



July 7, 2017

VIA ONLINE PORTAL

Managing Director
Attn: FOIA Request
Federal Communications Commission
445 12th 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.

On April 27, 2017, the FCC made publicly available a final draft of a Notice of Proposed Rulemaking reflecting the agency's intention to reverse course on net neutrality.¹ On May 7, 2017, after comedian John Oliver encouraged his viewers to comment on the proposed rule, there were reports that the FCC's Electronic Comment Filing System (ECFS) experienced intermittent loss of connectivity.² The next day, the FCC claimed that it had experienced "multiple distributed denial-of-service attacks (DDoS)."³ The FCC website experienced similar connectivity issues during the

¹ See FCC, *Fact Sheet: Restoring Internet Freedom; Notice of Proposed Rulemaking – WC Docket No. 17-108* (Apr. 27, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344614A1.pdf. The FCC subsequently considered the proposed rule at its May 2017 open meeting and finalized the proposed rulemaking. See *In the Matter of Restoring Internet Freedom*, FCC 17-60, WC Docket No. 17-108 (May 18, 2017), https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-60A1.pdf; *Restoring Internet Freedom*, 82 Fed. Reg. 25,568 (proposed June 2, 2017) (to be codified at 47 C.F.R. pts. 8 and 20), <https://www.gpo.gov/fdsys/pkg/FR-2017-06-02/pdf/2017-11455.pdf>.

² See, e.g., Ali Breland, *FCC Site Crashes After John Oliver Segment*, THE HILL (May 8, 2017, 9:42 AM), <http://thehill.com/policy/technology/332342-john-oliver-roasts-the-fccs-plan-to-curb-net-neutrality>.

³ Press Release, FCC CIO Statement On Distributed Denial-Of-Service Attacks On FCC Electronic Comment Filing System (May 8, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344764A1.pdf; Hayley Tsukayama, *The FCC Says an Attack—Not John Oliver—Hampered Its Website*, WASH. POST, May 9, 2017, https://www.washingtonpost.com/news/the-switch/wp/2017/05/08/the-fcc-says-an-attack-not-john-oliver-hampered-its-website/?utm_term=.ecedf0ff7f06.



comment period that led to the current net neutrality rules in 2014.⁴ A recent letter from Congress to the FCC outlined several additional technological and cybersecurity concerns with the commenting process for this proposed rule.⁵

These technical issues raise two concerning possibilities: first, that the FCC is in fact falling victim to cyberattacks, or second, that the FCC's online commenting system is simply incapable of handling the volume of comments it is receiving on this issue. Either way the result is the same: people who want to weigh in and comment on the proposed rule may be unable to do so.

American Oversight seeks to understand what steps the FCC has taken to address cybersecurity issues and ensure that its online commenting system is capable of handling the full volume of public comments on the proposed rollback of net neutrality rules.

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 memoranda, reports, or other communications describing the FCC's response to problems with accessing or submitting comments on the Electronic Comment Filing System (ECFS) that occurred in June 2014 regarding GN Docket No. 14-28, "Protecting and Promoting the Open Internet" (hereinafter the "June 2014 incident"). This request excludes public speeches, public testimony, or public reports.
- (2) All memoranda, reports, or other communications addressing any testing conducted on the ECFS since the June 2014 incident, including the results of any such testing and any modifications made to the system based on the results of that testing. This request excludes public speeches, public testimony, or public reports.
- (3) All memoranda, reports, or other communications addressing the capacity of the ECFS to receive comments, including any warnings or concerns about whether the system could handle a high volume of comments. This request excludes public speeches, public testimony, or public reports.

⁴ Amanda Holpuch, *John Oliver's Cheeky Net Neutrality Plea Crashes FCC Website*, THE GUARDIAN, June 3, 2014, <https://www.theguardian.com/technology/2014/jun/03/john-oliver-fcc-website-net-neutrality>; Jim Puzzanghera, *Surge in Net-Neutrality Comments Crashes FCC Site; Deadline Extended*, L.A. TIMES, July 15, 2014, <http://www.latimes.com/business/technology/la-fi-tt-fcc-website-net-neutrality-20140715-story.html>.

⁵ Letter from Frank Pallone, Ranking Member, Committee on Energy and Commerce et al., to Ajit Pai, Chairman, Federal Communications Commission, et al. (June 26, 2017), https://democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/FCC.Chairman.Commissioners.2017.06.26.%20Letter%20to%20FCC%20re%20cybersecurity%20preparadness%20and%20public%20comments.CAT_.OI%5B1%5D.pdf.

- (4) All memoranda, reports, or other communications describing the FCC’s response to problems with accessing the ECFS or submitting or retaining comments on that system in 2017 regarding WC Docket No. 17-108, “Restoring Internet Freedom.” This request excludes public speeches, public testimony, or public reports.

The search for records responsive to these requests should include all individuals and locations likely to contain responsive records, including but not limited to the Office of the Managing Director, the Information Technology Office, and the Chief Information Officer.

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.⁶ **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.**⁷

⁶ 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).

⁷ 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

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 custodian-driven searches.**⁸ 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.”⁹ 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.”¹⁰ 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.”¹¹ 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.’”¹²

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)).

⁸ 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>.

⁹ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹⁰ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹¹ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹² *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)).

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.¹³ 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, 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 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 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.”¹⁴ The subject of the current request relates directly to the functioning of the FCC’s system for receiving comments as part of its notice-and-comment rulemaking procedure. There has been significant public interest in FCC Chairman Ajit Pai’s plans to roll back the net neutrality provisions put in place by the FCC during the prior administration.¹⁵

¹³ *Mead Data Central*, 566 F.2d at 261.

¹⁴ 47 C.F.R. § 0.470(e)(2)(i)-(iii).

¹⁵ 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/>; Cecilia King, *Ajit Pai, F.C.C. Chairman, Moves to Roll Back Telecom Rules*, N.Y. TIMES, Apr. 19, 2017,

Indeed, the recent proposed rulemaking has received millions of public comments.¹⁶ It is undoubtedly in the public interest to shed light on whether the FCC anticipated the technical issues with its online commenting system, and what steps—if any—the agency took to prevent such issues and quickly remedy them once they happened.

This request is primarily and fundamentally for non-commercial purposes.¹⁷ 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.¹⁸ 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,¹⁹ American Oversight promptly posted the records to its website and

<https://www.nytimes.com/2017/04/19/technology/ajit-pai-fcc-telecom-deregulation.html>; 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/>; 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>.

¹⁶ Docket 17-108, FEDERAL COMMUNICATIONS COMMISSION https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-108&sort=date_disseminated,DESC (last visited July 7, 2017) (showing 5,142,085 filings); see also Seung Lee, *Tech Companies to Join “Day of Action” Protest to Protect Net Neutrality*, THE MERCURY NEWS (July 6, 2017, 2:27 PM), <http://www.mercurynews.com/2017/07/06/tech-companies-to-join-day-of-action-protest-to-protect-net-neutrality/> (over 5 million comments received).

¹⁷ 45 C.F.R. § 5.54(b)(3).

¹⁸ American Oversight currently has over 11,000 page likes on Facebook, and over 32,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited July 6, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight>, (last visited July 6, 2017).

¹⁹ *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

published an analysis of what the records reflected about DOJ's process for ethics waivers.²⁰ As another example, American Oversight's 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.²¹

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) 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. As noted above, there has been significant public interest in the FCC's proposal to roll back net neutrality rules,²² and the recent proposed rulemaking has received millions of public comments.²³ Moreover, the comment period on the proposed rule rolling back net neutrality rules is set to close on August 16, 2017.²⁴ The public needs to understand how the FCC is addressing the serious concerns about the technological capabilities and potential cybersecurity issues with its online commenting system before the window to address those concerns has closed.

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,²⁵ 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."²⁶ American Oversight uses the information it gathers, 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 website and promotes their availability on social media

²⁰ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

²¹ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

²² See *supra* note 15.

²³ See *supra* note 16.

²⁴ See *In the Matter of Restoring Internet Freedom*, FCC 17-60, WC Docket No. 17-108 (May 18, 2017), https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-60A1.pdf; *Restoring Internet Freedom*, 82 Fed. Reg. 25,568 (proposed June 2, 2017) (to be codified at 47 C.F.R. pts. 8 and 20), <https://www.gpo.gov/fdsys/pkg/FR-2017-06-02/pdf/2017-11455.pdf>.

²⁵ 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).

²⁶ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

platforms, such as Facebook and Twitter.²⁷ 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,²⁸ American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.²⁹ As another example, 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.³⁰

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, please contact Sara Creighton at 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

²⁷ American Oversight currently has over 11,000 page likes on Facebook, and over 32,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited July 6, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight>, (last visited July 6, 2017).

²⁸ *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

²⁹ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

³⁰ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.