

June 26, 2020

VIA EMAIL

Mark R. Brook
FOIA Officer
1400 Independence Avenue, SW
South Building
2095
Washington, DC 20250
AMS.FOIA@ams.usda.gov

Re: Freedom of Information Act Request

Dear Mr. Brook:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of your agency, 7 C.F.R. Part 1, American Oversight and Union of Concerned Scientists make the following request for records.

The outbreak of the novel coronavirus, SARS-CoV-2, and the disease it causes, COVID-19, has been declared a public health emergency at both the national and international levels.¹ Since late 2019, the virus has spread across the globe, sickened millions of people, and resulted in hundreds of thousands of deaths, including more than 120,000 in the U.S. alone.²

On April 19, 2020, USDA announced that it would purchase up to \$3 billion worth of food and distribute to those affected by the economic crisis caused by the pandemic,³ which has resulted in unemployment levels unsurpassed since the Great Depression.⁴ On May 8, 2020, the “Farmers to Families Food Box” announced the allocation of \$1.2 billion in

¹ *Coronavirus Disease 2019 (COVID-19) Situation Summary*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/summary.html>.

² *Coronavirus Map: Tracking the Global Outbreak*, N.Y. TIMES (June 24, 2020, 4:10 AM) <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html>.

³ *See USDA to Purchase Up to \$3 Billion in Agricultural Commodities, Issue Solicitations for Interested Participants*, USDA, Apr. 19, 2020, <https://www.ams.usda.gov/content/usda-purchase-3-billion-agricultural-commodities-issue-solicitations-interested>.

⁴ Heather Long & Andrew Van Dam, *America Is in a Depression. The Challenge Now Is to Make It Short-Lived*, WASH. POST (Apr. 9, 2020 7:07 PM), <https://www.washingtonpost.com/business/2020/04/09/66-million-americans-filed-unemployed-last-week-bringing-pandemic-total-over-17-million/>.



contracts for the purchase, packaging, and distribution of agricultural products,⁵ but concerns have arisen about how bids were evaluated and whether contracts were given out appropriately.⁶ USDA has already cancelled one of the largest contracts⁷ and another recipient has come under scrutiny for not having delivered a single box of food for weeks after the contract was awarded.⁸

American Oversight and Union of Concerned Scientists submit this request to shed light on USDA's response to the coronavirus pandemic, including its management of the Farmer to Families Food Box program.

Requested Records

American Oversight and Union of Concerned Scientists request that USDA produce the following records within twenty business days:

1. All final directives, orders, decisions, protocols, or guidance produced by or provided to your agency regarding the Farmers to Families Food Box Program, including but not limited to the following topics:
 - a. Requirements that contract awardees possess Perishable Agricultural Commodities Act (PACA) licenses, or exemptions allowing bidders without PACA licenses to receive contracts;
 - b. Processes to ensure that contract awardees use federal funds solely for the acquisition, packaging, and distribution of qualifying food;
 - c. Processes for distributing federal funds, such as whether contract awardees will receive payments upon completion of the contract, in installments, or upfront;
 - d. Supervisory processes for evaluating whether a contract awardee has fulfilled their contract and for reclaiming federal funds in the event a

⁵ See *Announcement of Contract Awards for the Farmers to Families Food Box Program*, USDA, May 8, 2020

<https://www.ams.usda.gov/sites/default/files/media/AnnouncementofContractAwards.pdf>; *Farmers to Families Food Box*, USDA, <https://www.ams.usda.gov/selling-food-to-usda/farmers-to-families-food-box>.

⁶ Courtney Weaver, *Food Aid Effort Faulted for Neglecting New York and US North-East*, FINANCIAL TIMES, May 27, 2020, <https://www.ft.com/content/a57885ba-e72f-4d50-bd60-2f0df0ec4612>.

⁷ *As Wedding Planner Promises Deliveries, Congressmen Call for Cancellation In \$39 Million Contract*, BLUE BOOK SERVS., May 27, 2020, <https://www.producebluebook.com/2020/05/27/as-wedding-planner-promises-deliveries-congressmen-call-for-cancellation-in-39-million-contract/>.

⁸ Helena Bottemiller Evich, *USDA Food Boxes MIA in San Antonio*, POLITICO (May 28, 2020, 10:00 AM), <https://www.politico.com/newsletters/morning-agriculture/2020/05/28/usda-food-boxes-mia-in-san-antonio-787948>.

contract is unsatisfactorily fulfilled or unfulfilled (i.e., “clawback” provisions).

This request includes records regarding both the current round of contracts covering the time period from May 15 to June 30, 2020, as well as subsequent renewals or new contracts awarded.⁹

2. Records sufficient to identify the following information concerning the Farmers to Families Food Box program:
 - a. The total number of bids rejected;
 - b. The total number of audits or other supervisory processes completed to evaluate whether an awardee has satisfactorily fulfilled their contract and the results of those audits;

Please provide all responsive records from April 24, 2020, through the date of the search.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency’s regulations, American Oversight and Union of Concerned Scientists request 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.

Requesters seek 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.”¹⁰ The public has a significant interest in understanding how USDA is responding to the unprecedented pandemic. Records with the potential to shed light on this matter would contribute significantly to public understanding of operations of the federal government, including illuminating how the agency is allocating funds intended to provide nutrition to Americans during a public health and economic crisis. Requesters are committed to transparency and make the responses agencies provide to FOIA requests publicly available, and the public’s understanding of the government’s activities would be enhanced through our analysis and publication of these records.

⁹ Tom Karst, *USDA Plans Second Round of Farmers to Families Box Contracts*, AGWEB (May 28, 2020, 10:53 AM), <https://www.agweb.com/article/usda-plans-second-round-farmers-families-box-contracts>.

¹⁰ 5 U.S.C. § 552(a)(4)(A)(iii).

This request is primarily and fundamentally for non-commercial purposes.¹¹ As 501(c)(3) nonprofits, American Oversight and Union of Concerned Scientists do not have commercial purposes and the release of the information requested is not in either organization'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 also demonstrated its commitment to the public disclosure of documents and creation of editorial content through numerous substantive analyses posted to its website.¹³ 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;¹⁴ posting records received as part of American Oversight's "Audit the Wall" 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;¹⁵ posting records regarding potential self-dealing at the Department of Housing & Urban Development and related analysis;¹⁶ posting records and analysis relating to the

¹¹ See 5 U.S.C. § 552(a)(4)(A)(iii).

¹² American Oversight currently has approximately 15,600 page likes on Facebook and 104,000 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited June 24, 2020); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited June 24, 2020).

¹³ News, AMERICAN OVERSIGHT, <https://www.americanoversight.org/blog>.

¹⁴ DOJ Records Relating to Solicitor General Noel Francisco's Recusal, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *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 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>.

¹⁶ *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>.

federal government's efforts to sell nuclear technology to Saudi Arabia;¹⁷ 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.¹⁸

Union of Concerned Scientists (UCS) is a science-based public interest organization with more than 500,000 supporters—including parents, businesspeople, scientists, teachers, and students—throughout the United States. To help further its work of using sound scientific analysis—not political calculations or corporate hype—to create a healthy, safe, and sustainable future, as well as promote scientific integrity in government science, UCS seeks to provide its members and activists, as well as the general public, up-to-date information, news, and commentary on various aspects of science policy.

UCS consistently publishes in-depth reports on topics of critical interest.¹⁹ It also publishes newsletters, fact sheets, blogs and other publications in print and electronic form. Moreover, UCS serves as a resource for the media and testifies before Congress, including on issues related to scientific integrity.

UCS maintains a public website, www.ucsusa.org, with science-policy related information and news. Its website is visited an average of 15,000 times each day. In March of 2015, UCS had over one million unique visitors to its website. Visitors to the website include scientists, teachers, businesspeople, federal and state officials, and other concerned citizens. Moreover, information posted on UCS's website is often linked to websites of other organizations. UCS also has a blog, available at blog.ucsusa.org, and is active on Facebook and Twitter.

UCS has a long history of successfully working with the news media to hold government officials and agencies accountable. For example, UCS staff possess detailed knowledge of political interference in science at the EPA.²⁰ Its work in this area has been the subject of

¹⁷ *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>.

¹⁸ *Sessions' Letter Shows DOJ Acted on Trump's Authoritarian Demand to Investigate Clinton*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/sessions-letter>.

¹⁹ Visit www.ucsusa.org for numerous examples of reports published on a variety of different topics.

²⁰ See <http://www.ucsusa.org/our-work/center-science-and-democracy/promoting-scientific-integrity/interference-at-the-epa.html> for more information.

major congressional hearings²¹ and news coverage.²²

Accordingly, American Oversight and Union of Concerned Scientists qualify for a fee waiver.

Guidance Regarding the Search & Processing of Requested Records

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

- 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 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. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.²³ 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.²⁴
- 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

²¹ See *Allegations of Political Interference with the Work of Government Climate Change Scientists: Hearing Before the H. Comm. on Oversight & Gov. Reform*, 110th Cong. (2007), <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg34913/html/CHRG-110hhrg34913.htm>.

²² See, e.g., Dina Cappillo, *Groups to EPA: Stop Muzzling Science Advisers*, SAN DIEGO UNION-TRIBUNE (Aug. 23, 2014, 10:44 AM), <https://www.sandiegouniontribune.com/sdut-groups-accuse-epa-of-muzzling-outside-advisers-2014aug12-story.html>; Christopher Lee, *Scientists Report Political Interference*, WASH. POST, April 24, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/23/AR2008042303074.html>.

²³ 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).

²⁴ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016).

requirements to manage agency information electronically,²⁵ 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 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 Requesters, please do not hesitate to contact us to discuss this request. We welcome 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, Union of Concerned Scientists, 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

²⁵ 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>.

responsive records to American Oversight, please also provide responsive material on a rolling basis.

We share a common mission to promote transparency in government. We look forward to working with your agency on this request. If you do not understand any part of this request, please contact Emma Lewis at foia@americanoversight.org or 202.919.6303. Also, if American Oversight and Union of Concerned Scientists' 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



Ricardo J. Salvador
Director and Senior Scientist
Food and Environment Program
Union of Concerned Scientists