Green, LindaE

From: American Oversight FOIA <foia@americanoversight.org>
Sent: Friday, August 18, 2017 2:31 PM
To: FOIA HQ
Subject: Expedited FOIA Request: EPA-17-0324
Attachments: EPA-17-0324 (Konkus Waivers and Recusals).pdf

Dear FOIA Officer:

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

Sincerely,

Sara Creighton
Counsel
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AMERICAN OVERSIGHT

August 18, 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: Expedited Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of the Environmental Protection Agency (EPA), 40 C.F.R. Part 2, American Oversight makes the following request for records.

It was recently reported that EPA has assigned the process of approving competitive grant solicitations to a political appointee, in a sharp break from tradition, which usually sees grants reviewed by career employees.[1] The political appointee in charge of reviewing solicitations is John Konkus, the Deputy Associate Administrator in EPA's Office of Public Affairs.[2] Nothing in the stated mission of the Office of Public Affairs indicates it has a responsibility for competitive grant solicitations.[3]

Given that EPA has taken the highly unusual step of politicizing the grant solicitation process, American Oversight seeks to investigate how that process is being overseen by Mr. Konkus, including whether and how he is complying with his ethical obligations.

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[1] *See* Sean Reilly, *Pruitt Assigns Political Appointee to Vet Grant Requests*, E&E NEWS, Aug. 17, 2017, https://www.eenews.net/stories/1060058907.
[2] *Id.*; Protocol for Office of Public Affairs Review of Draft Competitive Grant Solicitations, *available at* https://www.eenews.net/assets/2017/08/17/document_gw_10.pdf.
[3] *See* About the Office of Public Affairs, EPA, https://www.epa.gov/aboutepa/about-office-public-affairs-opa (last visited Aug. 18, 2017).

Requested Records

American Oversight requests that EPA produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

1. Records reflecting any recusal determinations made or issued for John Konkus, the Deputy Associate Administrator in the Office of Public Affairs.

2. Records reflecting any conflicts or ethics waivers or authorizations issued for John Konkus, including authorizations pursuant to 5 C.F.R. § 2635.502.

Please provide all responsive records through the date the search is conducted.

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 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.

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.[4] **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.**[5]

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[4] *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).

[5] *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

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.**[6] **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 insists 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. 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."[7] 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."[8] 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."[9] 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.'"[10]

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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)).

[6] 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.

[7] FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

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

[9] *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223—24 (D.C. Cir. 1987) (emphasis in original).

[10] *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)).

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.[11] 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, 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 EPA 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 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.[12] Moreover, the request is primarily and fundamentally for non-commercial purposes.[13]

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.[14] The solicitation and awarding of grants of federal funding is plainly a government activity, and one about which the public is often uninformed. Historically, competitive grant solicitations at the EPA were handled by career staff; now that the process has been politicized, it is more critical than ever that the public have a window into the decisions being made and the various entities that have input into the process. The American people deserve to

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[11] *Mead Data Central*, 566 F.2d at 261.
[12] 40 C.F.R. § 2.107(l)(1).
[13] *Id.*
[14] *Id.*; *see also* 40 C.F.R. § 2.107(l)(2)(i)-(iv).

know more about the political appointee who is overseeing the process that is reportedly responsible for hundreds of millions of dollars of taxpayer funds per year.[15]

This request is primarily and fundamentally for non-commercial purposes.[16] 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.[17] 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,[18] 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.[19] 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.[20]

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E) and 40 C.F.R. § 2.104(e), American Oversight requests that EPA expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief, that there is an urgent need to inform the public about the federal government activity that is the subject of this request. As mentioned above, the competitive grant program at EPA reportedly accounts for hundreds of millions of dollars.[21] The choice to place the decision-making authority for competitive grant solicitations in the hands of a political appointee is a dramatic departure from past practice, and

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[15] *See* Reilly, *supra* note 1.
[16] 40 C.F.R. § 2.107(l)(1); 40 C.F.R. § 2.107(l)(3)(i)-(ii).
[17] American Oversight currently has over 11,200 page likes on Facebook, and over 33,600 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited Aug. 14, 2017); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited Aug. 14, 2017).
[18] *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco.
[19] *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents.
[20] *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.
[21] *See* Reilly, *supra* note 1.

one that raises serious questions about how the EPA is choosing to spend taxpayer dollars. The American public deserves transparency into this newly-politicized process. Given that grant solicitations are no doubt being reviewed and approved (or rejected) on an ongoing basis, there is an urgent need to shed light on the competitive grant solicitation process—and the political appointee overseeing that process—before any more decisions are made that might not be in the public's best interests. The information American Oversight seeks thus concerns "a matter of a current exigency to the American public."[22]

I further certify that American Oversight is primarily engaged in disseminating information to the public. 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. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,[23] American Oversight "'gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.'"[24] American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and 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.[25] 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, American Oversight promptly posted the records to its website[26] and published an analysis of what the records reflected about DOJ's process for ethics waivers.[27] Additionally, this particular FOIA request is part of a public project conducted by American Oversight 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.[28]

Accordingly, American Oversight's request satisfies the criteria for expedition.

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[22] *Al-Fayed v. Cent. Intelligence Agency*, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795, at 26 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3469).

[23] *See ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 30—31 (D.D.C. 2004); *EPIC v. Dep't of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

[24] *ACLU*, 321 F. Supp. 2d at 29 n.5 (*quoting EPIC*, 241 F. Supp. 2d at 11).

[25] American Oversight currently has approximately 11,200 page likes on Facebook, and 33,600 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited Aug. 16, 2017); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited Aug. 16, 2017).

[26] *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco.

[27] *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents.

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

Conclusion

We share a common mission to promote transparency in government. American Oversight looks 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 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