



February 14, 2019

VIA ELECTRONIC MAIL

Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue NW
Room N-2420
Washington, DC 20210
foiarequests@dol.gov

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 your agency's implementing regulations, American Oversight makes the following request for records.

In December 2017, the Department of Labor (DOL) proposed a rule that would roll back regulations regarding how companies could pool and distribute employee tips. In February 2018, press reported that senior DOL officials removed from the proposed rule data demonstrating that it would cost employees billions of dollars.¹ In March 2018, press reported that the decision to remove this data came after DOL officials "convinced [Office of Management and Budget (OMB)] Director Mick Mulvaney to overrule the White House regulatory affairs chief" Neomi Rao, who wanted DOL to reinsert the data before publishing the rule.² American Oversight seeks records to shed light on whether and to what extent DOL and OMB sought to suppress data in the rulemaking process in order to advance political goals to the detriment of American workers.

Requested Records

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

1. Copies of any and all final analyses—such as cost-benefit analyses—prepared by DOL staff assessing the impact of the DOL's December 5, 2017 proposed rule on Tip Regulations Under the Fair Labor Standards Act.

¹ Ben Penn, *Labor Dept. Ditches Data Showing Bosses Could Skim Waiters' Tips*, BLOOMBERG LAW (Feb. 1, 2018, 6:01 AM), <https://bna.news.bna.com/daily-labor-report/labor-dept-ditches-data-showing-bosses-could-skim-waiters-tips>.

² Ben Penn, *Mulvaney, Acosta Override Regulatory Office to Hide Tips Rule Data*, BLOOMBERG LAW (Mar. 21, 2018, 12:58 PM), <https://news.bloomberglaw.com/daily-labor-report/mulvaney-acosta-override-regulatory-office-to-hide-tips-rule-data-1?context=article-related>.



2. All records reflecting communications (including email messages, attachments, calendar invitations, calendar entries, telephone call logs, or handwritten or typed meeting notes) related to any analyses, including cost-benefit analyses, responsive to Item 1 of this request—as well as communications related to all interim or draft copies of these analyses—or the rule proposed in the Federal Register on December 5, 2017, between 1) DOL and 2) OMB or the White House (including any email addresses ending in @who.eop.gov).
3. All records reflecting communications (including email messages, attachments, calendar invitations, calendar entries, telephone call logs, or handwritten or typed meeting notes) between DOL and industry groups or trade associations regarding the proposed tip rule.
4. All records associated with any call between DOL Secretary Acosta and OIRA Administrator Rao on or about November 10, 2017, including all agendas, handwritten or typed meeting notes, talking points, memoranda, or any other documentation made in preparation for, during, or following the call. This includes any materials compiled, created, or maintained by the principals themselves or assistants, including any other employee in attendance on the call.
5. All records associated with any meeting between DOL Secretary Acosta and OMB Director Mick Mulvaney on or about November 2, 2017, including all agendas, handwritten or typed meeting notes, talking points, memoranda, or any other documentation, made in preparation for, during, or following the meeting. This includes any materials compiled, created, or maintained by the principals themselves or assistants, including any other employee in attendance at the meeting.

American Oversight requests that DOL search the following offices for records responsive to this request:

- i. The Office of the Secretary
- ii. The Office of the Deputy Secretary
- iii. The Front Office of the Office of the Solicitor (SOL)
- iv. Any SES or GS-15 employees in SOL's Division of Fair Labor Standards
- v. The Front Office of the Wage and Hour Division
- vi. All political appointees* in the Office of the Assistant Secretary of Policy

*“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, or any persons hired under Temporary Non-career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

Please provide all responsive records from February 16, 2017, through April 1, 2018.

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 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.**⁵ 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

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>.

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.”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.

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 hopes to decrease the likelihood of costly and time-consuming litigation in the future.

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) (emphases 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.

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 your agency's implementing regulations, 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. The disclosure of the information sought under this request will reveal the operations of the federal government, including the outcome of efforts to change how employers can manage the earnings of wage workers. There is profound interest in knowing what actions the government took in this space,¹¹ and the records responsive to this request will contribute significantly to the public's understanding of the government's activities.

This request is primarily and fundamentally not for commercial purposes, but rather the primary interest is in public disclosure of responsive records. 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.¹² 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,¹³ American Oversight promptly posted the records to its website and published an analysis of what the records

¹¹ See, e.g., Penn, *supra* note 1; Penn, *supra*, note 2.

¹² American Oversight currently has approximately 12,100 page likes on Facebook and 49,800 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Feb. 13, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Feb. 13, 2019).

¹³ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

reflected about DOJ's process for ethics waivers.¹⁴ 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.¹⁵

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 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 Cerissa Cafasso at foia@americanoversight.org or (202) 869-5244. 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

¹⁴ *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>.

¹⁵ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.