



November 16, 2017

**VIA FACSIMILE**

Department of Energy  
FOIA Requester Service Center  
1000 Independence Avenue SW  
Mail Stop MA-46  
Washington, DC 20585  
Fax: (202) 586-0575

**Re: Freedom of Information Act Request**

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations for the Department of Energy (DOE), 10 C.F.R. Part 1004, American Oversight and Environmental Working Group (EWG) make the following request for records.

On September 28, 2017, Energy Secretary Rick Perry sent a letter to the Federal Energy Regulatory Commission (FERC) urging the commission to adopt a rule that would require energy markets to recover “costs of fuel-secure generation units that make our grid reliable and resilient.”<sup>1</sup> Secretary Perry suggests that coal and nuclear energy plants are more resilient and reliable than natural gas or renewable plants, and therefore should be subsidized, which current markets fail to do.<sup>2</sup>

American Oversight and EWG are seeking information to determine the extent to which industry and trade groups, and others with a stake in these rules, may have engaged with Mr. Perry and DOE prior to this decision.

**Requested Records**

American Oversight and EWG request that DOE produce the following within twenty business days:

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<sup>1</sup> Letter from Rick Perry, Secretary of Energy, to Neil Chatterjee et al., Federal Energy Regulatory Commission (Sept. 28, 2017), <https://energy.gov/sites/prod/files/2017/09/f37/Secretary%20Rick%20Perry%27s%20Letter%20to%20the%20Federal%20Energy%20Regulatory%20Commission.pdf>.

<sup>2</sup> Jody Freeman & Joseph Goffman, *Rick Perry's Anti-Market Plan to Help Coal*, N.Y. TIMES, Oct. 25, 2017, <https://www.nytimes.com/2017/10/25/opinion/rick-perry-coal-antimarket.html>.



All communications between DOE and any employee or representative of any of the entities listed in Appendix A containing any of the following search terms (whether in the body or subject):

- Section 202(c)
- § 202(c)
- Section 205
- § 205
- Section 206
- § 206
- “premature retirements of power plants”
- “shall establish a tariff that provides a just and reasonable rate”
- “essential energy and ancillary reliability services”

The search for responsive records should include all individuals and locations likely to contain responsive records, including but not limited to the Office of the Secretary, the Office of the Under Secretary for Science & Energy and each of its offices, the Office of Energy Policy & Systems Analysis, and the four Power Marketing Administrations.

Please provide all responsive records from January 20, 2017, until September 28, 2017. Please note that we do not wish to obtain copies of any news or press clippings regarding these issues that are otherwise publicly available; accordingly, you may omit press clippings from the documents provided in response to this request, unless the record includes commentary on the press coverage.

In addition to the records requested above, American Oversight and EWG 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 DOE 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 and EWG seek 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.<sup>3</sup> **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.**<sup>4</sup>

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 DOE’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.**<sup>5</sup> 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 DOE’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DOE 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.”<sup>6</sup> 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

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<sup>3</sup> 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).

<sup>4</sup> 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)).

<sup>5</sup> 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>.

<sup>6</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

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.”<sup>7</sup> 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.”<sup>8</sup> 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.’”<sup>9</sup>

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.<sup>10</sup> 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 and EWG intend to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, DOE 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 and EWG 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, EWG, and DOE 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 15<sup>th</sup> Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight and EWG, 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 10 C.F.R. § 1004.9(a)(8), American Oversight and EWG 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

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<sup>7</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>8</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>9</sup> *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)).

<sup>10</sup> *Mead Data Central*, 566 F.2d at 261.

significant way.<sup>11</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>12</sup>

American Oversight and EWG request 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 operations or activities of the government.”<sup>13</sup> Mr. Perry’s proposed rule, if implemented, has the potential to radically alter American energy markets.<sup>14</sup> The American people deserve to know which outside individuals and groups are communicating with our nation’s top regulators. This request seeks information that will shed light on which interests are shaping our environmental policy. Disclosure of the requested information will contribute to public understanding; as discussed below American Oversight and EWG have both the ability and the intention to effectively convey the information they receive to the public.

This request is primarily and fundamentally for non-commercial purposes.<sup>15</sup> 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.<sup>16</sup> 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,<sup>17</sup> 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.<sup>18</sup> 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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<sup>11</sup> 10 C.F.R. § 1004.9(a)(8)(i)(A)-(D).

<sup>12</sup> 10 C.F.R. § 1004.9(a)(8)(ii)(A)-(B).

<sup>13</sup> 10 C.F.R. § 1004.9(a)(8)(i)(A)-(D).

<sup>14</sup> David Roberts, *Rick Perry’s Plan to Subsidize Coal and Nuclear Plants Is Bonkers*, Vox (Oct. 4, 2017, 9:10 AM), <https://www.vox.com/energy-and-environment/2017/10/4/16407278/rick-perry-doe-plan-coal-nuclear-energy-markets>.

<sup>15</sup> 10 C.F.R. § 1004.9(a)(8)(ii)(A)-(B).

<sup>16</sup> American Oversight currently has approximately 11,500 page likes on Facebook and 37,400 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Nov. 16, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Nov. 16, 2017).

<sup>17</sup> *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

<sup>18</sup> *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.<sup>19</sup>

EWG's interest in the disclosure of the requested records is purely non-commercial. EWG is a 501(c)(3) non-profit public interest organization dedicated to using the power of information to protect public health and the environment. EWG will use the information gathered in furtherance of this mission. EWG has long studied the public health and environmental impacts of various forms of energy production. As part of this work, EWG publishes reports and creates consumer-facing resources to educate the public and advocate for health- and environment-protective standards. For example, EWG research reports on subjects such as hydraulic fracturing, fossil fuel emissions, and renewable energy sources. Like American Oversight, EWG plans to use the information gathered, and its analysis of it, to educate the public through various media including reports, blogs, and press releases.

Accordingly, this request qualifies for a fee waiver.

### Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with you 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](mailto: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



Kenneth A. Cook  
President  
Environmental Working Group

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<sup>19</sup> *Audit the Wall*, AMERICAN OVERSIGHT, [www.auditthewall.org](http://www.auditthewall.org).

## Appendix A

In connection with the above FOIA request, American Oversight requests that DOE search for communications with anyone acting on behalf of the following entities:

1. U.S. Chamber of Commerce
2. Edison Electric Institute
3. Nuclear Energy Institute
4. American Coal Council
5. National Coal Council
6. American Energy Alliance
7. Institute for Energy Research
8. American Coalition for Clean Coal Electricity
9. Peabody Energy
10. American Legislative Exchange Council
11. Arch Coal
12. Alpha Natural Resources
13. Cloud Peak Energy
14. SMR Start
15. American Electric Power
16. Heartland Institute
17. Americans for Prosperity
18. Murray Energy
19. First Energy
20. The Southern Company