



January 28, 2019

VIA EMAIL

USDA Forest Service
FOIA Service Center
1400 Independence Avenue SW
Mail Stop: 1143
Washington, DC 20250-1143
wo_foia@fs.fed.us

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and U.S. Department of Agriculture (USDA) implementing regulations, 43 C.F.R. Part 2, American Oversight makes the following request for records from the United States Forest Service (USFS).

On January 9, 2019, President Trump threatened to have the Federal Emergency Management Agency (FEMA) withhold funding from California for managing wildfires “[u]nless they get their act together.”¹ This tweet followed a series of tweets by President Trump since August blaming California for poor management and suggesting that environmental laws are preventing effective firefighting. Former Interior Secretary Zinke also repeatedly suggested in 2018 that “radical environmentalists” were responsible for destruction caused by the fires.² American Oversight is seeking records to shed light on USFS officials’ response to or involvement in Administration statements on the California wildfires.

Requested Records

American Oversight requests that USFS produce the following within twenty business days. The search may be limited to USFS employees within the Office of the Chief of the Forest Service, including but not limited to the Chief, Associate Chief, and Chiefs of Staff.

1. All email communications linking to or referencing President Trump’s Twitter post at 7:25 AM on January 9, 2019, that reads, “Billions of dollars are sent to the State of California for Forest fires that, with proper Forest Management, would never happen. Unless they get

¹ Donald J. Trump (@realdonaldtrump), TWITTER, January 9, 2019 (7:25 AM), <https://twitter.com/realDonaldTrump/status/1083022011574747137>.

² Steve Benen, *Zinke Foolishly Blames California Fires on “Radical Environmentalists,”* MSNBC (Nov. 20, 2018, 10:06 AM), <http://www.msnbc.com/rachel-maddow-show/zinke-foolishly-blames-california-fires-radical-environmentalists>.



their act together, which is unlikely, I have ordered FEMA to send no more money. It is a disgraceful situation in lives & money!”³

Please provide all responsive records from January 8, 2019, through January 11, 2019.

2. All email communications linking to or referencing:
 - a. President Trump’s tweet at 12:08 AM on November 10, 2018, that reads, “There is no reason for these massive, deadly and costly forest fires in California except that forest management is so poor. Billions of dollars are given each year, with so many lives lost, all because of gross mismanagement of the forests. Remedy now, or no more Fed payments!”⁴; or
 - b. President Trump’s tweet at 4:40 AM on November 11, 2018, that reads, “With proper Forest Management, we can stop the devastation constantly going on in California. Get Smart!”⁵

Please provide all responsive records from November 9, 2018, through November 12, 2018.

3. All email communications linking to or referencing:
 - a. President Trump’s tweet at 6:06 PM on August 5, 2018, that reads, “California wildfires are being magnified & made so much worse by the bad environmental laws which aren’t allowing massive amount of readily available water to be properly utilized. It is being diverted into the Pacific Ocean. Must also tree clear to stop fire spreading!”⁶; or
 - b. President Trump’s tweet at 10:43 AM on August 6, 2018, that reads, “Governor Jerry Brown must allow the Free Flow of the vast amounts of water coming from the North and foolishly being diverted into the Pacific Ocean. Can be used for fires, farming and everything else. Think of California with plenty of Water - Nice! Fast Federal govt. approvals[.]”⁷

Please provide all responsive records from August 4, 2018, through August 7, 2018.

³ Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 9, 2019, 10:25 AM), <https://twitter.com/realDonaldTrump/status/1083022011574747137>.

⁴ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 10, 2018, 3:08 AM), <https://twitter.com/realdonaldtrump/status/1061168803218948096>.

⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 11, 2018, 4:40 AM), <https://twitter.com/realdonaldtrump/status/1061554334276747264>.

⁶ Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 6, 2018, 5:53 PM), <https://twitter.com/realdonaldtrump/status/1026587142989008897>.

⁷ Donald J. Trump (@realDonaldTrump), TWITTER (AUG. 6, 2018, 1:43 PM), <https://twitter.com/realdonaldtrump/status/1026524292396273664>.

4. All email communications regarding former Interior Secretary Ryan Zinke's opinion article published by CNN on November 26, 2018.⁸

Please provide all responsive records from November 25, 2018, through November 27, 2018.

5. All email communications regarding former Interior Secretary Ryan Zinke's opinion article published by USA Today on August 8, 2018.⁹

Please provide all responsive records from August 7, 2018, through August 9, 2018.

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, 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.**

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.¹⁰ **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**

⁸ Ryan Zinke, *What It Will Take to Prevent Deadly Wildfires*, CNN (Nov. 26, 2018, 11:48 AM), <https://www.cnn.com/2018/11/26/opinions/wildfire-prevention-goes-hand-in-hand-with-creating-jobs-zinke/index.html>.

⁹ Ryan Zinke, *Wildfires Seem Unstoppable, but They Can Be Prevented. Here's How.*, USA TODAY (Aug. 8, 2018, 6:00 AM), <https://www.usatoday.com/story/opinion/2018/08/08/active-forest-management-prevent-wildfires-column/913801002/>.

¹⁰ *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.¹¹

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 your agency’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.**¹² Furthermore, agencies that have adopted the National Archives and 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 your agency’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that your agency 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.”¹³ 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.”¹⁴ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing

¹¹ 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)).

¹² 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>.

¹³ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹⁴ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

the sought-after information.”¹⁵ 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.’”¹⁶

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.¹⁷ 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 your agency undertakes a search or incurs search or duplication costs. By working together at the outset, we 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 7 C.F.R. Part 1, Subpart A, Appendix A, Section 6, American Oversight requests a waiver of fees associated with processing this request for records. Disclosure of the requested information is in the public interest as it is likely to contribute significantly to public understanding of government operations and activities.¹⁸

The disclosure of the information sought has the potential to reveal, at a minimum, whether President Trump’s and other officials’ statements on the devastating 2018 California wildfires reflect USFS’s analyses, beliefs, or objective evidence. Moreover, in the wake of wildfires that have

¹⁵ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

¹⁶ *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)).

¹⁷ *Mead Data Central*, 566 F.2d at 261.

¹⁸ 7 C.F.R. Part 1, Subpart A, Appendix A, Section 6(a)(1)(i)-(iv); see, e.g., *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

exacted a disastrous human and environmental toll across the American West, the public has a significant interest in knowing whether there is any reasonable basis for President Trump’s claims and threats regarding California’s forest management. And, as described in more detail below, American Oversight “will disseminate the information to a reasonably broad audience of persons” through its social media accounts and its website.

This request is primarily and fundamentally not for commercial purposes, but rather the primary interest is in public disclosure of responsive records.¹⁹ 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.²⁰ 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,²¹ 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.²² As another example, American Oversight has a project called “Audit the Wall,” 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.²³

Accordingly, American Oversight qualifies for a fee waiver.

¹⁹ 7 C.F.R. Part 1, Subpart A, Appendix A, Section 6(a)(1)(v)-(vi).

²⁰ American Oversight currently has approximately 12,100 page likes on Facebook and 49,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Jan. 28, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Jan. 28, 2019).

²¹ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²² *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>.

²³ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with USFS 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 Hart Wood at foia@americanoversight.org or 202.873.1743. 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