



June 26, 2019

VIA ELECTRONIC MAIL

Michael Bell
Office of the Secretary
U.S. Department of Transportation
1200 New Jersey Ave. SE, W94-122
Washington, DC 20590
ost.foia@dot.gov

Re: Freedom of Information Act Request

Dear Mr. Bell:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Transportation (DOT), 49 C.F.R. Part 7, American Oversight makes the following request for records.

Secretary of Transportation Elaine Chao re-entered government service on January 31, 2017, with significant personal and financial ties to private entities working in the industries she would be overseeing.¹ Prior to her confirmation, Secretary Chao affirmed that she was “committed to the highest standards of ethical conduct for government officials” and promised to take steps “to avoid any actual or apparent conflict of interest.”² Nonetheless, her conduct since taking office raises questions about her willingness to follow through on this commitment. For example, Secretary Chao implements policies that may affect her family’s company, Foremost Group, and yet she has not recused herself from issues which may affect Foremost Group or the shipping industry more broadly.³ Secretary Chao and her office also have given preferential treatment to projects based in Kentucky, which is represented in the Senate by her husband, Senate Majority Leader

¹ See, e.g., Michael Forsythe & Eric Lipton, *For the Chao Family, Deep Ties to the World’s 2 Largest Economies*, N.Y. TIMES, June 2, 2019,

<https://www.nytimes.com/2019/06/02/us/politics/transportation-secretary-elaine-chao.html>; Eric Lipton, *Transportation Secretary Failed to Sever Financial Ties to Construction Company*, N.Y. TIMES, May 28, 2019, <https://www.nytimes.com/2019/05/28/us/politics/elaine-chao-stock-divest.html>.

² Ltr. from Elaine Chao to Judith Kaleta, Designated Agency Ethics Official, U.S. Dep’t of Transp. at 1, Jan. 5 2017, *available at* [https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/00E7BDF991DEEA3B852580C1002C7A31/\\$FILE/Chao,%20Elaine%20L.%20%20finalAMENDEDEA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/00E7BDF991DEEA3B852580C1002C7A31/$FILE/Chao,%20Elaine%20L.%20%20finalAMENDEDEA.pdf).

³ Forsythe & Lipton, *supra* note 1.



Mitch McConnell.⁴ Additionally, Secretary Chao continued to retain stock in Vulcan Materials Company more than a year after she promised to “receive a cash payout” for her shares,⁵ netting a gain of more than \$40,000 as the company’s shares rose 13% during this period.⁶

American Oversight seeks records regarding the external telephone contacts of Secretary Chao and key members of her office to shed light on their adherence to upholding “the highest standards of ethical conduct for government officials.”⁷

Requested Records

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

Any telephone call logs reflecting calls to, from, or including the individuals specified below:

1. Elaine Chao, Secretary of Transportation (since January 31, 2017, through the date of the search)
2. J. Todd Inman, former Deputy Chief of Staff and current Chief of Staff (since January 20, 2017, through the date of the search)
3. Derek Kan, Under Secretary of Transportation for Policy/Senior Advisor to the Secretary (since June 5, 2017, through the date of the search)
4. Monica Kuo, Special Assistant to the Under Secretary (since October 1, 2017, through the date of the search)

This request includes telephone logs for all desk and mobile phones used by the specified individuals for official purposes, including temporary phones assigned for international travel.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 49 C.F.R. § 7.43(c), 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

⁴ Tucker Doherty & Tanya Snyder, *Chao created special path for McConnell favored projects*, POLITICO (June 10, 2019, 5:02 AM), <https://www.politico.com/story/2019/06/10/mcconnell-elaine-chao-1358068>.

⁵ Ltr. from Elaine Chao, *supra* note 2.

⁶ Ted Mann & Brody Mullins, *Transportation Secretary Still Owns Stock She Pledged to Divest*, WALL ST. J. (May 28, 2019, 1:19 PM), <https://www.wsj.com/articles/transportation-secretary-still-owns-stock-she-pledged-to-divest-11559035921>.

⁷ Ltr. from Elaine Chao, *supra* note 2.

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 operations or activities of the government.⁸ Secretary Chao holds the highest-ranking post in DOT, and the public deserves to know whether she and those officials closest to her are complying with their ethical obligations. This is particularly so given the recent media attention on how many of Secretary Chao's personal and financial interests overlap with the industries and projects she is in charge of regulating.⁹ American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available, and the public's understanding of the government's activities would be enhanced through American Oversight's analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.¹⁰ 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.¹¹

American Oversight has also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses posted to its website.¹² Examples reflecting this commitment to the public disclosure of documents and the creation of editorial content include the posting of records related to an ethics waiver received by a senior Department of Justice attorney and an analysis of what those records demonstrated regarding the Department's process for issuing such waivers;¹³ posting records received as part of American Oversight's "Audit the Wall"

⁸ See 49 C.F.R. § 7.43(c)(1)–(4); see also 5 U.S.C. § 552(a)(4)(A)(iii).

⁹ See Forsythe & Lipton, *supra* note 1; Lipton, *supra* note 1; Doherty & Snyder, *supra* note 4; Mann & Mullins, *supra* note 6.

¹⁰ See 49 C.F.R. § 7.43(c)(5); see also 5 U.S.C. § 552(a)(4)(A)(iii).

¹¹ American Oversight currently has approximately 12,600 followers on Facebook and 54,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited June 19, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited June 19, 2019).

¹² News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

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

project to gather and analyze information related to the administration's proposed construction of a barrier along the U.S.-Mexico border, and analyses of what those records reveal;¹⁴ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹⁵ posting records and analysis relating to the federal government's efforts to sell nuclear technology to Saudi Arabia;¹⁶ and posting records and analysis regarding the Department of Justice's decision in response to demands from Congress to direct a U.S. Attorney to undertake a wide-ranging review and make recommendations regarding criminal investigations relating to the President's political opponents and allegations of misconduct by the Department of Justice itself and the Federal Bureau of Investigation.¹⁷

Accordingly, American Oversight qualifies for a fee waiver.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics. We seek records of any kind, including electronic records, audiotapes, emails, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any telephone conversations.
- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all prior

[compliance](https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents); *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>.

¹⁴ See generally *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>; see, e.g., *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

¹⁵ *Documents Reveal Ben Carson Jr.'s Attempts to Use His Influence at HUD to Help His Business*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/documents-reveal-ben-carson-jr-s-attempts-to-use-his-influence-at-hud-to-help-his-business>.

¹⁶ *Investigating the Trump Administration's Efforts to Sell Nuclear Technology to Saudi Arabia*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigating-the-trump-administrations-efforts-to-sell-nuclear-technology-to-saudi-arabia>.

¹⁷ *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

messages sent or received in that email chain, as well as any attachments to the email.

- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.¹⁸ 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, by intent or through negligence, failed to meet their obligations.¹⁹
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to government-wide requirements to manage agency information electronically,²⁰ and many agencies have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- 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 a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If

¹⁸ 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).

¹⁹ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

²⁰ 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 potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

Conclusion

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. 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 your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF 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.

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, please contact Christine H. Monahan at foia@americanoversight.org or (202) 788-0606. 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