



March 9, 2017

**VIA FACSIMILE**

NLRB FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4th Floor  
Washington, D.C. 20570  
Fax number: (202) 273-FOIA (3642)

**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 the National Labor Relations Board's implementing regulations, 29 C.F.R. § 102.117, American Oversight makes the following request for records.

American Oversight promotes accountability in government through transparency, enforcing the public's right to know what the government is up to. With scores of new individuals joining the government in key, senior positions, it is essential to understand who they are and the backgrounds they bring to their work. Without such transparency, the public cannot have confidence that government decisions are shaped by the interests of the American people, not personal or professional allegiances. To that end, American Oversight is seeking information regarding R. Alexander Acosta, President Donald Trump's nominee for Secretary of Labor.<sup>1</sup> To better understand who Mr. Acosta is and what skills and perspectives he would bring to the Department of Labor, American Oversight seeks records from his prior service in the executive branch.

**Requested Records**

American Oversight requests that the National Labor Relations Board (NLRB) produce within twenty business days copies of: personnel records, performance reviews, hiring analyses, correspondence, and salary and benefits information regarding Mr. Acosta. This should include, but is not limited to:

1. Internal analysis about Mr. Acosta concerning his nomination and appointment to the NLRB.

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<sup>1</sup> Alan Rappaport, *R. Alexander Acosta, Law School Dean, Is Trump's New Pick for Labor*, N.Y. TIMES, Feb. 16, 2017, <https://www.nytimes.com/2017/02/16/us/politics/alexander-acosta-labor-secretary-trump.html>.

2. Any correspondence concerning the nomination and potential appointment of Mr. Acosta from within the NLRB or from the public.
3. Minutes and corresponding documents for any meetings held at the NLRB concerning the nomination and potential appointment of Mr. Acosta.
4. Complaints regarding Mr. Acosta received from within the NLRB or from the public.
5. Any records or information regarding Mr. Acosta's salary, benefits or other compensation while a member of the NLRB.
6. Mr. Acosta's correspondence, which includes all communications sent or received by Mr. Acosta, or communication in which he was merely carbon copied ("CC'd"), from within the NLRB, from within a state or federal government or from the public.
7. Mr. Acosta's work product, including: memos authored or and any other written or electronic materials created by Mr. Acosta during his time with the NLRB.

Please provide all responsive records from January 1, 2002, through December 31, 2003. For reference, Mr. Acosta served as a member of the NLRB from December 17, 2002, to August 21, 2003.

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 your agency 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.

In conducting your search, please note that Mr. Acosta has used different names professionally, and a search should include variations of his name including Rene Alexander Acosta, Rene Acosta, Alexander Acosta, and Alex Acosta.

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>2</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 the material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.<sup>3</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 NLRB’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>4</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 archiving tools of the NLRB would capture that email under Capstone. Accordingly, American Oversight insists that the NLRB 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 the NLRB 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>5</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

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<sup>2</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>3</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>4</sup> Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), available at <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 & Agencies & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), available at <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

<sup>5</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

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>6</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>7</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>8</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>9</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, the NLRB 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 the NLRB before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and the NLRB 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 a rolling basis.

### **Fee Waiver Request**

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 29 C.F.R. § 102.117(d)(2)(iv), 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

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<sup>6</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>7</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>8</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>9</sup> *Mead Data Central*, 566 F.2d at 261.

significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).<sup>10</sup>

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 government operations and is not “primarily in the commercial interest of the requester.”<sup>11</sup> The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how public funds are spent and how officials conduct the public’s business.

To date, the Trump administration has not evidenced that it takes seriously the vetting of political appointees. Most recently, Andrew Puzder, the prior nominee to lead the U.S. Department of Labor, withdrew himself from consideration after questions were raised about his background months after he was first put forth.<sup>12</sup> Mr. Acosta’s nomination came just one day after Mr. Puzder’s withdrawal, raising questions about the scope of Mr. Acosta’s vetting.

This request is primarily and fundamentally for non-commercial purposes. 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 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 our public website.

Accordingly, American Oversight qualifies for a fee waiver.

### **Application for Expedited Processing**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 29 C.F.R. § 102.117(c)(2)(ii), American Oversight requests that the NLRB expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief, that there is widespread and exceptional media interest and there exist possible questions concerning the government’s integrity, which affect public confidence. As discussed above, to date the Trump administration has not evidenced thorough vetting of its nominees.

Mere days after Scott Pruitt was confirmed as Administrator of the Environmental Protection Agency, emails surfaced from his time as Oklahoma Attorney General reflecting close ties and

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<sup>10</sup> See, e.g., *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

<sup>11</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. §16.10(k).

<sup>12</sup> Alan Rappeport, *Andrew Puzder Withdraws From Consideration as Labor Secretary*, N.Y. TIMES, Feb. 15, 2017, <https://www.nytimes.com/2017/02/15/us/politics/andrew-puzder-withdrew-labor-secretary.html>.

coordination with the corporate entities he is now charged with overseeing.<sup>13</sup> The media has already demonstrated significant interest in Mr. Acosta's nomination.<sup>14</sup> Disclosure and analysis of Mr. Acosta's records prior to his committee hearing is necessary to avoid another confirmation as premature as that of Mr. Pruitt.

The requested documents will shed light on these issues of considerable interest to the public. The availability of Mr. Acosta's record from his time in public service while the U.S. Senate considers his nomination for Secretary of Labor is a quintessential example of "a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 29 C.F.R. § 102.117(c)(2)(ii).

Accordingly, American Oversight submits that its request satisfies the criteria for expedition.

### Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with the NLRB 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 us at foia@americanoversight.org. 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>13</sup> Coral Davenport and Eric Lipton, *The Pruitt Emails: E.P.A. Chief Was Arm in Arm With Industry*, N.Y. TIMES, Feb. 22, 2017, <https://www.nytimes.com/2017/02/22/us/politics/scott-pruitt-environmental-protection-agency.html>.

<sup>14</sup> Josh Dawsey and Eli Stokols, *Trump's 'Apprentice'-style Hiring Is Upending Washington*, POLITICO (Feb. 22, 2017, 06:43 PM), <http://www.politico.com/story/2017/02/donald-trump-apprentice-hiring-235281> ("Acosta was picked shortly after Puzder officially dropped out and wasn't at the 77-minute news conference where his nomination was announced. Trump didn't travel to Florida, where Acosta lives, to interview him. Acosta referred a request for comment to the White House."); John King, Manu Raju, and Dan Merica, *Trump Names First Hispanic Cabinet Pick*, CNN (Feb. 16, 2017, 6:55 PM), <http://www.cnn.com/2017/02/16/politics/donald-trump-white-house-announcement/>; Barry Meier, *Labor Nominee's Role in Sex Case Could Draw Scrutiny*, N.Y. TIMES, Feb. 17, 2017, <https://www.nytimes.com/2017/02/17/business/alexander-acosta-jeffrey-epstein-case.html>; Yuki Noguchi, *Trump Chooses R. Alexander Acosta As New Labor Nominee*, NPR (Feb. 16, 2017, 4:31 PM), <http://www.npr.org/2017/02/16/515638102/trump-chooses-r-alexander-acosta-as-new-labor-nominee>.