



November 28, 2018

VIA ELECTRONIC MAIL

Consumer Financial Protection Bureau
Attention: Chief FOIA Officer
1700 G Street NW
Washington, DC 20552
CFPB_FOIA@cfpb.gov

Re: Freedom of Information Act Request

Dear Chief FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 and Consumer Financial Protection Bureau (CFPB) implementing regulations, 12 C.F.R. Part 1070, American Oversight makes the following request for records.

Media reports indicate that CFPB has decided to reduce or eliminate routine supervisory examinations related to compliance with the Military Lending Act (MLA).¹ The MLA provides critical protections to servicemembers, and regular lender examinations create opportunities to detect and reduce practices that put them at risk. As nearly fifty senators noted in a letter to Acting Director Mick Mulvaney, the MLA also protects military readiness and saves taxpayers money. American Oversight seeks records to shed light on CFPB's decision to reduce or eliminate supervisory examinations related to MLA compliance.

Requested Records

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

1. All decision memoranda, action memoranda, or similar documents related to the Bureau's examination practices regarding the Military Lending Act (or MLA) or the Military Annual Percentage Rate (or MARP), including but not limited to reducing, suspending, or ending routine examinations or rescheduling or canceling previously planned examinations.
2. All records reflecting communications (including but not limited to emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar invitations, and calendar entries) regarding reducing, suspending, or ending supervisory

¹ Kate Berry, *Pentagon, Others Baffled by CFPB Plan to Cease Military Lending Exams*, AM. BANKER (Oct. 11, 2018, 9:00 PM), <https://www.americanbanker.com/news/pentagon-others-baffled-by-cfpb-plan-to-cease-military-lending-exams>.



examinations related to the Military Lending Act (or MLA) or the Military Annual Percentage Rate (or MARP) between any employee or contractor of the Department of Defense (DOD) and any of the following;

- Any political appointee² in the Office of the Director; the Supervision, Enforcement, and Fair Lending Division front office; the Office of Supervision Examinations; the Office of Supervision Policy; the Consumer Education and Engagement Division; or the Office of Servicemember Affairs
 - The Associate Directors of the Supervision, Enforcement and Fair Lending Division and the Consumer Education and Engagement Division
 - The Assistant Directors for Supervision Examinations, Supervision Policy, and Servicemember Affairs
3. All emails (including attachments), calendar invitations, and calendar entries (including attachments) regarding reducing, suspending, or ending supervisory examinations related to the Military Lending Act (or MLA) or the Military Annual Percentage Rate (or MARP) between any person or entity using an email address ending in .com, .org, .edu, .net, .mail, or .co and any of the following:
- Any political appointee in the Office of the Director; the Supervision, Enforcement, and Fair Lending Division front office; the Office of Supervision Examinations; the Office of Supervision Policy; the Consumer Education and Engagement Division; or the Office of Servicemember Affairs

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 these agency officials allocate their time on agency business.

This request includes communications on which the parties listed above are included in the carbon copy (cc) or blind carbon copy (bcc) fields.

American Oversight seeks all records from November 25, 2017, to the date the search is conducted.

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 CFPB uses FOIA questionnaires or certifications completed by individual custodians or

² “Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a Non-career SES, any Schedule C employees, any career employee detailed to the immediate office of the agency head since January 20, 2017, or any persons hired under Temporary Non-career SES Appointments, Limited Term SES Appointments, Temporary Transitional Schedule C Appointments, or an administratively determined appointment.

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 are subject to the Federal Records Act and FOIA.³ **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.**⁴

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 CFPB’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.**⁵ Furthermore, agencies that have adopted the National Archives and

³ 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).

⁴ 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)).

⁵ 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>.

Records Administration (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 CFPB's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that CFPB 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.”⁶ 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.”⁷ 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.”⁸ 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.’”⁹

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.¹⁰ 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, CFPB 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

⁶ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁷ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁸ *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

⁹ *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)).

¹⁰ *Mead Data Central*, 566 F.2d at 261.

duplication costs. By working together at the outset, American Oversight and CFPB 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 rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 12 C.F.R. § 1070.22(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.¹¹ Moreover, the request is primarily and fundamentally for non-commercial purposes.

American Oversight requests a waiver of fees as disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government.¹² The request relates to identifiable operations and activities of the federal government, namely an agency's enforcement of regulations that protect consumers.¹³ Disclosure of the requested records will be "meaningfully informative" about these matters, because there is not currently significant public information available about whether, how, or why CFPB decided to change its approach to MLA examinations.¹⁴ For similar reasons, the requested disclosures will enhance the public's understanding to a significant extent.¹⁵ Because CFPB's actions affect not only more than a million active duty service members but also affect overall military readiness and costs to American taxpayers, the requested records will enhance the "understanding of a reasonably broad audience of persons interested in the subject" of the requested records.¹⁶ And (as described further below) American Oversight will convey information obtained through this request to the general public via its website and social media accounts.¹⁷

This request is primarily and fundamentally not for commercial purposes.¹⁸ 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

¹¹ 12 C.F.R. § 1070.22(e).

¹² 12 C.F.R. § 1070.22(e)(1)(iii)(A), (2)(i)-(iv).

¹³ 12 C.F.R. § 1070.22(e)(2)(i).

¹⁴ 12 C.F.R. § 1070.22(e)(2)(ii).

¹⁵ 12 C.F.R. § 1070.22(e)(2)(iv).

¹⁶ 12 C.F.R. § 1070.22(e)(2)(iii).

¹⁷ *Id.*

¹⁸ 12 C.F.R. § 1070.22(e)(1)(iii)(B), (3)(i)-(ii).

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.¹⁹ 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.²⁰ As another example, American Oversight has received records relating to expenditures for office renovations at numerous agencies and has worked with media outlets to publicize its findings.²¹

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 CFPB 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 Beth France at foia@americanoversight.org or 202-897-2465. 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

¹⁹ American Oversight currently has over 12,000 page likes on Facebook, and over 49,000 followers on Twitter. American Oversight, FACEBOOK,

<https://www.facebook.com/weareoversight/> (last visited Nov. 28, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Nov. 28, 2018).

²⁰ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

²¹ *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; Glenn 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>.