



March 22, 2017

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OSD/JS FOIA Requester Service Center  
Chief, Ms. Stephanie Carr  
Office of Freedom of Information  
U.S. Department of Defense  
1155 Defense Pentagon  
Washington, DC 20301-1155  
Via Online Portal

U.S. Department of Education  
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U.S. Department of Energy  
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Washington, DC 20585  
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Records, FOIA, and Privacy Branch  
Office of Environmental Information  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW (2822T)  
Washington, DC 20460  
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U.S. General Services Administration  
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245 Murray Lane SW  
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Freedom of Information Act Office  
U.S. Department of Housing and Urban  
Development  
451 7th Street SW, Room 10139  
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MS-7328, MIB  
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FOIA/PA Mail Referral Unit  
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LOC Building  
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Office of the Solicitor  
Division of Management and Administrative  
Legal Services  
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200 Constitution Avenue NW  
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1200 New Jersey Avenue SE  
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FOIA Request  
Department of the Treasury  
Washington, DC 20220  
Via Facsimile: (202) 622-3895

U.S. Department of Veterans Affairs  
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FOIA Officer  
Office of Science and Technology Policy  
1650 Pennsylvania Avenue NW  
Washington, DC 20504  
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USTR FOIA Office, GSD/RDF  
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Anacostia Naval Annex, Bldg. 410/Door 123,  
250 Murray Lane SW  
Washington, DC 20509  
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Office of FOIA Services  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-2736  
Via Online form

Chief, FOIA/Privacy Act Office  
U.S. Small Business Administration  
409 3rd Street SW, 8th Floor  
Washington, DC 20416  
Via FOIAOnline

## Re: Freedom of Information Act Request

Dear Freedom of Information Officers:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and your agency's implementing regulations, American Oversight makes the following request for records. The records requested herein may reside in multiple components or offices within your agency. We ask that you coordinate this request across your agency in your role as the agency's FOIA contact.

On April 28, 2017, the Office of Government Ethics (OGE) sent a data call for certain documents and information to all federal agencies.<sup>1</sup> The data call instructed all agencies to provide documentation of or information about ethics waivers issued to any political appointees. Then, today, the New York Times reported that the White House—through the Office of Management and Budget—asked OGE to stay the data call, questioning OGE's legal authority to request such information.<sup>2</sup>

In accordance with its mission of promoting accountability in government through transparency, American Oversight seeks access to the records requested in OGE's data call.

### Requested Records

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

1. All records responsive to the OGE data call sent on April 28, 2017, attached hereto as Exhibit A. American Oversight seeks the production of those records regardless of whether or not they have been—or will be—provided to OGE.
2. If, at the time of your search, your agency has made a determination not to comply with the OGE data call, whether in whole or in part, American Oversight seeks all records reflecting the basis for the decision not to comply with the data call. Please include as responsive any records reflecting any legal or policy basis for not complying with the data call as well as any records reflecting any guidance, direction, or instruction received by your agency regarding compliance with the data call.

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<sup>1</sup> See Memorandum re: Data Call for Certain Waivers and Authorizations from Walter Shaub, Director, Office of Government Ethics, to Chief of Staff to the President et al. (Apr. 28, 2017), <https://www.oge.gov/web/OGE.nsf/All%20Advisories/5B5DECAECCE6CB8185258110007ADC76/%24FILE/PA-17-02.pdf?open>.

<sup>2</sup> See Eric Lipton, *White House Moves to Block Ethics Inquiry Into Ex-Lobbyists on Payroll*, N.Y. TIMES, May 22, 2017, [https://www.nytimes.com/2017/05/22/us/politics/trump-white-house-government-ethics-lobbyists.html?\\_r=0](https://www.nytimes.com/2017/05/22/us/politics/trump-white-house-government-ethics-lobbyists.html?_r=0); Letter from Mick Mulvaney, Director, Office of Management and Budget, to Walter Shaub, Director, Office of Government Ethics (May 17, 2017), <https://www.documentcloud.org/documents/3727995-OMB-Director-Mulvaney-Letter-to-Office-of.html>.

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>3</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>4</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>5</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>6</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>7</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, you are 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 hopes to 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.

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<sup>3</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>4</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>5</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>6</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>7</sup> *Mead Data Central*, 566 F.2d at 261.

## Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's implementing regulations, 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. 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 activities of the government." The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how officials conduct the public's business.

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. Many of those individuals previously worked as lobbyists in their respective fields and might be barred from working on certain matters under government ethics rules and Executive Orders, absent any waivers of those rules. OGE clearly believed it was important to determine whether and to what extent agencies have been issuing waivers of those rules to their appointees, and therefore issued a data call for that information on April 28, 2017.<sup>8</sup> Given that the White House has questioned OGE's legal authority to request that information,<sup>9</sup> American Oversight is filing this FOIA request to ensure that the public has access to the information at issue in OGE's data call, even if the agencies themselves choose not to—or are instructed not to—comply with the data call. It is imperative that the public have a thorough understanding of the potential conflicts of interest possessed by the government employees currently engaged in doing the government's work. Disclosure of the requested information will therefore contribute to the public's understanding of these aspects of the operation of the federal government.

This request is primarily and fundamentally not for commercial purposes, but rather the primary interest is in public disclosure of responsive records. 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

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<sup>8</sup> See Memorandum re: Data Call for Certain Waivers and Authorizations from Walter Shaub, Director, Office of Government Ethics, to Chief of Staff to the President et al. (Apr. 28, 2017), <https://www.oge.gov/web/OGE.nsf/All%20Advisories/5B5DECAECCE6CB8185258110007ADC76/%24FILE/PA-17-02.pdf?open>.

<sup>9</sup> See Eric Lipton, *White House Moves to Block Ethics Inquiry Into Ex-Lobbyists on Payroll*, N.Y. TIMES, May 22, 2017, [https://www.nytimes.com/2017/05/22/us/politics/trump-white-house-government-ethics-lobbyists.html?\\_r=0](https://www.nytimes.com/2017/05/22/us/politics/trump-white-house-government-ethics-lobbyists.html?_r=0); Letter from Mick Mulvaney, Director, Office of Management and Budget, to Walter Shaub, Director, Office of Government Ethics (May 17, 2017), <https://www.documentcloud.org/documents/3727995-OMB-Director-Mulvaney-Letter-to-Office-of.html>.

in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information it gathers, 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.<sup>10</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>11</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 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](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>10</sup> American Oversight currently has over 10,800 page likes on Facebook, and over 32,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 22, 2017); American Oversight (@weareoversight), TWITTER (last visited May 22, 2017).

<sup>11</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).

# Exhibit A



April 28, 2017  
PA-17-02

MEMORANDUM

TO: Chief of Staff to the President, Agency Heads, Designated Agency Ethics Officials,  
Inspectors General, and Appointees

FROM: Walter M. Shaub, Jr.  
Director

SUBJECT: Data Call for Certain Waivers and Authorizations

This Program Advisory is a data call for documents and information. Copies of all documents and written responses required by this Program Advisory must be submitted to the U.S. Office of Government Ethics (OGE) by **Thursday, June 1, 2017**, except as specified herein. Documents are to be submitted in Portable Document Format (PDF) through the Designated Agency Ethics Official (DAEO) or the DAEO's designee for each agency, including the White House, to the agency's assigned OGE Desk Officer. Agencies and relevant agency officials, including White House officials, are required to exercise due diligence in collecting the documents and information covered by this data call.

I. Background

The Ethics in Government Act vests OGE with responsibility for providing “overall direction of executive branch policies related to preventing conflicts of interest.”<sup>1</sup> OGE is the “supervising ethics office” for a decentralized executive branch ethics program established by the Ethics in Government Act.<sup>2</sup> OGE also has responsibility for interpreting and issuing guidance on Executive Order 13770.<sup>3</sup> In connection with these responsibilities, OGE conducts reviews of agency ethics programs in order to ensure their compliance with program requirements and to ensure their effectiveness in advancing the mission of the executive branch ethics program.<sup>4</sup> OGE also conducts single-issue reviews of individual agencies, groups of agencies, or the executive branch ethics program as a whole.<sup>5</sup> Accordingly, OGE is conducting a review of waivers and authorizations issued to a specified class of appointees during a 12-month period. The documents and information subject to this data call are necessary for the performance of the duties of OGE's Director and in furtherance of OGE's mission with respect to the executive branch ethics program.<sup>6</sup>

<sup>1</sup> 5 U.S.C. app. § 402(a).

<sup>2</sup> 5 U.S.C. app. § 109(18)(D).

<sup>3</sup> See OGE Legal Advisory, LA-17-02 (2017); OGE Legal Advisory, LA-17-03 (2017); see also Exec. Order No. 13770, § 4(c) (Jan. 28, 2017).

<sup>4</sup> 5 C.F.R. § 2638.108(a)(9).

<sup>5</sup> *Id.*

<sup>6</sup> See 5 U.S.C. app. §§ 402(b)(10), 403(a)(2); 5 C.F.R. § 2638.202.





## II. Deadlines

### A. Appointees Serving in the United States

The deadline for submission of responsive documents and information is **Thursday, June 1, 2017**, with respect to all appointees who were stationed in the United States when the waiver or authorization was issued or approved.

### B. Appointees Serving Outside the United States

The deadline for submission of responsive documents and information is **Tuesday, August 1, 2017**, with respect to all appointees who were stationed outside the United States when the waiver or authorization was issued or approved.

## III. Documents

All agencies, including the White House, are required to produce the documents described in this section.

### A. Time Period Covered

This data call applies to all covered documents issued or approved during the period from May 1, 2016, through April 30, 2017. The period between these times is the “covered period.”

### B. Persons Covered<sup>7</sup>

This data call applies to individuals who met the definition of “appointee” under Executive Order 13770 at any time during the period from January 20, 2017, through April 30, 2017.<sup>8</sup> This data call also applies to individuals who met the definition of “appointee” under Executive Order 13490 at any time during the period from May 1, 2016, through January 20, 2017.<sup>9</sup> Every individual meeting either of these criteria is a “covered person,” unless excluded in the next paragraph.

Notwithstanding the preceding description of covered persons, several exclusions apply. Members of the uniformed services are excluded from this data call, except to the extent that, at the time of the waiver or authorization, they were serving in positions traditionally filled by civilian appointees (e.g., Secretary of Defense, Assistant to the President for National Security Affairs, etc.). Appointees whose public financial disclosure reports are, or were at the time of the waiver or authorization, excluded from public availability pursuant to 5 U.S.C. app. § 105(a)(1) are excluded from this data call. Appointees who were, at the time of the waiver or authorization, required to file confidential financial disclosure reports are excluded from this data call.

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<sup>7</sup> Note that, as used in this Program Advisory, the term “appointee” applies to appointees and to former appointees who were appointees at the time of the waiver or authorization.

<sup>8</sup> Exec. Order No. 13770, § 2(b) (Jan. 28, 2017).

<sup>9</sup> Exec. Order No. 13490, § 2(b) (Jan. 21, 2009).

### C. Waivers and Authorizations Covered

This data call applies to all of the types of waivers and authorizations listed below that were issued or approved with respect to a covered person during the covered time period. These documents are the “covered documents.”

1. Waivers issued or approved under Executive Order 13770.<sup>10</sup>
2. Waivers issued or approved under Executive Order 13490.<sup>11</sup>
3. Waivers issued or approved under 18 U.S.C. § 208(b)(1).
4. Authorizations issued or approved under 5 C.F.R. § 2635.502(d).
5. Waivers issued or approved under 5 C.F.R. § 2635.503(c).

### IV. Information

Agencies, including the White House, are required to produce the information identified below as to each covered waiver or authorization, **unless a written copy of the waiver or authorization is produced**. The information identified below is not required as to any written waiver or authorization that is produced in response to this Program Advisory.

#### A. Executive Order 13770

As to each waiver under Executive Order 13770, if you have not produced a written waiver in response to the data call for documents in the preceding section, describe the following information in a written response:

1. The name and title of the appointee covered by the waiver.
2. The name of the organizational unit and agency in which the appointee was employed at the time of the waiver.
3. The name and title of the individual who issued or approved the waiver.
4. The section(s) and paragraph(s) of the Executive Order waived.
5. Matter(s) covered by the waiver, including the names of relevant parties and a description of the matter(s).

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<sup>10</sup> Exec. Order No. 13770, § 3 (Jan. 28, 2017).

<sup>11</sup> Exec. Order No. 13490, § 3 (Jan. 21, 2009).

B. Executive Order 13490

As to each waiver under Executive Order 13490, if you have not produced a written waiver in response to the data call for documents in the preceding section, describe the following information in a written response:

1. The name and title of the appointee covered by the waiver.
2. The name of the organizational unit and agency in which the appointee was employed at the time of the waiver.
3. The name and title of the individual who issued or approved the waiver.
4. The section(s) and paragraph(s) of the Executive Order waived.
5. Matter(s) covered by the waiver, including the names of relevant parties and a description of the matter(s).

C. 18 U.S.C. § 208(b)(1)

As to each waiver under 18 U.S.C. §208(b)(1), if you have not produced a written waiver in response to the data call for documents in the preceding section, describe the following information in a written response:

1. The name and title of the appointee covered by the waiver.
2. The name of the organizational unit and agency in which the appointee was employed at the time of the waiver.
3. The name and title of the individual who issued or approved the waiver.
4. Matter(s) covered by the waiver, including the names of relevant parties and a description of the matter(s).

D. 5 C.F.R. § 2635.502(d)

As to each authorization under 5 C.F.R. § 2635.502(d), if you have not produced a written authorization in response to the data call for documents in the preceding section, describe the following information in a written response:

1. The name and title of the appointee covered by the authorization.
2. The name of the organizational unit and agency in which the appointee was employed at the time of the authorization.

3. The name and title of the individual who issued or approved the authorization.
4. Matter(s) covered by the authorization, including the names of relevant parties and a description of the matter(s).

E. 5 C.F.R. § 2635.503(c)

As to each waiver under 5 C.F.R. § 2635.503(c), if you have not produced a written waiver in response to the data call for documents in the preceding section, describe the following information in a written response:

1. The name and title of the appointee covered by the waiver.
2. The name of the organizational unit and agency in which the appointee was employed at the time of the waiver.
3. The name and title of the individual who issued or approved the waiver.
4. Matter(s) covered by the waiver, including the names of relevant parties and a description of the matter(s).