



May 11, 2017

VIA ONLINE PORTAL

Managing Director  
Attn: FOIA Request  
Federal Communications Commission  
445 12<sup>th</sup> Street SW, Room 1-A836  
Washington, DC 20554  
Online Request via FOIAonline

**Re: Expedited Freedom of Information Act Request**

Dear Freedom of Information Act Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and Federal Communications Commission (FCC) implementing regulations, 47 C.F.R. Part 0, American Oversight makes the following request for records.

Shortly after taking office, President Donald J. Trump elevated Commissioner Ajit Pai to the post of Chairman of the FCC.<sup>1</sup> Since that time, Mr. Pai has initiated an aggressive agenda, withdrawing or rolling back regulatory actions taken by the FCC during the previous administration, including suspending net neutrality transparency requirements for broadband providers with fewer than 250,000 customers<sup>2</sup> and closing an investigation into discriminatory practices by AT&T and Verizon, among other things.<sup>3</sup> On April 26, Mr. Pai gave a speech outlining his plans to further

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<sup>1</sup> See Ted Johnson, *President Trump Elevates Ajit Pai to FCC Chair*, VARIETY (Jan. 23, 2017, 2:59 PM), <http://variety.com/2017/biz/news/ajit-pai-fcc-donald-trump-2-1201967364/>.

<sup>2</sup> Marguerite Reardon, *FCC Chips Away at Net Neutrality Rules*, CNET (Feb. 23, 2017, 12:54 PM), <https://www.cnet.com/news/fcc-net-neutrality-ajit-pai-republican-transparency-rule/>.

<sup>3</sup> Marguerite Reardon, *AT&T, Verizon Catch a Break Under Trump FCC*, CNET (Feb. 3, 2017, 2:32 PM), <https://www.cnet.com/news/trumps-fcc-net-neutrality-at-t-and-verizon-zero-rating-inquiry-pai/>; see also Cecilia King, *Ajit Pai, F.C.C. Chairman, Moves to Roll Back Telecom Rules*, N.Y. TIMES, Apr. 19, 2017, [https://www.nytimes.com/2017/04/19/technology/ajit-pai-fcc-telecom-deregulation.html?\\_r=0](https://www.nytimes.com/2017/04/19/technology/ajit-pai-fcc-telecom-deregulation.html?_r=0); Tony Romm, *FCC Chairman Ajit Pai Is Expected to Unveil New Net Neutrality Plan on Wednesday*, RECODE (Apr. 24, 2017, 4:07 PM), <https://www.recode.net/2017/4/24/15412650/fcc-chairman-ajit-pai-new-net-neutrality-plans>; Margaret Harding McGill, *FCC Chief to Launch Net Neutrality Rewrite This Week, Sources Say*, POLITICO (Apr. 24, 2017, 6:22 PM), <http://www.politico.com/story/2017/04/24/net-neutrality-fcc-237543>; Jacob Kastrenakes, *FCC Chief Ajit Pai Really Sounds Like He Plans to End Title II Net Neutrality*, THE VERGE (Apr. 4, 2017, 2:28 PM), <http://www.theverge.com/2017/4/4/15177970/ajit-pai-keeps-hinting-at-title-ii-net-neutrality-reversal>; Jeff John Roberts, *FCC Chair Takes New Swipe at Net Neutrality Rules*, FORTUNE, Apr. 5, 2017, <http://fortune.com/2017/04/05/fcc-ajit-pai-net-neutrality/>.



alter the net neutrality rules established by the FCC during the prior administration,<sup>4</sup> and he has already begun implementing those plans.<sup>5</sup>

Earlier, on March 6, 2017, it was reported that Chairman Pai met with President Trump in the Oval Office.<sup>6</sup> In years past, Republicans in Congress expressed concern about whether President Barack Obama had inappropriately influenced the policymaking process at the FCC.<sup>7</sup> Under the same reasoning, it is important for the public to understand how, if at all, the White House may have attempted to influence the policies of the purportedly independent FCC.

### **Requested Records**

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

- (1) All communications or records reflecting communications (including correspondence, emails, telephone call logs, calendar entries, meeting agendas, or any other records reflecting communications) between employees in the office of Chairman Ajit Pai (including Chairman Pai) and members of the Trump transition team or employees of the Trump White House, including but not limited to technology advisors Mark Woolway, Kevin Harrington, Reed Cordish, Peter Thiel, Michael Kratsios, Matt Lira, and Grace Koah.

Please provide all responsive records from November 8, 2016, through the date the search is conducted.

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<sup>4</sup> Todd Shields, *FCC Chief Sets Up Telecom Clash with Call to End Net Neutrality*, BLOOMBERG TECHNOLOGY (Apr. 26, 2017, 1:28 PM), <https://www.bloomberg.com/news/articles/2017-04-26/fcc-chief-calls-for-net-neutrality-rollback-setting-off-clash>.

<sup>5</sup> See Notice of Proposed Rulemaking, *Restoring Internet Freedom*, (proposed Apr. 27, 2017), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344614A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344614A1.pdf).

<sup>6</sup> John Eggerton, *Updated: Trump Meets with FCC's Pai in Oval Office*, BROADCASTING & CABLE (Mar. 6, 2017, 8:58 AM), <http://www.broadcastingcable.com/news/washington/updated-trump-meets-fccs-pai-oval-office/163810>; Ted Johnson, *President Trump Meets with FCC Chairman Ajit Pai*, VARIETY (Mar. 6, 2017, 2:21 PM), <http://variety.com/2017/biz/news/trump-fcc-chairman-meeting-1202002998/>.

<sup>7</sup> See Mario Trujillo, *GOP Watchdogs Smell 'Smoke' with FCC Probe*, THE HILL (Feb. 15, 2015, 8:00 AM), <http://thehill.com/policy/technology/232836-gop-watchdogs-smell-smoke-with-fcc-probe>; Gautham Nagesh & Brody Mullins, *Net Neutrality: How White House Thwarted FCC Chief*, WALL ST. J., Feb. 4, 2015, <https://www.wsj.com/articles/how-white-house-thwarted-fcc-chief-on-internet-rules-1423097522>; Letter from Jason Chaffetz, Chairman, House Committee on Oversight and Government Reform, to Tom Wheeler, Chairman, Federal Communications Commission (Feb. 6, 2015), <https://oversight.house.gov/wp-content/uploads/2015/05/2015-02-06-JEC-to-Wheeler-FCC-open-internet.pdf>.

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 the FCC 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>8</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>9</sup>

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 the FCC’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**

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<sup>8</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>9</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 [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)).

custodian-driven searches.<sup>10</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 the FCC's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that the FCC 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>11</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>12</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>13</sup> 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.’”<sup>14</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>15</sup> Claims of nonsegregability must be made with the same degree of detail as required

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<sup>10</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>11</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>12</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>13</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>14</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>15</sup> *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, the FCC 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 the FCC 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 47 C.F.R. § 0.470(e)(1), 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 the operations or activities of the government.”<sup>16</sup> As discussed above, FCC Chairman Ajit Pai has made news over his plans to roll back the net neutrality provisions put in place by the FCC during the prior administration, and has begun implementing those plans.<sup>17</sup> And it has been widely reported that he met with President Trump on at least one occasion.<sup>18</sup> This request seeks to gain insight into the participants and contents of those and other meetings, so that the public can better understand whether and how the White House has been influencing a supposedly “independent” agency.

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<sup>16</sup> 47 C.F.R. § 0.470(e)(2)(i)-(iii).

<sup>17</sup> Reardon, *supra* note 2; King, *supra* note 3; Kastrenakes, *supra* note 3; Roberts, *supra* note 3; Romm, *supra* note 3; McGill, *supra* note 3; Shields, *supra* note 4; *see also* Notice of Proposed Rulemaking, *Restoring Internet Freedom*, (proposed Apr. 27, 2017), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344614A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344614A1.pdf).

<sup>18</sup> *See supra* note 6.

This request is primarily and fundamentally not for commercial purposes.<sup>19</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 commercial 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 its website and promote their availability on social media platforms, such as Facebook and Twitter.<sup>20</sup> 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.<sup>21</sup>

Accordingly, American Oversight qualifies for a fee waiver.

### **Application for Expedited Processing**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(i) and 47 C.F.R. § 0.461(h)(3)(ii), American Oversight requests that the FCC expedite the processing of this request.

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. Mr. Pai recently gave a speech outlining his plans to roll back the net neutrality provisions put in place under by the FCC during the prior administration.<sup>22</sup> On April 27, 2017, the FCC took steps to begin implementing those plans by issuing a Notice of Proposed Rulemaking designed to reverse the FCC's 2015 decision to subject ISPs to Title II utility-style regulations.<sup>23</sup> The Commission is planning to discuss that proposed rulemaking in its May Open Meeting on May 18, 2017,<sup>24</sup> and has sought comments by July 17, 2017.<sup>25</sup> In order for the public to be able to meaningfully participate

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<sup>19</sup> 47 C.F.R. § 0.470(e)(3)(i)-(ii).

<sup>20</sup> American Oversight currently has over 10,800 page likes on Facebook, and over 32,300 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 11, 2017); American Oversight (@weareoversight), TWITTER (last visited May 11, 2017).

<sup>21</sup> *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.auditthewall.org/>.

<sup>22</sup> Shields, *supra* note 4; see also Reardon, *supra* note 2; King, *supra* note 3; Kastrenakes, *supra* note 3; Roberts, *supra* note 3; Romm, *supra* note 3; McGill, *supra* note 3.

<sup>23</sup> See Notice of Proposed Rulemaking, *Restoring Internet Freedom*, (proposed Apr. 27, 2017), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344614A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344614A1.pdf).

<sup>24</sup> Press Release, *FCC Announces Tentative Agenda for May Open Meeting* (Apr. 27, 2017), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344615A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344615A1.pdf).

<sup>25</sup> See Notice of Proposed Rulemaking, *Restoring Internet Freedom*, (proposed Apr. 27, 2017), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344614A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344614A1.pdf).

in this or any subsequent regulations Mr. Pai may propose within the time provided for public comment, it is imperative that the public understand what motivated the FCC to take those steps.

Moreover, Mr. Pai has been nominated for a second term as an FCC Commissioner, which will require Senate confirmation.<sup>26</sup> The public needs information about Mr. Pai's activities during his first few months as Chairman in order to evaluate whether he is truly "independent" of President Trump and contact their Senators with their support for, or opposition to, his nomination prior to his confirmation hearings.

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,<sup>27</sup> 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."<sup>28</sup> American Oversight will use the information gathered, and its analysis of it, to educate the public through reports, press releases, and other media. American Oversight will also make materials it gathers available on its website and promote their availability on social media platforms, such as Facebook and Twitter.<sup>29</sup> 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.<sup>30</sup>

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 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,

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<sup>26</sup> Todd Shields, *Trump Renominates Net Neutrality Foe Ajit Pai to FCC, Source Says*, BLOOMBERG POLITICS (Mar. 7, 2017, 2:25 PM), <https://www.bloomberg.com/politics/articles/2017-03-07/net-neutrality-foe-ajit-pai-said-renominated-by-trump-to-fcc>.

<sup>27</sup> 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).

<sup>28</sup> *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

<sup>29</sup> American Oversight currently has over 10,800 page likes on Facebook, and over 32,300 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 11, 2017); American Oversight (@weareoversight), TWITTER (last visited May 11, 2017).

<sup>30</sup> *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.auditthewall.org/>.

please contact Sara Creighton 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,

A handwritten signature in blue ink, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers  
Executive Director  
American Oversight