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DEPARTMENT OF JUSTICE



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April 7, 2017

VIA ELECTRONIC DELIVERY AND U.S. MAIL

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

RE: Freedom of Information Act Request Regarding Administrator Scott Pruitt

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended, and its implementing regulations, I hereby make this request for records on behalf of the Attorney General of California. This request describes: (1) the records sought, and (2) our request for a fee waiver for production of these records.

Request for Materials

The Attorney General of California respectfully requests that the U.S. Environmental Protection Agency (EPA) produce a copy of all of the following records (in electronic format, or print versions if electronic versions are not available):

Documents related to compliance with ethical standards

1. Ethics Agreements entered into by Scott Pruitt on or after November 9, 2016, including but not limited to his January 3, 2017, Ethics Agreement.
2. Communications discussing any Ethics Agreement entered into by Scott Pruitt on or after November 9, 2016.
3. Instruction given by any EPA employee to Scott Pruitt regarding matters from which he should be recused or disqualified.
4. The pledge required by Executive Order 13770 of January 28, 2017 ("Ethics Commitments by Executive Branch Appointees") signed by Scott Pruitt.

5. Waivers of restrictions under section 3 of Executive Order 13770 pertaining to Scott Pruitt.
6. Communications discussing a waiver of restrictions under section 3 of Executive Order 13770 pertaining to Scott Pruitt.
7. Impartiality Determinations (including any determinations under 5 C.F.R. § 2635.502) regarding Scott Pruitt's authorization or ability to participate as Administrator in an activity or decision.
8. Requests by Scott Pruitt to any EPA employee for an Impartiality Determination (including any determination under 5 C.F.R. § 2635.502).
9. Communications discussing an Impartiality Determination (including any determination under 5 C.F.R. § 2635.502) regarding Scott Pruitt.
10. Documents reviewed by EPA ethics officials in evaluating an Impartiality Determination (or other determination under 5 C.F.R. § 2635.502) regarding Scott Pruitt.
11. Notices of disqualification and disqualification statements required by 5 C.F.R. § 2635.502(e) regarding Scott Pruitt.
12. Communications discussing a notice of disqualification or disqualification statement required by 5 C.F.R. § 2635.502(e) regarding Scott Pruitt.
13. Screening arrangements regarding recusal or disqualification of Scott Pruitt from any matter.
14. Communications discussing screening arrangements regarding recusal or disqualification of Scott Pruitt from any matter.
15. Written recusal statements regarding any agreement by Scott Pruitt not to engage in matters implicating his ethics agreement.
16. Communications discussing a written recusal statement regarding any agreement by Scott Pruitt not to engage in matters implicating his ethics agreement.
17. Evidence of compliance documents sent by EPA to the Office of Government Ethics regarding any agreement by Scott Pruitt not to engage in matters implicating his Ethics Agreement.

18. Communications discussing an evidence of compliance documents sent by EPA to the Office of Government Ethics regarding any agreement by Scott Pruitt not to engage in matters implicating his Ethics Agreement
19. Communications from Scott Pruitt discussing any of the following:
 - Environmental Protection Agency 40 C.F.R. Part 60, [FRL-9961-10-OAR], Review of the Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, 82 Fed. Reg. 16,330 (Apr. 4, 2017);
 - Environmental Protection Agency 40 C.F.R. Part 60, [FRL-9961-10-OAR], Review of Clean Power Plan, 82 Fed. Reg. 16,329 (Apr. 4, 2017);
 - Environmental Protection Agency 40 C.F.R. Part 60, [FRL-9961-10-OAR], Review of the 2016 Oil and Gas New Source Performance Standards for New, Reconstructed, and Modified Sources, 82 Fed. Reg. 16,331 (Apr. 4, 2017)

(Collectively “Administrator’s Announcements of Review published in the Federal Register on April 4, 2017); and

 - Environmental Protection Agency, 40 C.F.R. Part 60 [FRL-9961-12-OAR], Withdrawal of Proposed Rules: Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; and Clean Energy Incentive Program Design Details, 82 Fed. Reg. 16144 (Apr. 3, 2017) (hereafter “Administrator’s Withdrawal of Proposed Rules published in the Federal Register on April 3, 2017).
20. Communications between any EPA ethics official (including but not limited to Kevin Minoli and Justina Fugh) and any other person (including but not limited to Scott Pruitt) discussing any of the Administrator’s Announcements of Review published in the Federal Register on April 4, 2017 or the Administrator’s Withdrawal of Proposed Rules published in the Federal Register on April 3, 2017.
21. Communications between any EPA ethics official (including but not limited to Kevin Minoli and Justina Fugh) and any other person regarding Scott Pruitt on or after November 9, 2016.
22. Communications between any EPA employee and the Office of Government Ethics regarding Scott Pruitt on or after November 9, 2016.

23. Communications between any EPA employee and the Oklahoma Bar Association regarding Scott Pruitt on or after November 9, 2016.
24. Communications between any EPA employee and the Oklahoma Attorney General's Office regarding Scott Pruitt on or after November 9, 2016.

Documents related to duties of the Administrator and filling of vacancies.

25. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating under what circumstances a person may serve as Acting Administrator when the Administrator must be recused due to a conflict of interest or the appearance of lack of impartiality.
26. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating under what legal authority another person may serve as Acting Administrator when the Administrator must be recused due to a conflict of interest or the appearance of lack of impartiality.
27. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating under what circumstances a person other than the Administrator may make regulations that are subject to 42 U.S.C. § 7607(d).
28. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating under what legal authority a person other than the Administrator may make regulations that are subject to 42 U.S.C. § 7607(d).
29. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating how EPA is to determine when "the absence of the Administrator" exists, as that expression is used in 40 C.F.R. § 1.23.
30. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating how EPA is to determine when a period of the "absence or disability of the Administrator" or "the event of a vacancy in the office of Administrator" exist, as those terms are used in Reorganization Plan No. 3 of 1970, § 1(c).
31. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating how EPA is to determine when a period exists during which the Administrator and Deputy Administrator have "become otherwise unable to perform the functions and duties of the office of the Administrator," as those terms are used in any Executive Order providing for an order of succession within EPA (including the Executive Order of January 13, 2017).
32. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating how EPA is to determine when a period exists during which the

Administrator “is otherwise unable to perform the functions and duties of the office,” as those terms are used in 5 U.S.C. § 3345(a).

The Attorney General believes that the documents sought are publicly available, of great public interest, and not exempt from required disclosure under FOIA. This request is made with the understanding that it will be forwarded to any other offices that may be in possession of the requested documents.

In addition, given that disclosure of these records would be in the public interest, even if you determine that certain of the documents sought are exempt under FOIA, the Attorney General requests that you disclose these documents as a matter of agency discretion. If you deny any part of this request, please cite each specific reason that you believe justifies your refusal to release the information, together with a synopsis of the records withheld. In the case of deletions, please state a reason for each partial denial of access. To expedite this request, I would be willing to discuss specific instances of deletion or other exemption claims in advance of a final decision by the agency.

Request for a Fee Waiver

The California Attorney General is, of course, a noncommercial organization not subject to review fees. In addition, the Attorney General requests a waiver of search and copying fees associated with these requests. Under FOIA, agencies must waive such fees where disclosure is likely to contribute significantly to public understanding of the operations and activities of the government and disclosure is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii). EPA has incorporated this requirement in its regulations for responding to FOIA requests. 40 C.F.R. § 2.107. Under the criteria set forth in the EPA regulations, such a waiver is appropriate here, as explained below.

“Whether the subject of the requested records concerns ‘the operations or activities of the government.’” 40 C.F.R. § 2.107(k)(2)(i).

These requests explicitly concern only the operation or activities of the federal government. Specifically, they concern (1) the process EPA has undertaken to ensure that its Administrator is in compliance with federal ethics regulations, with the Ethics Pledge President Trump required all of his appointees to sign at the time of their appointment, and with the Ethics Agreement Mr. Pruitt submitted to the EPA and on which the Senate relied in confirming him; and (2) EPA’s policies and procedures for determining who (if anyone) can assume the powers of the Administrator if he is recused or disqualified from participating in a matter.

“Whether the disclosure is ‘likely to contribute’ to an understanding of government operations or activities.” 40 C.F.R. § 2.107(k)(2)(ii).

The requested documents are likely to increase public understanding of the process EPA has employed to assure compliance with ethical standards with respect to its Administrator. Information currently in the public domain in this regard consists of statements made by Mr. Pruitt and by an EPA ethics official prior to his confirmation as Administrator. The public is currently unaware of what EPA has done to ensure compliance now that the appearance of a conflict of interest has actually arisen. Further, while EPA and Mr. Pruitt have stated that if he is disqualified from participating in any matter due to ethical conflicts or the appearance of lack of impartiality another EPA employee can fulfill the Administrator’s duties, there is no information in the public record showing that the Federal Vacancy Reform Act or existing EPA procedures allow another EPA employee to assume the Administrator’s rulemaking powers under 42 U.S.C. § 7601(a)(1) on a case-by-case basis. The requested documents would fill this gap in the public’s knowledge about these topics.

“Whether disclosure of the requested information will contribute to ‘public understanding.’” 40 C.F.R. § 2.107(k)(2)(iii).

The documents EPA produces in response to these requests will be available to interested parties upon request to the Attorney General. The Attorney General may also present some or all of the documents in public filings in court cases involving EPA.

“Whether the disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.” 40 C.F.R. § 2.107(k)(2)(iv).

The amount of information currently available to the public about EPA’s efforts to ensure compliance with ethics standards is minimal and pre-dates Mr. Pruitt’s confirmation as Administrator. The level of public understanding will be enhanced to a significant degree by disclosing these documents.

“Whether the requester has a commercial interest that would be furthered by the requested disclosure.” 40 C.F.R. § 2.107(k)(3)(i).

The California Attorney General is a public officer acting on behalf of the State and the public pursuant to the California Constitution, statutory authority, and common law. See Cal. Const. art. V, § 13; Cal. Gov’t Code § 12511; *D’Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974). The information sought in this FOIA request will assist the Attorney General in representing the 39 million people of California. Disclosure of the documents sought “is likely to contribute significantly to public understanding of the operations or activities of the Government,” and the materials requested are not sought for any commercial purpose.

"Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is 'primarily in the commercial interest of the requester.'" 40 C.F.R. § 2.107(k)(3)(ii).

As described above, the California Attorney General is a public officer and as such has no commercial interest in the requested documents. The requested documents thus cannot be primarily in the commercial interest of the requester.

Please send all requested materials to my attention, at the address provided above, within 20 days, and produce all records currently existing in electronic format on a CD, pursuant to 5 U.S.C. § 552(a)(3)(B). Please call me at (510) 879-0987 if you have any questions about this request.

Sincerely,

Handwritten signature of Timothy E. Sullivan in black ink.

TIMOTHY E. SULLIVAN
Deputy Attorney General

For XAVIER BECERRA
Attorney General