Green, LindaE

From: American Oversight FOIA <foia@americanoversight.org>
Sent: Friday, June 23, 2017 3:34 PM
To: FOIA HQ
Subject: FOIA Request EPA-17-0194
Attachments: EPA-17-0194.pdf

Dear FOIA Officer:

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

Sincerely,

Sara Creighton
Counsel
American Oversight
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EPA-17-0194

AMERICAN OVERSIGHT

June 23, 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 *et seq.* and the implementing regulations for the Environmental Protection Agency (EPA), 40 C.F.R. Part 2, American Oversight makes the following request for records.

During his tenure as Oklahoma's Attorney General, current EPA Administrator Scott Pruitt reportedly took several steps to obscure his email communications. First, it has been reported that on numerous occasions he sent or received emails regarding government business from his personal email account.[1] Second, it has recently come to light that he used two different government email addresses while serving as Attorney General.[2] Neither of those details was properly disclosed to the Senate during his confirmation process.[3]

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[1] Michael Biesecker & Sean Murphy, *Records Show EPA's Pruitt Used Private Email, Despite Denial at Confirmation Hearing*, CHICAGO TRIBUNE (Feb. 27, 2017, 7:18 PM), http://www.chicagotribune.com/news/nationworld/politics/ct-epa-scott-pruitt-private-emails-20170227-story.html; Steven Mufson, *New EPA Head Told Congress He Never Used Personal Email for Government Business. But It Turns Out He Did.*, WASH. POST, Mar. 2, 2017, https://www.washingtonpost.com/news/energy-environment/wp/2017/03/02/new-epa-head-told-congress-he-never-used-personal-email-for-government-business-but-it-turns-out-he-did/?utm_term=.c8e35eb9b661;

[2] Dino Grandoni, *Scott Pruitt Used Two Government Email Addresses In His Last Job. He Told Congress He Used One.*, WASH. POST, June 14, 2017, https://www.washingtonpost.com/news/powerpost/wp/2017/06/14/pruitt-used-two-government-email-addresses-in-his-last-job-he-told-congress-he-used-one/?utm_term=.ab8ac8a357e1; Samantha Page, *Pruitt Under Fire Again for Misleading Congress On His Email Use*, THINKPROGRESS, June 15, 2017, https://thinkprogress.org/but-his-emails-again-aed947a14e0f.

[3] *See supra* notes 1, 2.

American Oversight is seeking records sufficient to evaluate how Mr. Pruitt has been conducting agency business since taking over as the head of the EPA, and in particular whether he is properly complying with all Federal Records Act requirements.

Requested Records

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

1. All emails between (a) Scott Pruitt, Ryan Jackson (Chief of Staff), John Reeder (Deputy Chief of Staff), or Mike Flynn (Acting Deputy Administrator) and (b) any email address containing a house.gov or senate.gov domain from June 1, 2017, to June 15, 2017.

   In searching for documents responsive to this request, please search all email accounts used by these individuals, including any alias email accounts or personal email accounts on which they may have conducted government business. American Oversight does not seek to identify the full email addresses associated with those accounts if that would include any exempt information, just the communications sent or received on those accounts. If multiple accounts are reflected among responsive documents, that should not be obscured through redaction.

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.[1] **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**

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[1] 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).

official systems or if officials have, through negligence or willfulness, failed to meet their obligations.[5]

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 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

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[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 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), *available at* 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), *available at* 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).

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]

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 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. 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 the

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[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)).
[11] *Mead Data Central*, 566 F.2d at 261.

operations or activities of the government."[12] The public interest in how Mr. Pruitt is conducting agency business at the EPA is plentiful, particularly given his conduct as Oklahoma Attorney General.[13] Indeed, the years of intense media and legal scrutiny into how Hillary Clinton maintained her emails as Secretary of State have greatly increased public interest of the methods by which Cabinet-level officials conduct official government business. Additionally, there have already been several concerning allegations that federal agencies under the Trump administration may not be fully and properly complying with the requirements of the Federal Records Act, such as by relying on non-governmental email accounts to conduct official government business,[14] or by using encrypted chat programs that automatically delete messages to conduct official business.[15] The American people deserve to know how the country's top regulators are (or are not) using technology to conduct agency business and whether they are complying with federal record-keeping requirements in doing so.

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 our public website and promote their availability on social media platforms, such as Facebook and Twitter.[17] One example of American Oversight's demonstrated public disclosure of documents and creation of editorial content is in its recently launched "Audit the Wall" effort, 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.[18]

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[12] 40 C.F.R. § 2.107(l)(1), (2)(i)-(iv).

[13] *See supra*, notes 1, 2.

[14] *See, e.g.*, Nina Burleigh, *Trump White House Senior Staff Have Private RNC Email Accounts*, NEWSWEEK (Jan. 25, 2017, 1:09 PM), http://www.newsweek.com/trump-emails-rnc-reince-priebus-white-house-server-548191.

[15] *See, e.g.*, Jonathan Swan & David McCabe, *Confide: The App for Paranoid Republicans*, AXIOS, Feb. 8, 2017, https://www.axios.com/confide-the-new-app-for-paranoid-republicans-2246297664.html; Sheera Frenkel, *White House Staff Are Using a "Secure" App that's Really Not So Secure*, BUZZFEED NEWS (Feb. 16, 2017, 7:23 PM), https://www.buzzfeed.com/sheerafrenkel/white-house-staff-are-using-a-secure-app-thats-really-not-so?utm_term=.efEzZeNrz#.jdbz07qZz; Andrew Restuccia & Nancy Cook, *Trump Inspires Encryption Boom in Leaky DC*, POLITICO (Feb. 28, 2017, 11:54 AM), http://www.politico.com/story/2017/02/trump-encryption-cybersecurity-leaks-235417.

[16] 40 C.F.R. § 2.107(l)(1), (3)(i)-(ii).

[17] American Oversight currently has over 10,900 page likes on Facebook, and over 32,700 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited June 22, 2017); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited June 22, 2017).

[18] *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org (last visited June 20, 2017).

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 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