

May 18, 2020

FOIA Officer
U.S. Department of Transportation
Office of the Inspector General
1200 New Jersey Ave., SE J-3
Washington, DC 20590

Re: Freedom of Information Act Request

Dear FOIA Officer:

Citizens for Responsibility and Ethics in Washington (“CREW”) makes this request pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and Department of Transportation (“DOT”) regulations.

First, CREW requests all communications or records of communications sent to, copied to, or received by acting Inspector General Mitch Behm or Barry J. DeWeese Assistant Inspector General for Surface Transportation Audits to or from Howard “Skip” Elliot, Administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Deputy PHMSA Administrator Drue Pearce, Executive Director Howard “Mac” McMillan, or Director of Governmental, International and Public Affairs Ben Kochman from June 1, 2019 to May 16, 2020 regarding outstanding open OIG recommendations for PHMSA.

Second, CREW requests all documents referring or relating to PHMSA’s outstanding OIG recommendations from June 1, 2019 to May 16, 2020.

Third, CREW requests all communications or records of communications sent to, copied to, or received by acting Inspector General Mitch Behm or Barry J. DeWeese Assistant Inspector General for Surface Transportation Audits to or from Secretary Elaine Chao, Chief of Staff Todd Inman, Deputy Chief of Staff Sean McMaster, or Assistant Secretary for Governmental Affairs Adam Sullivan regarding outstanding open OIG recommendations for PHMSA.

Fourth, CREW requests all communications or records of communications sent to, copied to, or received by General Counsel Omer Poirier regarding recusal or other ethical requirements related to Howard “Skip” Elliot’s dual roles as Administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA) and acting Inspector General.

Fifth, CREW requests all communications or records of communications sent to, copied to, or received by acting Inspector General Mitch Behm, Barry J. DeWeese Assistant Inspector General for Surface Transportation Audits, or General Counsel Omer Poirier from January 1, 2020 to May 16, 2020 regarding the possibility of Howard “Skip” Elliott,

Administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA), serving as acting Inspector General.

Please search for responsive records regardless of format, medium, or physical characteristics. We seek records of any kind, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical material. Our request includes without limitation all correspondence, letters, emails, text messages, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request also includes any attachments to emails and other records, as well as emails to which the subjects of this request were cc'ed or bcc'ed.

If it is your position any portion of the requested records is exempt from disclosure, CREW requests that you provide it with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. See 5 U.S.C. § 552(b). 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. See *Mead Data Central v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A) and DOT regulations, CREW 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 likely will contribute to a better understanding of relevant government procedures by CREW and the general public in a significant way. See 5 U.S.C. § 552(a)(4)(A)(iii). Moreover, the request primarily and fundamentally is for non-commercial purposes. See, e.g., *McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

In 2019, the Department of Transportation Office of Inspector General (OIG) began a review of allegations that Secretary Chao afforded McConnell's constituents special treatment and helped steer millions of federal dollars to Kentucky at a time when he is facing low approval ratings and a tough reelection bid.¹ On January 9, 2020, DOT Inspector General Calvin Scovell, III announced his retirement after 13 years leading the office effective January 31, 2020.² Per the Federal Vacancies Reform Act (FVRA) and OIG's order of succession, on February 1, 2020,

¹ Tucker Doherty and Tanya Snyder, *Chao's Team Helped McConnell's State Win its Largest DOT Grant*, *Politico*, Dec. 17, 2020, <https://www.politico.com/news/2019/12/17/chao-mcconnell-transportation-kentucky-086343>.

² U.S. Department of Transportation Office of Inspector General, *U.S. Department of Transportation Inspector General Calvin L. Scovel III Announces Retirement*, available at https://www.oig.dot.gov/sites/default/files/DOT%20OIG%20Press%20Release%20-%20Retirement%20of%20Inspector%20General%20Scovel_0.pdf, (Jan. 9, 2020).

Mitch Behm assumed the authority and duties of Acting Inspector General for DOT OIG.³ Mr. Behm has been with DOT OIG since 2003, where he has served as a financial expert, project manager and program director, and received numerous awards from the OIG community.⁴ Under the FVRA, an acting officer may serve in a vacant position for no longer than 210 days, with adjustments to be made if the President submits a nomination to fill the position and under other specified circumstances.⁵

On May 15, 2020, the same day that President Trump announced his intention to fire the State Department Inspector General, Trump also notified Congress that he would nominate Eric Soskin, a Justice Department trial lawyer “involved in some hot-button immigration and civil rights cases” to serve as DOT IG.⁶ That same day, Trump removed acting IG Behm, appointing Howard “Skip” Elliott, a political appointee serving as administrator of the Pipeline and Hazardous Materials Safety Administration, to serve in his place.⁷ Astonishingly, a DOT spokesperson said that Elliott “will continue to serve as leader of the pipeline agency under a dual-hat arrangement.”⁸ IGs are meant to be apolitical and independent, they do not typically come from among an administration’s pool of political appointees.⁹ Unfortunately, this is not the first time the Trump administration has sought to install a political appointee as an acting IG amidst a high profile investigation.¹⁰ For example, in 2018, the administration abruptly moved a political appointee, Suzanne Israel Tufts, from the Department of Housing and Urban Development to serve as the acting watchdog for the Interior Department, overseeing ongoing investigations into then-Secretary Ryan Zinke’s conduct, including a Montana land-development deal backed by the chairman of the oil services firm Halliburton.¹¹ The *Washington Post* called the move “an unusual choice for a role that is traditionally nonpartisan.”¹²

The requested records will shed light on whether senior leadership at DOT OIG were informed regarding the removal of Mitch Behm as IG or installing a political appointee from the agency as his replacement prior to the public announcement. In particular, the records are likely to contribute to greater public understanding of the process of an acting IG’s abrupt replacement

³ U.S. Department of Transportation Office of Inspector General, Deputy Inspector General (Acting Inspector General) available at <https://www.oig.dot.gov/about-oig/deputy-inspector-general>, (last visited May 18, 2020).

⁴ *Id.*

⁵ U.S. Government Accountability Office, Federal Vacancies Reform Act available at <https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act>, (last visited May 18, 2020).

⁶ Meredith McGraw and Nahal Toosi, Trump Ousts State Department Watchdog, *Politico*, May 15, 2020, <https://www.politico.com/news/2020/05/15/state-department-inspector-general-fired-261536>.

⁷ Philip Rucker, Karen DeYoung, Lisa Rein and Hannah Knowles, Trump Ramps Up Retaliatory Purge with Firing of State Department Inspector General, *Washington Post*, May 16, 2020, https://www.washingtonpost.com/politics/trump-ramps-up-retaliatory-purge-with-firing-of-state-department-inspector-general/2020/05/16/8f8b55da-979a-11ea-82b4-c8db161ff6e5_story.html.

⁸ *Id.*

⁹ Lisa Rein, Robert O’Harrow Jr. and Juliet Eilperin, HUD Appointee Abruptly Moved to Lead Interior Dept.’s Watchdog Unit Amid Zinke Probe, *Washington Post*, Oct. 16, 2018, https://www.washingtonpost.com/politics/hud-political-appointee-abruptly-moved-to-lead-interiors-watchdog-office-amid-ongoing-investigations-into-zinke/2018/10/16/30de03b4-d164-11e8-83d6-291fced2ab1_story.html.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

amidst a significant OIG investigation into alleged political favoritism by Secretary Chao to benefit her husband Senator Mitch McConnell as he faces reelection. The documents will also identify whether there are ethical restrictions placed on Mr. Elliott's work as acting IG given that he will also maintain his role leading PHMSA, which has several open OIG recommendations related to its operations. The President and his political appointees have routinely bent, broken or ignored federal laws barring the coopting of federal resources for political purposes.¹³ The public deserves to know why acting IG Behm was replaced at this time and whether Elliott and his team have been sufficiently responsive to OIG's recommendations.

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the public's right to be aware of the activities of government officials, to ensuring the integrity of those officials, and to highlighting and working to reduce the influence of money on politics. CREW uses a combination of research, litigation, and advocacy to advance its mission. CREW intends to analyze the information responsive to this request and to share its analysis with the public through reports, press releases, or other means. In addition, CREW will disseminate any documents it acquires from this request to the public through its website, www.citizensforethics.org. The release of information obtained through this request is not in CREW's financial interest.

CREW further requests that it not be charged search or review fees for this request pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) because CREW qualifies as a member of the news media. *See Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (holding non-profit a "representative of the news media" and broadly interpreting the term to include "any person or organization which regularly publishes or disseminates information to the public").

CREW routinely and systematically disseminates information to the public in several ways. CREW's website receives tens of thousands of page views every month. The website includes a blog that reports on and analyzes newsworthy developments regarding government ethics, corruption, and money in politics, as well as numerous reports CREW has published to educate the public about these issues. In addition, CREW posts all documents it receives under the FOIA its website, and those documents have been visited hundreds of thousands of times.

Under these circumstances, CREW satisfies fully the criteria for a fee waiver.

Conclusion

If you have any questions about this request or foresee any problems in fully releasing the requested records, please contact me at (202) 408-5565 or dsherman@citizensforethics.org. Also, if CREW's request for a fee waiver is not granted in full, please contact our office immediately upon making such a determination.

¹³ Citizens for Responsibility and Ethics in Washington, *The Hatch Act: Mixing Partisan Goals with Official Positions in the Trump Administration*, <https://www.citizensforethics.org/hatch-act-mixing-partisan-goals-official-positions-trump-administration/>, (last visited Apr. 22, 2020).

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Where possible, please produce records in electronic format. Please send the requested records to dsherman@citizensforethics.org or Donald K. Sherman, Citizens for Responsibility and Ethics in Washington, 1101 K St, N.W., Suite 201, Washington, D.C. 20005. Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D.K. Sherman', with a long horizontal flourish extending to the right.

Donald K. Sherman
Deputy Director