹¹ See 49 C.F.R. § 7.43(c)(5); see also 5 U.S.C. § 552(a)(4)(A)(iii).

¹² American Oversight currently has approximately 12,600 followers on Facebook and 54,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited June 19, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited June 19, 2019).

¹³ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

¹⁴ DOJ Records Relating to Solicitor General Noel Francisco's Recusal, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *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>.

¹⁵ See generally *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; see, e.g., *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

Urban Development and related analysis;¹⁶ posting records and analysis relating to the federal government’s efforts to sell nuclear technology to Saudi Arabia;¹⁷ and posting records and analysis regarding the Department of Justice’s decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President’s political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.¹⁸

Accordingly, American Oversight qualifies for a fee waiver.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. For instance, if the request seeks “communications,” please search all locations likely to contain communications, including relevant hard-copy files, correspondence files, appropriate locations on hard drives and shared drives, emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voicemail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.
- 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 for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior

¹⁶ *Documents Reveal Ben Carson Jr.’s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>.

¹⁷ *Investigating the Trump Administration’s Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>.

¹⁸ *Sessions’ Letter Shows DOJ Acted on Trump’s Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

messages sent or received in that email chain, as well as any attachments to the email.

- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.¹⁹ 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, by intent or through negligence, failed to meet their obligations.²⁰
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,²¹ and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- 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 a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If

¹⁹ 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).

²⁰ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²¹ 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>.

records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. 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 your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF 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.

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, please contact Christine H. Monahan at foia@americanoversight.org or (202) 788-0606. 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