Green, LindaE

From: American Oversight FOIA <foia@americanoversight.org>
Sent: Tuesday, December 19, 2017 3:48 PM
To: FOIA HQ
Subject: FOIA Request: EPA-17-0588
Attachments: EPA-17-0588 .pdf

Dear FOIA Officer:

Please find attached a request for information under the Freedom of Information Act.

Sincerely,

Sara Creighton
Counsel
American Oversight
foia@americanoversight.org | 202-869-5246
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EPA-17-0588

AMERICAN OVERSIGHT

December 19, 2017

VIA ELECTRONIC MAIL

Records, FOIA, and Privacy Branch
Office of Environmental Information
Environmental Protection Agency
1200 Pennsylvania Avenue NW (2822T)
Washington, DC 20460
hq.foia@epa.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 the implementing regulations of the Environmental Protection Agency (EPA), 40 C.F.R. Part 2, American Oversight makes the following request for records.

On December 15, Mother Jones and the New York Times reported that EPA signed a $120,000 no-bid contract with Definers Public Affairs to provide media services.[1] Definers was founded by Joe Pounder and Matt Rhoades, two longtime Republican political operatives. Mr. Pounder and Mr. Rhoades previously founded America Rising, a Republican political opposition research firm.

The Times also reported that since President Trump took office, at least 40 FOIA requests have been submitted to the EPA by Allan Blutstein, a vice president for both Definers and America Rising. Many of those requests sought records about EPA employees who had been critical of the Trump administration.

Earlier today, it was reported that EPA had decided to cancel the contract with Definers Public Affairs.[2] However, many questions remain about the initial decision to award a no-bid contract to

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[1] *See* Rebecca Leber et al., *The EPA Hired a Major Republican Opposition Research Firm to Track Press Activity*, MOTHER JONES (Dec. 15, 2017, 6:00 AM), http://www.motherjones.com/politics/2017/12/the-epa-hired-a-major-republican-opposition-research-firm-to-track-press-activity/; Eric Lipton & Lisa Friedman, *E.P.A. Contractor Has Spent Past Year Scouring the Agency for Anti-Trump Officials*, N.Y. TIMES, Dec. 15, 2017, https://www.nytimes.com/2017/12/15/us/politics/epa-scott-pruitt-foia.html; Eric Lipton & Lisa Friedman, *E.P.A. Employees Spoke Out. Then Came Scrutiny of Their Email.*, N.Y. TIMES, Dec. 17, 2017, https://www.nytimes.com/2017/12/17/us/politics/epa-pruitt-media-monitoring.html?_r=0.

[2] *See* Brady Dennis, *EPA to End Controversial Contract with Conservative 'Media Monitoring' Firm*, WASH. POST (Dec. 19, 2017, 12:22 PM), https://www.washingtonpost.com/news/energy-

Definers, as well as the circumstances surrounding recent actions taken by both Definers and America Rising. American Oversight seeks records to help answer those questions.

Requested Records

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

> All communications between anyone in the Office of the Administrator (including all of the offices within the AO's office) and the Office of General Counsel (including the FOIA office) relating to any FOIA request submitted by Mr. Allan Blutstein, America Rising, Definers Public Affairs, or NTK Network, including but not limited to at least the following FOIA requests:

- EPA-HQ-2017-003301
- EPA-R5-2017-003495
- EPA-HQ-2017-003526
- EPA-R5-2017-003841
- EPA-HQ-2017-005364
- EPA-R3-2017-005375
- EPA-R9-2017-005393
- EPA-R8-2017-005403
- EPA-R7-2017-005406
- EPA-R10-2017-005407
- EPA-R1-2017-005411
- EPA-R2-2017-005412
- EPA-R4-2017-005413
- EPA-R6-2017-005415
- EPA-R5-2017-005435
- EPA-R10-2017-005992
- EPA-HQ-2017-006323
- EPA-R9-2017-006351
- EPA-HQ-2017-006363
- EPA-R3-2017-006720
- EPA-R5-2017-006721
- EPA-R1-2017-006731
- EPA-HQ-2017-006735
- EPA-R1-2017-006759
- EPA-HQ-2017-006760
- EPA-HQ-2017-006771
- EPA-HQ-2017-006774
- EPA-HQ-2017-006821
- EPA-HQ-2017-007013
- EPA-HQ-2017-007034
- EPA-HQ-2017-007173
- EPA-HQ-2017-007485
- EPA-R3-2017-007549
- EPA-R4-2017-007551
- EPA-R10-2017-007552
- EPA-R1-2017-007589
- EPA-R2-2017-007590
- EPA-R7-2017-007591
- EPA-R8-2017-007593
- EPA-R6-2017-007675
- EPA-HQ-2017-008239
- EPA-HQ-2017-010087
- EPA-R3-2017-011881

In addition to the records requested above, we also request 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 EPA 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.

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environment/wp/2017/12/19/epa-to-end-controversial-contract-with-conservative-media-monitoring-firm/?utm_term=.a9b9b75d67a7.

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 is 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; we have 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 EPA'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 Agency (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 EPA's archiving tools would capture that email under Capstone. Accordingly, American Oversight insist that EPA 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. We are available to work with

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[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.

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, we request 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, EPA 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, 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, 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, please also provide responsive material on a rolling basis.

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[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.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l), 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.[12]

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 government operations and activities.[13] The information sought by this request will shed significant light on how the EPA processed FOIA requests by an entity with which it had a pre-existing political relationship and an ongoing contractual relationship. This request will help answer some of the many questions that were raised by public reporting on the Definers contract and the numerous FOIA requests filed by Mr. Blutstein.

This request is primarily and fundamentally for non-commercial purposes.[14] 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.[15] 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,[16] 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.[17] 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

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[11] 40 C.F.R. § 2.107(l)(1).
[12] *Id.*
[13] *Id.*; *see also* 40 C.F.R. § 2.107(l)(2)(i)-(iv).
[14] 40 C.F.R. § 2.107(l)(1); 40 C.F.R. § 2.107(l)(3)(i)-(ii).
[15] American Oversight currently has approximately 11,700 page likes on Facebook and 38,200 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited Dec. 19, 2017); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited Dec. 19, 2017).
[16] *DOJ Civil Division Response Noel Francisco Compliance,* AMERICAN OVERSIGHT, https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance.
[17] *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.

information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.[18]

Accordingly, this request qualifies for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. We look forward to working with EPA 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 Sara Creighton at foia@americanoversight.org or 202.869.5246. Also, if our 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

[18] *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.