



July 18, 2017

**VIA ELECTRONIC MAIL**

Office of the Solicitor  
Division of Management and Administrative Legal Services  
U.S. Department of Labor  
200 Constitution Avenue NW, Room N-2420  
Washington, DC 20210  
foiarequest@dol.gov

FOIA Coordinator  
U.S. Department of Labor - OASAM  
200 Constitution Avenue NW  
Washington, DC 20210  
foiarequest@dol.gov

**Re: Freedom of Information Act Request**

Dear Freedom of Information Act Officers:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of the Department of Labor (DOL), 29 C.F.R. Part 70, American Oversight makes the following request for records.

American Oversight promotes accountability in government through transparency, informing the public's right to know what the government is up to. With scores of new individuals joining the government and with reports that outside groups are playing an outside role in policy-shaping, it is essential to understand how third-party policy-advocacy organizations are attempting to influence federal policy. Without such transparency, the public cannot have confidence that government decisions are shaped by the interests of the American people, not personal or professional allegiances.

**Requested Records**

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

1. All emails that political appointees<sup>1</sup> sent to or received<sup>2</sup> from email addresses containing @heritage.org or @heritageaction.com.

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<sup>1</sup> For purposes of this request, please understand "political appointee" to include any employee who is appointed on or after January 20, 2017 under non-career Senior Executive Service (SES), Schedule C, Schedule B, or other temporary appointment authority, including any career



2. All emails forwarding or copying records from any personal email address belonging to a political appointee reflecting communications with staff at the Heritage Foundation or Heritage Action for America.
3. All emails that political appointees sent to or received from email addresses containing @fed-soc.org.
4. All emails forwarding or copying records from any personal email address belonging to a political appointee reflecting communications with staff at the Federalist Society.
5. All emails that political appointees sent to or received from email addresses containing @aei.org.
6. All emails forwarding or copying records from any personal email address belonging to a political appointee reflecting communications with staff at the American Enterprise Institute (AEI).
7. All emails that political appointees sent to or received from email addresses containing @hoover.org.
8. All emails forwarding or copying records from any personal email address belonging to a political appointee reflecting communications with staff at the Hoover Institution.
9. All emails that political appointees sent to or received from email addresses containing @manhattan-institute.org.
10. All emails forwarding or copying records from any personal email address belonging to a political appointee reflecting communications with staff at the Manhattan Institute.
11. All emails that political appointees sent to or received from email addresses containing @lexingtoninstitute.org.
12. All emails forwarding or copying records from any personal email address belonging to a political appointee reflecting communications with staff at the Lexington Institute.
13. All emails that political appointees sent to or received from email addresses containing @uschamber.com.

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employee detailed on or after January 20, 2017 to serve in the front office of any component, or detailed on or after that date to serve in any position eligible to be filled by a non-career SES appointment.

<sup>2</sup> For purposes of this request, please understand “sent to or received from” to include emails that were sent by or received from an account by virtue of being included as a cc: or bcc:.

14. All emails forwarding or copying records from any personal email address belonging to a political appointee reflecting communications with staff at the U.S. Chamber of Commerce.
15. All emails that political appointees sent to or received from email addresses containing @cei.org.
16. All emails forwarding or copying records from any personal email address belonging to a political appointee reflecting communications with staff at the Competitive Enterprise Institute.

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

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 DOL 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 is subject to the Federal Records Act and FOIA.<sup>3</sup> **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.**<sup>4</sup>

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<sup>3</sup> 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).

<sup>4</sup> 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

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 DOL’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.<sup>5</sup> 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 DOL’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DOL 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.”<sup>6</sup> 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.”<sup>7</sup> 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.”<sup>8</sup> Further, “the withholding agency must supply ‘a relatively detailed

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[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)).

<sup>5</sup> 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>.

<sup>6</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>7</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>8</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

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.”<sup>9</sup>

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.<sup>10</sup> 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, DOL 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 DOL 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 15<sup>th</sup> Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on rolling basis.

### **Fee Waiver Request**

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 29 C.F.R. § 70.41(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.<sup>11</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>12</sup>

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 government operations.<sup>13</sup> The disclosure of the information sought under this request will

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<sup>9</sup> *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)).

<sup>10</sup> *Mead Data Central*, 566 F.2d at 261.

<sup>11</sup> 29 C.F.R. § 70.41(a)(1)(i).

<sup>12</sup> 29 C.F.R. § 70.41(a)(1)(ii).

<sup>13</sup> 29 C.F.R. § 70.41(a)(1)(i); 29 C.F.R. § 70.41(a)(2)(i)-(iv).

document and reveal the operations of the federal government, including how officials conduct the public's business.

During the presidential transition, media reports indicated that non-government policy organizations were significantly shaping the new administration's policy priorities.<sup>14</sup> Since January 20, 2017, the Trump administration has been appointing or assigning individuals to play significant roles in shaping the agenda of every federal agency, some of whom have previous employment or professional ties with these outside organizations.<sup>15</sup> Identifying how external policy advocates are shaping the work of federal employees is essential to informing the public regarding the operations and decisionmaking of the federal government, and informing the public regarding the activities of political appointees using government resources. In particular, only with clarity regarding the communications between external policy advocates and the political appointees setting the agenda and priorities of the Trump administration can the public make informed assessments regarding whether decisions might have been unduly influenced by special interests. Disclosure of the requested information will contribute to the public's understanding of these aspects of the operation of the federal government.

This request is primarily and fundamentally for non-commercial purposes.<sup>16</sup> 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 the availability on social media platforms, such as Facebook and Twitter.<sup>17</sup> 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

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<sup>14</sup> Katie Glueck, *Trump's Shadow Transition Team*, POLITICO (Nov. 22, 2016, 5:01 AM), <http://www.politico.com/story/2016/11/trump-transition-heritage-foundation-231722> ("Now, the Heritage Foundation has emerged as one of the most influential forces shaping President-elect Donald Trump's transition team, embedding the veteran Washington group into the operation of a candidate who ran loudly against the Beltway."); John Fund, *Why Conservatives Are (Mostly) Cheering the Trump Transition*, NATIONAL REVIEW, Dec. 4, 2016, <http://www.nationalreview.com/article/442747/trump-transition-cheers-conservatives-right-wing-think-tanks>.

<sup>15</sup> See *FOIA Response: Department of Labor Appointees and Resumes*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/foia-response-department-labor-appointees-resumes>.

<sup>16</sup> 29 C.F.R. § 70.41(a)(1)(ii); 29 C.F.R. § 70.41(a)(3)(i)-(ii).

<sup>17</sup> American Oversight currently has approximately 11,100 page likes on Facebook, and 33,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited July 18, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 18, 2017).

website<sup>18</sup> and published an analysis of what the records reflected about DOJ's process for ethics waivers.<sup>19</sup> Additionally, 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.<sup>20</sup>

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 DOL 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 Cerissa Cafasso at [foia@americanoversight.org](mailto:foia@americanoversight.org) or (202) 869-5246. 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

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<sup>18</sup> *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

<sup>19</sup> *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

<sup>20</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).