



May 5, 2017

**VIA ELECTRONIC**

FOIA Request  
Department of the Treasury  
Washington, DC 20220  
treasfoia@treasury.gov

**Re: Freedom of Information Act Request**

Dear FOIA Officers:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the Department of the Treasury (Treasury) implementing regulations, 31 C.F.R. part 1, American Oversight makes the following request for records.

Earlier this week, the House Financial Services Committee met to mark up a final version of H.R. 10, the “Financial CHOICE Act of 2017.”<sup>1</sup> H.R. 10 would make significant changes to the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>2</sup> Treasury Secretary Steve Mnuchin has publicly signaled his support for the bill.<sup>3</sup> He also recently told leaders in the financial services industry that they should “thank him for [their] bank stocks doing better,” indicating that he was personally involved in financial deregulation efforts—efforts that include Congressional action to repeal elements of the Dodd-Frank legislation.<sup>4</sup> With just such a bill moving forward in the Financial Services Committee, the public has a right to know to what extent Secretary Mnuchin was in fact involved in drafting the legislation and whether he directed the committee to include provisions to benefit specific bank stocks.

American Oversight is seeking to understand the interaction between agencies of the Trump administration and Congress on policy matters relating to financial regulation.

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<sup>1</sup> See *Markup of H.R. 10, the Financial CHOICE Act of 2017*, FINANCIAL SERVICES COMMITTEE, <http://financialservices.house.gov/calendar/eventsingle.aspx?EventID=401827>.

<sup>2</sup> Hazel Bradford, *House Financial Services Committee Approves Dodd-Frank Replacement Bill*, PENSIONS & INVESTMENTS (May 4, 2017, 1:12 PM), <http://www.pionline.com/article/20170504/ONLINE/170509907/house-financial-services-committee-approves-dodd-frank-replacement-bill>.

<sup>3</sup> Ben lane, *Mnuchin Declares Support for Republican Dodd-Frank Replacement*, HOUSINGWIRE, Apr. 27, 2017, <http://www.housingwire.com/articles/39975-mnuchin-declares-support-for-republican-dodd-frank-replacement>.

<sup>4</sup> Alan Rappeport, *House Republicans Move to Gut Bank Regulations*, N.Y. TIMES, May 5, 2017, [https://www.nytimes.com/2017/05/05/us/politics/dodd-frank-finance-banking-regulations.html?ref=politics&\\_r=0](https://www.nytimes.com/2017/05/05/us/politics/dodd-frank-finance-banking-regulations.html?ref=politics&_r=0).



## Requested Records

American Oversight requests that the Department of the Treasury produce the following within twenty business days:

1. All communications between Treasury and Congressman Jeb Hensarling, any other member of the House Financial Services Committee, or any staff member working for either the House Financial Services Committee or one of its members concerning proposed legislation or administrative actions related to financial regulation.

Please provide all responsive records from January 20, 2017, to the date the search is conducted. Also, American Oversight is aware of the letter sent from Committee Chairman Jeb Hensarling to Secretary Mnuchin stating his view that all communications between the Committee and the Department of the Treasury in connection with “legislative, oversight, and investigative matters” are “congressional records,” rather than “agency records” for purposes of the Freedom of information Act.<sup>5</sup> We disagree with that assessment; communications between Congress and executive branch agencies constitute “agency records” and are therefore subject to disclosure under FOIA. Accordingly, if Treasury withholds any records responsive to this request on the grounds that they are congressional records and not subject to disclosure under FOIA, please inform us that you have withheld the records on that basis, as we intend to litigate whether that is a proper basis for withholding records.

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.

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.**

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<sup>5</sup> See Letter from Jeb Hensarling, Chairman, House Committee on Financial Services, to Steven Mnuchin, Secretary, Department of the Treasury (Apr. 3, 2017), <https://www.documentcloud.org/documents/3700409-Treas-Letter.html>.

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>6</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 moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.**<sup>7</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 Treasury’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>8</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 Treasury’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that Treasury 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.**

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<sup>6</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>7</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>8</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>.

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>9</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>10</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>11</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>12</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>13</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, Treasury 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 Treasury 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 rolling basis.

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

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

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

<sup>12</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>13</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 31 C.F.R. § 1.7(d)(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.”<sup>14</sup> 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.

The requested records will shed light on the role that Congress plays in shaping policy regarding financial regulation at the Department of the Treasury, as well as the inverse—what role does the executive branch play in shaping policy at the legislative level. More specifically, the requested records would allow the public to more fully evaluate any proposed legislative or administrative actions by either the House Financial Services Committee or the Department of the Treasury by revealing the motivations and considerations behind any proposed actions that may be discussed in the requested records. Finally, it will be highly informative regarding governmental operations to see the extent to which Treasury follows the Committee’s request to classify responsive records as congressional records outside the purview of FOIA, rather than the “agency records” that the clearly are. The public deserves to know whether the Department will be complying with its statutory obligations under FOIA, and whether the executive branch is collaborating with Congress to conceal relevant policy deliberations about which the public has a right to know.

This request is primarily and fundamentally not for commercial purposes.<sup>15</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 commercial 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 its website and promote their availability on social media platforms, such as Facebook and Twitter.<sup>16</sup> One example of American Oversight’s demonstrated public disclosure of documents and creation of editorial

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<sup>14</sup> 31 C.F.R. § 1.7(d)(1).

<sup>15</sup> 31 C.F.R. § 1.7(d)(1).

<sup>16</sup> American Oversight currently has over 10,800 page likes on Facebook, and over 32,300 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 5, 2017); American Oversight (@weareoversight), TWITTER (last visited May 5, 2017).

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>17</sup>

Accordingly, American Oversight qualifies for a fee waiver.

Notwithstanding its fee waiver request, pursuant to 31 C.F.R. § 1.5(b)(7), American Oversight hereby states that it is willing to pay fees in an amount not more than \$25.00.

### **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,

A handwritten signature in blue ink that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal flourish extending to the left.

Austin R. Evers  
Executive Director  
American Oversight

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<sup>17</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).