



May 17, 2018

**VIA ELECTRONIC MAIL**

National Credit Union Administration  
Office of General Counsel  
1775 Duke Street  
Alexandria, VA 22314  
[foia@ncua.gov](mailto:foia@ncua.gov)

**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 the implementing regulations governing the National Credit Union Administration (NCUA), 12 C.F.R. Part 792, American Oversight makes the following request for records.

The *Washington Post* has reported that NCUA Chairman J. Mark McWatters has engaged in several questionable practices since being appointed to the board of NCUA in 2014. Chairman McWatters has reportedly never moved to the Washington D.C. area even though NCUA's headquarters are located in Alexandria, Virginia.<sup>1</sup> Consequently, the Chairman seems to have run the agency remotely from his home in Texas while also, reportedly, incurring substantial official travel expenses.<sup>2</sup> Mr. McWatters also seems to have maintained a close relationship with Representative Jeb Hensarling, Chairman of the House of Representatives committee responsible for oversight of NCUA.<sup>3</sup>

American Oversight seeks records that have the potential to shed light on Chairman McWatters' use of public resources and performance of his duties at NCUA, particularly as Mr. McWatters has been repeatedly mentioned as a potential director of the Consumer Financial Protection Bureau (CFPB).<sup>4</sup>

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<sup>1</sup> Robert O'Harrow Jr. & Andrew Ba Tran, *This Man Runs a Federal Agency Near Washington - From His Home in Dallas*, WASH. POST, May 11, 2018, [https://www.washingtonpost.com/investigations/this-man-runs-a-federal-agency-near-washington--from-his-home-in-dallas/2018/05/11/71f186e6-4730-11e8-ad53-d5751c8f243f\\_story.html?noredirect=on&utm\\_term=.4e53d7c10272](https://www.washingtonpost.com/investigations/this-man-runs-a-federal-agency-near-washington--from-his-home-in-dallas/2018/05/11/71f186e6-4730-11e8-ad53-d5751c8f243f_story.html?noredirect=on&utm_term=.4e53d7c10272).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Victoria Finkle, *Credit Union Regulator McWatters on Shortlist to Head CFPB*, AMERICAN BANKER (Dec. 28, 2017, 5:44 PM), <https://www.americanbanker.com/news/credit-union-regulator-mark-mcwatters-on-shortlist-to-head-cfpb>; David Baumann, *McWatters Under Serious*



## Requested Records

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

All calendars or calendar entries for J. Mark McWatters from August 26, 2014, to the date a search is conducted, including any calendars maintained on his behalf (e.g., by an administrative assistant or a scheduler).

For calendar entries created in Outlook or similar programs, the documents should be produced in “memo” form to include all invitees, any notes, and all attachments. Please do not limit your search to Outlook calendars—we request the production of any calendar—paper or electronic, whether on government-issued or personal devices—used to track or coordinate how Mr. McWatters allocates his time on agency business. The search would include any calendars associated with Mr. McWatters’ individual email account, as well as any official calendars maintained for him, including by his administrative assistant or scheduler.

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 NCUA 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>5</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**

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*Consideration for CFPB Director*, CREDIT UNION TIMES (Dec. 29, 2017, 5:27 AM), <https://www.cutimes.com/2017/12/29/mcwatters-under-serious-consideration-for-cfpb-dir/>.

<sup>5</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).

moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.<sup>6</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 NCUA’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.**<sup>7</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 NCUA’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that NCUA 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>8</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>9</sup> Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing

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<sup>6</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)).

<sup>7</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>8</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>9</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

the sought-after information.”<sup>10</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>11</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>12</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, NCUA 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 NCUA 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 12 C.F.R. § 792.27, 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.<sup>13</sup> The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how the highest-ranking official at

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<sup>10</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>11</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>12</sup> *Mead Data Central*, 566 F.2d at 261.

<sup>13</sup> 12 C.F.R. § 792.27(a)(1)–(2).

NCUA conducts the public's business and expends public resources in support of his role. The public deserves to know whether a high-ranking government official like Mr. McWatters is fulfilling the complete duties of his role. And the public deserves to know whether high-ranking government officials are inappropriately influenced by personal relationships, gifts or private interests.<sup>14</sup> The records requested here would make a particularly significant contribution to public understanding of Chairman McWatters official activities because he has repeatedly failed to answer media inquiries regarding the issues that are the subject of this request.<sup>15</sup> And, as discussed below, American Oversight has the intent and ability to effectively disseminate the requested information to the public.

This request is primarily and fundamentally for non-commercial purposes,<sup>16</sup> and American Oversight intends to, and has the ability to, effectively convey the requested information to a broad public audience.<sup>17</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 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.<sup>18</sup> 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,<sup>19</sup> 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.<sup>20</sup> As another example, American Oversight has received records relating to expenditures for office renovations at numerous other agencies and has worked with media outlets to publicize its findings.<sup>21</sup>

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<sup>14</sup> O'Harrow & Ba Tran, *supra* note 1.

<sup>15</sup> *Id.* ("McWatters declined multiple requests for interviews and did not respond to questions emailed to him.")

<sup>16</sup> 12 C.F.R. § 792.27(b)(1).

<sup>17</sup> 12 C.F.R. § 792.27(a)(3).

<sup>18</sup> American Oversight currently has approximately 11,800 page likes on Facebook and 44,000 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 16, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited May 16, 2018).

<sup>19</sup> *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

<sup>20</sup> *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>.

<sup>21</sup> *See, e.g.*, Brady Dennis & Juliet Eilperin, *Scott Pruitt's \$25,000 Soundproof Phone Booth? It Actually Cost More Like \$43,000*, WASH. POST, Mar. 14, 2018, [https://www.washingtonpost.com/news/energy-environment/wp/2018/03/14/scott-pruitts-25000-soundproof-phone-booth-it-actually-cost-more-like-43000/?utm\\_term=.c5479a61c62d](https://www.washingtonpost.com/news/energy-environment/wp/2018/03/14/scott-pruitts-25000-soundproof-phone-booth-it-actually-cost-more-like-43000/?utm_term=.c5479a61c62d); Glenn

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 NCUA 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](mailto: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

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Thrush, *Emails Contradict Ben Carson's Claims About \$31,000 Dining Set for Office*, N.Y. TIMES, Mar. 14, 2018, <https://www.nytimes.com/2018/03/14/us/ben-carson-dining-table.html>.