



May 11, 2018

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: Freedom of Information Act Request

Dear Freedom of Information Act Officer:

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

Recent reports have revealed that foreign and domestic corporations paid President Trump's personal attorney Michael Cohen millions of dollars for consultations following the president's election.¹ These corporations appear to have hired Mr. Cohen—a personal injury lawyer and owner of a taxi business—to gain access to, or information about, the current administration.² AT&T, a corporation with a myriad of regulatory interests before the FCC including net neutrality regulations, was among the corporations that hired Mr. Cohen through his company, Essential Consultants LLC, to advise the corporation on FCC regulation.³ Given Mr. Cohen's lack of relevant experience with FCC matters, this arrangement strongly suggests that Mr. Cohen was hired to provide information about, or access to, FCC regulators by virtue of his relationship with the president.

¹ See, e.g., Mike McIntire et al., *How Michael Cohen, Denied Job in White House, Was Seen as Its Gatekeeper*, N.Y. TIMES, May 9, 2018, <https://www.nytimes.com/2018/05/09/us/politics/michael-cohen-shell-company.html>; Shawn Boburg & Aaron C. Davis, *South Korean Firm Paid Michael Cohen \$150,000 as It Sought Contract from U.S. Government*, WASH. POST (May 9, 2018, 9:40 PM), https://www.washingtonpost.com/investigations/south-korean-firm-paid-michael-cohen-150000-as-it-sought-contract-from-us-government/2018/05/09/0ae31788-53b7-11e8-abd8-265bd07a9859_story.html?utm_term=.c32426d0e277.

² McIntire, *supra* note 1.

³ Hadas Gold, *AT&T Confirms It Paid Michael Cohen for Consulting on Time Warner Deal*, CNN (May 10, 2018, 9:11 PM), <http://money.cnn.com/2018/05/10/media/att-michael-cohen/index.html>.



Alarming, FCC Chairman Ajit Pai had a private dinner⁴ with the AT&T executive—Bob Quinn—who hired Mr. Cohen⁵ shortly before President Trump re-nominated Chairman Pai for another term at the FCC.⁶ While Chairman Pai has tersely denied that Michael Cohen made any inquiries regarding the FCC’s net neutrality policies,⁷ his private dinner with an individual who hired the president’s personal lawyer suggests that corporations may have improperly influenced FCC policy.

American Oversight seeks records with the potential to shed light on the substance of the private dinner Chairman Pai shared with AT&T executives and to show whether FCC was subject to improper influence as a result of Mr. Cohen’s arrangement with AT&T.

Requested Records

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

All briefing memoranda, briefing books, “trip books” or other materials prepared for Chairman Ajit Pai for his February 2017 trip to Barcelona, Spain.

Please provide all responsive records from January 1, 2017 to March 1, 2017.

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

⁴ *FCC Calendars and Communications With ISPs Regarding Net Neutrality*, AMERICAN OVERSIGHT (Aug. 29, 2017), <https://www.americanoversight.org/document/fcc-calendars-communications-isps-regarding-net-neutrality>.

⁵ Dan Mangan, *AT&T CEO Says Hiring Trump Lawyer Michael Cohen Was a ‘Big Mistake’*, CNBC (May 11, 2018), <https://www.cnbc.com/2018/05/11/att-ceo-says-hiring-trump-lawyer-michael-cohen-was-a-big-mistake-reuters.html>.

⁶ Ted Johnson, *President Trump Renominates Ajit Pai for New FCC Term*, VARIETY (Mar. 7, 2017, 12:38 PM), <https://variety.com/2017/biz/news/ajit-pai-donald-trump-fcc-1202003785/>.

⁷ Todd Shields, *‘No’ Cohen Inquiries on Net Neutrality on AT&T’s Behalf, FCC Chairman Says*, BLOOMBERG (May 10, 2018, 1:07 PM), <https://www.bloomberg.com/news/articles/2018-05-10/-no-cohen-inquiries-to-fcc-on-net-neutrality-on-at-t-s-behalf>.

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.⁸ **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.**⁹

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.**¹⁰ 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.**

⁸ 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).

⁹ 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)).

¹⁰ 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>.

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.”¹¹ 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.”¹² 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.”¹³ 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.’”¹⁴

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.¹⁵ 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 a rolling basis.

¹¹ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

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

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

¹⁴ *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)).

¹⁵ *Mead Data Central*, 566 F.2d at 261.

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 as it is likely to contribute significantly to public understanding of the operations or activities of the government.¹⁶ The subject of this request relates to a meeting between the Chairman of the FCC and executives of one of the largest corporations subject to FCC's regulatory authority, AT&T.¹⁷ AT&T has important regulatory interests before the FCC, including net neutrality regulation and the Time Warner merger.¹⁸ And, FCC Chairman Pai has made regulatory decisions favorable to AT&T following the private dinner that is the primary subject of this request.¹⁹ In light of recent revelations that Mr. Cohen was hired by corporate interests for apparent access to or inside information about the administration, there is significant public interest in AT&T's interactions with the FCC, evidenced by extensive media coverage of AT&T's decision to hire Mr. Cohen.²⁰ The public deserves to know whether AT&T has had an improper influence on FCC policy. And, as described below, American Oversight has the intent and capability to broadly disseminate information gained from the requested records to the public.

This request is primarily and fundamentally for non-commercial purposes.²¹ 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

¹⁶ See 47 C.F.R. § 0.470(e)(2)(i)-(iii).

¹⁷ See *supra* note 4.

¹⁸ See Jon Brodtkin, *FCC Helps AT&T and Time Warner Avoid Lengthy Merger Review*, ARS TECHNICA (Apr. 18, 2017, 11:45 AM), <https://arstechnica.com/tech-policy/2017/04/atttime-warner-merger-is-one-step-closer-to-government-approval/>; Brian Fung, *AT&T May Be Violating Net Neutrality with This Program, the FCC Says*, WASH. POST, Jan. 11, 2017, https://www.washingtonpost.com/news/the-switch/wp/2017/01/11/atts-sponsored-data-program-may-violate-net-neutrality-the-fcc-says/?utm_term=.ae00ee538ffc.

¹⁹ See Brodtkin, *supra* note 21.

²⁰ See, e.g., Gold *supra* note 3; Mangan *supra* note 5; Emily Stewart, *AT&T's and Novartis's Payments to Michael Cohen Are Definitely Sketchy But Maybe Not Illegal*, VOX (May 11, 2018, 11:19 AM), <https://www.vox.com/policy-and-politics/2018/5/9/17336856/michael-cohen-novartis-att-shell-company>.

²¹ See 47 C.F.R. § 0.470(e)(3)(i)-(ii).

promotes their availability on social media platforms, such as Facebook and Twitter.²² 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,²³ 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.²⁴ 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.²⁵

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 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 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,



Austin R. Evers
Executive Director
American Oversight

²² American Oversight currently has approximately 11,800 page likes on Facebook and 41,900 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 11, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight>, (last visited May 11, 2018).

²³ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²⁴ *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>.

²⁵ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.