The Daily Dot

December 15, 2017

TO:

Michael Toland, Ph.D.
Departmental Freedom of Information Officer
Office of Privacy and Open Government
14th and Constitution Avenue NW
Mail Stop 52010FB
Washington, DC 20230

FROM:

Ellen Ioanes, FOIA Intern
The Daily Dot
85 Broad Street
New York, NY 10004
336-425-8861

RE: **Request Under Freedom of Information Act (Expedited Processing & Fee Waiver Requested)**

Dear FOIA officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq.[1] and the implementing regulations of the U.S. Department of State, 15 C.F.R.. part 4[2], The Daily Dot makes the following request for records.

Since allegations about producer Harvey Weinstein's sexual predation against numerous women broke in October 2017, reports of inappropriate or criminal behavior have featured prominently in the news cycle.[3] The have touched many industries, from Hollywood, to media, to music, art, the foodservice industry and, of course, politics.

Senate candidate Roy Moore of Alabama allegedly tried to date and/or have sexual relations with teenage girls as young as 14 when he was a lawyer in his 30s.[4] As of election day in Alabama, at least nine women had accused Moore of some type of sexual misconduct.[5]

Minnesota Senator Al Franken recently announced his resignation after being accused by at least seven women of inappropriate sexual behavior, including forcible kissing and groping.[6] Franken announced his resignation on December 7, 2017.

Other politicians accused of sexual misconduct include President George H.W. Bush, President Donald Trump, Rep. Ruben Kihuen, Rep. John Moore, Rep. Trent Franks, Rep. John Conyers and Rep. Blake Farenthold have all been accused of some form of sexual harassment or misconduct. Conyers and Franks have resigned.

Conyers and Farenthold have used a taxpayer-funded account to pay out settlements to accusers, with little

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[1] https://www.gpo.gov/fdsys/granule/USCODE-2011-title5/USCODE-2011-title5-partI-chap5-subchapII-sec552/content-detail.html

[2] https://www.ecfr.gov/cgi-bin/text-idx?SID=ce4e6cc59c9c12e772269b3638192b46&mc=true&node=se15.1.4_13&rgn=div8

[3] Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, December 12, 2017, https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinstein s-accusers-tell-their-stories

[4] Alice Crites, Stephanie McCrummen and Beth Reinhard, *Woman says Roy Moore initiated sexual encounter when she was 14, he was 32,* December 12, 2017, https://www.washingtonpost.com/investigations/woman-says-roy-moore-initiated-sexual-encounter-when-she-was-14-he-was-32/2017/11/09/1f495878-c293-11e7-afe9-4f60b5a6c4a0_story.html?utm_term=.a1e328ae5c76

[5] Elizabeth Ponsot, *These nine women have accused Roy Moore of sexual misconduct*, December 12, 2017, https://qz.com/1147348/these-nine-women-have-accused-roy-moore-of-sexual-misconduct/

[6] Heather Caygle, *Another woman says Franken tried to forcibly kiss her*, December 12, 2017, https://www.politico.com/story/2017/12/06/al-franken-accusation-sexual-harassment-2006-281049

transparency.[7] Conyers apparently paid out $27,000 of taxpayer money in 2014 as severance when a woman in his office was allegedly fired for rejecting his advances.[8] Representative Blake Farenthold apparently used the fund to pay out $84,000 to his former communications director, whom he allegedly fired after she complained about the inappropriate work environment Farenthold created, including sexually suggestive conversations and gender discrimination.[9]

More such allegations are likely coming, against powerful figures from all industries, including politics and government.

Requested Records

The Daily Dot requests that the Commerce Department produce the following within twenty business days and further seeks expedited review of this request for the reasons identified below:

1. Line item budgets detailing any payouts for settlements of any kind.
2. Any communication (email, text message, memo or phone call readout, and attachments thereof) from the Chief Financial Officer and Assistant Secretary for Administration regarding the payment of such settlements.
3. Any communication (email, text message, memo or phone call readout, and attachments thereof) from the Office of the Inspector General regarding the payment of such settlements.
4. Any communication (email, text message, memo or phone call readout, and attachments thereof) from the Office of the General Counsel regarding the payment of such settlements.
5. Any communication or instruction to staff regarding the pursuit or request of such payments.
6. Any record of payment for such settlements.

The search for responsive records should include individuals and locations where records are likely to exist, including but not limited to the Office of Secretary Wilbur Ross, the Office of the Chief Information Officer, the Office of the Assistant Secretary, the office of the Chief Financial Officer, the Office of the Inspector General, and the Office of the General Counsel.

The Commerce Department should limit its search to responsive records created between January 1, 1997, and the date the search begins.

The Daily Dot seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms "records," "communications," and "documents" 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.

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.[10] 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; The Daily Dot has a right to records contained in those files even if material has not yet been moved to official systems or if officials

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[7] Rachel Bade and Kyle Cheney, *GOP lawmakers slam secret sexual harassment settlements*, December 13, 2017, https://www.politico.com/story/2017/11/29/congress-sexual-harassment-settlements-republicans-react-268432

[8] Emily Stewart, *Report: Rep. John Conyers settled a $27,000 sexual misconduct complaint in 2015*, December 13, 2017, https://www.vox.com/policy-and-politics/2017/11/21/16684606/john-conyers-settlement-buzzfeed

[9] Rachel Bade, *Lawmaker behind secret $84K sexual harassment settlement unmasked*, December 13, 2017, https://www.politico.com/story/2017/12/01/blake-farenthold-taxpayer-funds-sexual-harassment-274458

[10] 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)

have, through negligence or willfulness, failed to meet their obligations.[11] 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.

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 the Commerce Department'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.[12] Furthermore, agencies that have adopted the 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 the Commerce Department's archiving tools would capture that email under Capstone.

Accordingly, The Daily Dot insists that the Commerce Department 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.

If any potentially responsive records have been destroyed and/or transferred to other agencies or offices, such as the National Archives and Records Agency (NARA), then I request copies of the destruction or transfer slips as well as any other documentation relating to, mentioning or describing said transfer or destruction, to include but not be limited to confirmation that the Commerce Department has no other copies of said records.

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."[13]

If it is your position that any portion of the requested records is exempt from disclosure, The Daily Dot 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."[14] 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."[15] 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.'"[16]

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable nonexempt 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.[17] Claims of non-segregability 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.

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[11] *Id.* at 8 ("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))

[12] 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

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

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

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

[16] *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))

[17] See *Mead Data Central*, 566 F.2d at 261

In addition to the records requested above, The Daily Dot 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 the Commerce Department 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.

You should institute a preservation hold on information responsive to this request. The Daily Dot intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, the Commerce Department is on notice that litigation is reasonably foreseeable.

Where possible, please provide responsive material in electronic format by email (eioanes@thedailydot.com) or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to: Ellen Ioanes, 460 West 149th Street, Apt. 55, New York, NY 10031.

Finally, The Daily Dot requests rolling production of these records as they are located and reviewed.

Please be aware that under 5 U.S.C. § 552(a)(6)(A), a FOIA request is considered constructively denied after twenty business days and is subject to an appeal on that basis.

Fee Waiver

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii), The Daily Dot 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 Daily Dot is an online news organization and therefore I am entitled to a fee waiver on the grounds that disclosure of the information sought is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

Regardless, *The Daily Dot* is willing to pay fees for this request up to $25 without prior approval. If you estimate that the fees will exceed this limit, please notify me first.

Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1), The Daily Dot requests that the Commerce Department expedite the processing of this request. Requests shall receive expedited processing when a requester demonstrates 1) "An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information" ; or 2) "A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence." [18]

First, The Daily Dot is an organization "primarily engaged in disseminating information."[19] (finding that The Daily Dot is a "representative of the news media" because it "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into distinct work, and distributes that work to an audience.")

Second, these records are urgently needed to inform the public about actual or alleged government activity. Specifically, The Daily Dot contends there exists an urgency to inform the public about the the manner in which their tax dollars are being spent, particularly given the fact that multiple legislators have used public dollars to pay out sexual harassment settlements.

Moreover, the subject of this request is of widespread and exceptional media interest, as demonstrated by the numerous links to mainstream media coverage included in this request. The Courts have found that the issue of news coverage is especially critical in determining whether a "compelling need" exists for expedited FOIA

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[18] 5 U.S.C. § 552(a)(6)(E)(v)(II)

[19] See *Am. Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D. Cir. 2004)

processing.[20] The Court have asserted that the "ultimate conclusion" with regards to expedited processing relies on important underlying facts, such as "the credibility of a claimant's allegations regarding government activity, the existence of a threat to physical safety, *or whether an issue is the subject of news coverage*."[21]

The Courts have found a "compelling need" to exist when the subject matter of a request is "central to a pressing issue of the day"[22] Moreover, the Courts have stated that "matters of wider public concern" are indicated by "a flurry of articles and television coverage, which has continued at least until last month."[23]

In conclusion, The Daily Dot believes this matter lies at the very heart of the "urgency to inform the public concerning actual or alleged Federal Government activity" standard.[24]

Further, any delay in the release of these records would hamper The Daily Dot's ability to inform the public about this urgent issue.

Certification

The above information is true and correct to the best of my knowledge.

Further Correspondence

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, The Daily Dot 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, The Daily Dot and the State Department can decrease the likelihood of costly and time-consuming litigation in the future.

You may contact me by email (eioanes@thedailydot.com) or by phone (336-425-8861).

Sincerely,

Ellen Ioanes
FOIA Intern
The Daily Dot

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[20] See *Al-Fayed v. Central Intelligence Agency*, 254 F.3d 300, 306 (D.C. Cir. 2001) (Al-Fayed)
[21] *Id.* at 308. (emphasis added)
[22] See*: Wadelton v. Department of State*, 13-0412 ESH, 2013 WL 1760853 (D.D. Cir. 2013) (Wadelton
[23] See *Edmonds v. FBI*, CIV.A. 02-1294 (ESH), 2002 WL 32539613 (D.D.C. Dec. 3, 2002)
[24] U.S.C. § 552(a)(6)(E)(v)(II); See also *Al-Fayed* at 306