



June 22, 2017

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

Steven Goodman
Acting FOIA Liaison
National Marine Fisheries Services
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
Public Reference Facility (SOU1000)
1315 East-West Highway (SSMC3)
Room 9719
Silver Spring, MD 20910
Via FOIAOnline

Re: Freedom of Information Act Request

Dear Mr. Toland and Mr. Goodman:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and Department of Commerce implementing regulations, 15 C.F.R. Part 4, American Oversight and Environmental Working Group (EWG) make the following request for records.

News outlets have reported that Dow Chemical and two other manufacturers of certain pesticides sent letters to the heads of several Cabinet agencies—including the Department of Commerce—asking the agencies to “set aside” the results of certain government studies concerning the risks those pesticides pose to endangered species.¹ American Oversight and EWG are seeking records to reveal what other contacts industry and trade groups, as well as others with a stake in decisions affecting endangered species, may have had with agency staff in recent months.

¹ See Michael Biesecker, *AP Exclusive: Pesticide Maker Tries to Kill Risk Study*, AP, Apr. 20, 2017, <https://apnews.com/a29073ecef9b4841b2e6cca07202bb67>; Letter from Dow AgroSciences, LLC et al. to Wilbur Ross, Secretary of Commerce, Ryan Zinke, Secretary of the Interior, and Scott Pruitt, EPA Administrator (Apr. 13, 2017), <http://interactives.ap.org/2017/dow-epa/>.



Requested Records

American Oversight and EWG request that the Department of Commerce and its components the National Oceanic and Atmospheric Administration and the National Marine Fisheries Service (collectively, “Commerce”) produce the following records within twenty business days:

1. All communications between any of the following Commerce officials—(a) all political appointees and any career SES staff in the Office of the Secretary; (b) all political appointees in the National Oceanic and Atmospheric Administration; and (c) all political appointees in the National Marine Fisheries Service—and any of the following entities:
 - a. The following agricultural or trade groups with interests in pesticides (or anyone acting on their behalf):
 - i. CropLife;
 - ii. American Farm Bureau;
 - iii. American Soybean Association;
 - iv. American Sugarbeet Growers Association;
 - v. National Corn Growers Association;
 - vi. Oklahoma Farm Bureau;
 - vii. National Cotton Council;
 - viii. California Cotton Ginners and Growers Association;
 - ix. California Citrus Quality Council;
 - x. California Farm Bureau Federation;
 - xi. California Fresh Fruit Association;
 - xii. Florida Fruit and Vegetable Association;
 - xiii. Almond Alliance; or
 - xiv. Western Growers.
 - b. The following pesticide manufacturers (or anyone acting on their behalf):
 - i. Dow Chemical;
 - ii. Dow AgroSciences;
 - iii. Makhteshim Agan of North America (aka “ADAMA”); or
 - iv. FMC Corporation.
 - c. Any member of Congress or anyone acting on behalf of a member of Congress (including both personal and committee staff) regarding agricultural issues or pesticides.
 - d. The following think tanks (or anyone acting on their behalf), to the extent such communications relate to agricultural issues or pesticides:
 - i. Heritage Foundation;
 - ii. Heritage Action;
 - iii. Cato Institute; or
 - iv. Chamber of Commerce.

Please provide all responsive records from January 20, 2017, to the date the search is conducted. Please note that we do not wish to obtain copies of any news or press clippings regarding these issues that are otherwise publicly available; accordingly, you may omit press clippings from the documents provided in response to this request, unless the record includes commentary on the press coverage.

In addition to the records requested above, we also request 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 Commerce 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 and EWG seek 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 is 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; we have 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 Commerce prior FOIA practices unreasonable. **In light of the government-wide requirements to**

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)).

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 Agency (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 Commerce's archiving tools would capture that email under Capstone. Accordingly, we insist that Commerce 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. We are 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."⁵ If it is your position that any portion of the requested records is exempt from disclosure, we request 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.

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>.

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) (emphasis 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.

You should institute a preservation hold on information responsive to this request. We intend to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, Commerce 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, we welcome 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, 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, please also provide responsive material on 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 and EWG request 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.¹⁰ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹¹

Disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding of government operations or activities.”¹² There is widespread interest in how regulated industries are interacting with the agencies responsible for their field under the new administration. Recently, the EPA announced that it had denied a petition to ban the pesticide chlorpyrifos, despite concluding during the Obama administration that the pesticide could pose risks to consumers, including nervous-system birth defects.¹³ Decisions like that one

¹⁰ 15 C.F.R. § 4.11(l)(1)(i).

¹¹ 15 C.F.R. § 4.11(l)(1)(ii).

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

¹³ Environmental Protection Agency [EPA-HQ-OPP-2007-1005; FRL-9960-77], *Chlorpyrifos; Order Denying PANNA and NRDC’s Petition to Revoke Tolerances*, Mar. 29, 2017, https://www.epa.gov/sites/production/files/2017-03/documents/chlorpyrifos3b_order_denying_panna_and_nrdc27s_petition_to_revoke_tolerances.pdf; see also Eric Lipton, *E.P.A. Chief, Rejecting Agency’s Science, Chooses Not to Ban Insecticide*, N.Y. TIMES, Mar. 29, 2017, https://www.nytimes.com/2017/03/29/us/politics/epa-insecticide-chlorpyrifos.html?_r=0; Brady Dennis, *EPA Chief, Rejecting Agency’s Own Analysis, Declines to Ban Pesticide Despite Health Concerns*, WASH. POST, Mar. 29, 2017, https://www.washingtonpost.com/news/energy-environment/wp/2017/03/29/trump-epa-declines-to-ban-pesticide-that-obama-had-proposed-outlawing/?utm_term=.e5f6153a7536; Geoffrey Mohan,

raise serious questions about the motivations of top Trump administration officials. The American people deserve to know which outside individuals and groups are communicating with our nation's top regulators. This request seeks information that will shed light on which interests are shaping our environmental and agricultural policy.

This request is primarily and fundamentally for non-commercial purposes.¹⁴ 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 will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight will also make materials it gathers available on our public website and promote their availability on social media platforms, such as Facebook and Twitter.¹⁵ One example of American Oversight's demonstrated public disclosure of documents and creation of editorial content is in its recently launched "Audit the Wall" effort, 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.¹⁶

EWG's interest in the disclosure of the requested records is purely non-commercial. EWG is a 501(c)(3) non-profit public interest organization dedicated to using the power of information to protect public health and the environment. EWG will use the information gathered in furtherance of this mission. EWG has long studied the public health and environmental impacts of pesticides and other toxic chemicals, particularly with regards to children's health. As part of this work, EWG publishes reports and creates consumer-facing resources to educate the public and advocate for health-protective standards. For example, every year EWG releases its Shopper's Guide to Pesticides in Produce to educate consumers about pesticide residues found on conventional produce samples. Like American Oversight, EWG plans to use the information gathered, and its analysis of it, to educate the public through various media including reports, blogs, and press releases.

Accordingly, this request qualifies for a fee waiver.

Conclusion

We look 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 Sara Creighton at foia@americanoversight.org or (202) 869-5246. Also, if our

Trump Administration Reverses Course on Nerve-Agent Pesticide, CHICAGO TRIBUNE, Mar. 30, 2017, <http://www.chicagotribune.com/business/ct-epa-pesticide-chlorpyrifos-20170330-story.html>.

¹⁴ 15 C.F.R. § 4.11(l)(1)(ii), (3)(i)-(ii).

¹⁵ American Oversight currently has over 10,900 page likes on Facebook, and over 32,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited June 20, 2017); American Oversight (@weareoversight), TWITTER (last visited June 20, 2017).

¹⁶ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

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



Melanie Benesh
Legislative Attorney
Environmental Working Group