



March 27, 2018

VIA ELECTRONIC MAIL

Kathy Ray
U.S. Department of Transportation
1200 New Jersey Avenue SE
W94-122
Washington, DC 20590
ost.foia@dot.gov

Re: Expedited Freedom of Information Act Request

Dear Ms. Ray:

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.

President Trump and multiple members of his Cabinet, including DOT Secretary Elaine Chao, have consistently stated that passing the president's infrastructure plan is a high legislative priority for the administration.¹ And the administration has made clear that President Trump plans to travel around the country campaigning for passage of the infrastructure plan in advance of this fall's congressional elections.² The administration's infrastructure plan—which it labels a “Legislative Outline”—seeks a broad array of statutory changes and commits the administration to “working with the Congress” to implement the plan.³ Among the proposed changes in the administration's plan are dramatic changes to the National Environmental Policy Act (NEPA).⁴ NEPA affects agency actions with potential environmental impacts across the federal government, and is

¹ See e.g., Brian Naylor, *5 Cabinet Secretaries Push Trump Infrastructure Plan Before Congress*, NPR (Mar. 14, 2018, 5:37 PM), <https://www.npr.org/2018/03/14/593590830/5-cabinet-secretaries-push-trump-infrastructure-plan-before-congress>; Mallory Shelbourne, *Trump: Dems Blocking Infrastructure to Prevent Me from Having a Win*, THE HILL (Mar. 7, 2018, 1:19 PM), <http://thehill.com/policy/transportation/infrastructure/377202-trump-dems-stopping-infrastructure-bill-to-prevent-me>.

² Mark Niquette & Yueqi Yang, *Trump to Promote Public Works Plan as Lawmakers Seek Funding*, BLOOMBERG (Mar. 14, 2018, 2:51 PM), <https://www.bloomberg.com/news/articles/2018-03-14/trump-to-promote-infrastructure-plan-as-lawmakers-seek-funding>.

³ THE WHITE HOUSE, LEGISLATIVE OUTLINE FOR REBUILDING INFRASTRUCTURE IN AMERICA, <https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf>.

⁴ *Id.* at 35–40.



particularly important in assessing the environmental impacts of large transportation projects.⁵ The administration's plan specifically targets transportation planning and highway projects.⁶

American Oversight seeks records to determine what efforts the administration is making to implement this legislative priority which President Trump has determined to make an important issue for the 2018 congressional elections.

Requested Records

American Oversight requests that DOT produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

1. All records reflecting communications (including but not limited to emails, email attachments, text messages, chat or Slack messages, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, fact sheets, statements of principles, interim or final policy, legislative proposals, any handwritten or electronic notes taken during any responsive communications, summaries of any responsive communications, or other materials) between (a) DOT and (b) any member of Congress or congressional staff (senate.gov or house.gov), regarding reform or repeal of the National Environmental Policy Act (NEPA) or implementation of a "One Agency, One Decision" approach to environmental review.
2. All records reflecting communications (including but not limited to emails, email attachments, text messages, chat or Slack messages, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, fact sheets, statements of principles, interim or final policy, legislative proposals, any handwritten or electronic notes taken during any responsive communications, summaries of any responsive communications, or other materials) between (a) DOT and (b) any employee of the Executive Office of the President (eop.gov), and regarding reform or repeal of the National Environmental Policy Act (NEPA) or implementation of a "One Agency, One Decision" approach to environmental review.

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

DOT is in the best position to determine the DOT components and offices that have records responsive to this request. However, public reporting indicates that, at a minimum, (a) the Office of the Secretary, (b) the Office of the Deputy Secretary, and (c) the Office of the Assistant Secretary for Governmental Affairs likely possess responsive records.

⁵ See, e.g., Kevin DeGood, Center for American Progress, **THE BENEFITS OF NEPA: HOW ENVIRONMENTAL REVIEW EMPOWERS COMMUNITIES AND PRODUCES BETTER PROJECTS** (Jan. 16, 2018), <https://cdn.americanprogress.org/content/uploads/2018/01/12090301/BenefitsNEPA-brief-3.pdf>.

⁶ THE WHITE HOUSE, *supra* note 3 at 38–39.

American Oversight therefore requests that DOT search those offices and any other components or offices that DOT determines are likely to contain responsive 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 DOT 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.⁷ **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.**⁸

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 DOT’s prior FOIA practices unreasonable. **In light of the government-wide requirements to manage**

⁷ 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).

⁸ 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)).

information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.⁹ 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 DOT's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DOT 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.”¹⁰ 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.”¹¹ 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.”¹² 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.’”¹³

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.¹⁴ Claims of nonsegregability must be made with the same degree of detail as required

⁹ 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>.

¹⁰ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹¹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹² *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹³ *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)).

¹⁴ *Mead Data Central*, 566 F.2d at 261.

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, DOT 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 DOT 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

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 49 C.F.R. §§ 7.42(i), 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.¹⁵ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁶

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 and activities.¹⁷ The requested records are correspondence between DOT and Congress and the Executive Office of the President regarding the administration's highest legislative priority in advance of the 2018 congressional elections.¹⁸ Records related to DOT's efforts to engage with Congress and other parts of the administration on an important legislative priority clearly "concern[] the operations or activities of the Federal Government,"¹⁹ and will assist the public in understanding whether the administration is acting in accordance with its public representations about its infrastructure priorities.²⁰ The American people deserve to know how the administration is working to enact legislation that it claims is important to upcoming elections. As

¹⁵ 49 C.F.R. § 7.43(c).

¹⁶ *Id.*

¹⁷ 49 C.F.R. § 7.43(c)(1)-(4).

¹⁸ *See Shelbourne, supra* note 1.

¹⁹ 49 C.F.R. § 7.43(c)(1).

²⁰ *See* 49 C.F.R. § 7.43(c)(2).

discussed below, American Oversight has both the ability and the intention to effectively convey the information it receives to the public, and disclosure of the requested records to American Oversight will result in a “significant” “contribution to public understanding of Federal Government operations or activities.”²¹

This request is primarily and fundamentally for non-commercial purposes.²² 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.²³ 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 website²⁴ and published an analysis of what the records reflected about DOJ’s process for ethics waivers.²⁵ 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.²⁶

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E) and 49 C.F.R. § 7.31(c)(1)(ii), American Oversight requests that DOT expedite the processing of this request.

²¹ 49 C.F.R. § 7.43(c)(4).

²² 49 C.F.R. § 7.43(c)(5).

²³ American Oversight currently has approximately 11,900 page likes on Facebook and 41,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Mar. 26, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Mar. 26, 2018).

²⁴ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²⁵ *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>.

²⁶ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

I certify to be true and correct to the best of my knowledge and belief, that there is an urgent need to inform the public about the federal government activity that is the subject of this request.²⁷ The information American Oversight seeks concerns “a matter of a current exigency to the American public.”²⁸ President Trump’s recently released infrastructure plan is the administration’s highest legislative priority, and the president plans to tie campaigning for passage of the plan to the fast-approaching 2018 congressional elections.²⁹ The American public will, consequently, be making electoral decisions based on President Trump’s representations about his administration’s infrastructure plan and the administration’s efforts to engage Congress to enact the plan. Courts have, further, recognized that there is an urgent need for disclosure of records to the public when those records are related to, and may influence, an ongoing legislative debate.³⁰

I further certify that American Oversight is primarily engaged in disseminating information to the public. 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. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,³¹ American Oversight “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.”³² American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and 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.³³ American Oversight has demonstrated its

²⁷ See, e.g., The Associated Press, *Trump to Promote Infrastructure Plan in Ohio Next Week*, N.Y. TIMES (Mar. 23, 2018, 6:47 PM), <https://www.nytimes.com/aponline/2018/03/23/us/politics/ap-us-trump-ohio-.html>; Silvia Amaro, *Trump Urged to Push Ahead with Trillion-Dollar Infrastructure Plans by Global Finance Execs*, CNBC (Mar. 23, 6:37 AM), <https://www.cnbc.com/2018/03/23/trump-urged-to-push-ahead-with-trillion-dollar-infrastructure-plans-by-global-finance-execs.html>; Patricia Cohen & Alan Rappeport, *Trump’s Infrastructure Plan Puts Burden on State and Private Money*, N.Y. TIMES, Feb. 12, 2018, <https://www.nytimes.com/2018/02/12/business/trump-infrastructure-proposal.html>; Brianna Gurciullo, *Congress Punctures Trump’s Infrastructure and Aviation Plans, in One Day*, POLITICO (Feb. 27, 2018, 7:41 PM), <https://www.politico.com/story/2018/02/27/cornyn-trump-infrastructure-might-not-happen-2018-430097>.

²⁸ *Al-Fayed v. Cent. Intelligence Agency*, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795, at 26 (1996), reprinted in 1996 U.S.C.C.A.N. 3448, 3469).

²⁹ See Naylor *supra* note 1; Shelbourne, *supra* note 1.

³⁰ See *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005).

³¹ See *ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 30–31 (D.D.C. 2004); *EPIC v. Dep’t of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

³² *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

³³ American Oversight currently has approximately 11,900 page likes on Facebook and 41,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Mar. 26, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Mar. 26, 2018).

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 website³⁴ and published an analysis of what the records reflected about DOJ's process for ethics waivers.³⁵ 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.³⁶

Accordingly, American Oversight's request satisfies the criteria for expedition.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with DOT 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 Dan McGrath at foia@americanoversight.org or 202.897.4213. 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,

A handwritten signature in blue ink that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal line extending to the left.

Austin R. Evers
Executive Director
American Oversight

³⁴ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

³⁵ *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>.

³⁶ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.