

August 4, 2020

BY EMAIL:

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U.S. Department of Defense OSD/JS
FOIA Requester Service Center Defense Freedom of Information Division
1155 Defense Pentagon, Washington, D.C. 20301-1155

Re: Freedom of Information Act Request

Dear FOIA Officer:

Citizens for Responsibility and Ethics in Washington (“CREW”) submits this request for records pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and United States Department of Defense (“DOD”) regulations.

Specifically, CREW seeks communications, meeting documents, or other records of discussions, deliberations, or other inter-agency and intra-agency communications from May 14, 2020 to July 31, 2020 (1) relating to the DOD’s involvement in the U.S. International Development Finance Corporation (“DFC”) decision to extend a \$765 million loan under the Defense Production Act (“DPA”) to Eastman Kodak Company (“Kodak”) and (2) between DOD employees and any employees, agents, or any other representative of Kodak, including, but not limited to, Kodak CEO James Continenza and Kodak’s registered lobbyists Nagraj Bokinkere, David Bullwinkle, Terry Taber, and Kristen Calabrese Williams.

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, and anyone who was cc’ed or bcc’ed on any emails.

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).

Please be advised that CREW intends to pursue all legal remedies to enforce its right under the FOIA to access these documents. Accordingly, because litigation reasonably is foreseeable, SBA should institute an agency-wide preservation hold on documents potentially responsive to this request.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A) and DOD 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).

Facts

On May 14, 2020, President Trump signed an executive order delegating authority to the United States International Development Finance Corporation to make loans under the Defense Production Act in coordination with the Department of Defense in order to support “the domestic production of strategic resources needed to respond to the COVID-19 outbreak, or to strengthen any relevant domestic supply chains.”¹

On June 22, 2020, the DFC issued a request for proposals from private firms to support “projects that support the domestic production or distribution of pharmaceuticals, personal protective equipment (PPE), medical testing supplies, vaccines, ventilation equipment, or relevant ancillary materials and technologies.”²

On July 28, 2020, the DFC, as part of its “new partnership with DOD,” announced that it would make a \$765 million loan to Kodak to support the development of Kodak Pharmaceuticals.³ The stated intent of the loan is to support Kodak Pharmaceuticals as it executes a plan to begin producing chemicals essential to numerous generic medications in the United States. The DFC explains that “Kodak Pharmaceuticals will produce critical

¹ EO on Delegating Authority Under the DPA to the CEO of the U.S. International Development Finance Corporation to Respond to the COVID-19 Outbreak, May 14, 2020 *available at* <https://www.whitehouse.gov/presidential-actions/eo-delegating-authority-dpa-ceo-u-s-international-development-finance-corporation-respond-covid-19-outbreak/>

² DFC Request for Proposals, June 22, 2020 *available at* https://www.dfc.gov/sites/default/files/media/documents/DFC-DPA-RFP-06222020_0.pdf

³ DFC to Sign Letter of Interest for Investment in Kodak’s Expansion Into Pharmaceuticals, July 28, 2020 *available at* <https://www.dfc.gov/media/press-releases/dfc-sign-letter-interest-investment-kodaks-expansion-pharmaceuticals>

pharmaceutical components that have been identified as essential but have lapsed into chronic national shortage, as defined by the Food and Drug Administration (FDA).⁴

Prior to the Kodak loan, President Trump had repeatedly ignored calls to invoke the DPA to secure critical medical supplies.⁵ One of the chemicals Kodak plans to manufacture is a critical ingredient in the anti-malaria medication hydroxychloroquine, which President Trump has repeatedly and incorrectly touted as a cure for Covid-19.⁶ In his comments about the award, President Trump praised the “extraordinary leadership” of Kodak and said they have hired “some of the best people in the world to be taking care of that company and watching that company, watching over it.”⁷

Following the July 28 announcement, Kodak shares increased in value by more than 2000%, topping out at over \$60 on July 29.⁸ Kodak’s market capitalization increased to \$2.6 billion at the peak of its value, up from below \$150 million prior to the announcement. Kodak stocks also saw a suspicious spike in trading volumes on Monday, a day before the announcement, which also raised concerns about insider information.

In the last decade, Kodak has never spent more than \$500,000 on lobbying in a single year, according to data compiled by Open Secrets.⁹ It did not spend any money on lobbying in 2019 or in the first quarter of 2020. In the second quarter of 2020, which covers the period following the President’s May delegation of DPA loan authority to the DFC and the DOD through Kodak’s July 28 announcement, Kodak spent \$870,000 on federal lobbying.¹⁰ It does not appear that Kodak paid an outside lobbying firm; instead, it appears that four of its executives registered as lobbyists.¹¹ Kodak disclosed that it lobbied the White House, the DOD, and the DFC (incorrectly labeled as the “Overseas Private Investment Corporation”) among other agencies on “COVID-19 Programs- Specialty Chemicals Manufacturing”.¹²

Analysis

⁴ *Id.*

⁵ Aishvarya Karvi, “Virus Surge Brings Calls for Trump to Invoke Defense Production Act,” *New York Times*, July 22, 2020 available at

<https://www.nytimes.com/2020/07/22/us/politics/coronavirus-defense-production-act.html>

⁶ Rachael Levy, “Kodak Shifts Into Drug Production With Help of \$765 Million U.S. Loan,” *The Wall St. Journal*, July 28, 2020 available at

<https://www.wsj.com/articles/kodak-lands-765-million-u-s-loan-in-start-of-medical-supply-chain-fix-11595930400>

⁷ Remarks by President Trump at Press Briefing, July 28, 2020 available at

<https://www.whitehouse.gov/briefings-statements/remarks-president-trump-press-briefing-july-28-2020/>

⁸ Tyler Bailey, “Kodak options are exploding, but traders are betting the bottom is about to fall out,” *CNBC*, July 30, 2020 available at

<https://www.cnbc.com/2020/07/30/kodak-options-are-exploding-but-the-action-paints-a-bearish-picture.html>

⁹ Eastman Kodak Lobbying, *Open Secrets*, available at

<https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2020&id=D000000570>

¹⁰ Eastman Kodak Form LD-2, Second Quarter, 2020 available at

<https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=4B4FFB57-1135-4DCA-B324-B587A5CA-C03D&filingTypeID=60>

¹¹ *Id.*

¹² *Id.*

Kodak is, and likely remains, a troubled company. In 2012 it filed for bankruptcy protection,¹³ and in the years since it has attempted a number of failed forays into the technological flavors of the month, including an inauspicious pivot to blockchain in 2018 that briefly increased its stock valuation.¹⁴ In 2019, Kodak divulged in its annual report that it had a negative cash flow and was operating at a huge loss.¹⁵ In the first quarter of 2020, the company reported that its revenue had further declined by 8 percent and that it had a net loss of \$111 million. If Kodak keeps burning cash at this rate, the company may blow through the \$765 million loan before even establishing a profitable pharmaceutical business. It may take another \$765 million loan to keep them afloat until then.¹⁶ The DFC/DOD's DPA investment in Kodak Pharmaceuticals is the company's first foray into pharmaceutical manufacturing since its ill-conceived purchase of drug-maker Sterling Drug for approximately \$5.1 billion in 1988¹⁷ before selling it in pieces in 1994.¹⁸

Given Kodak's scant history in pharmaceutical production, its increase in lobbying, and the firm's exceptionally rocky recent financial history, the DOD and DFC's DPA loan appears highly unusual and financially suspect. It is also unclear whether Kodak participated in a competitive bidding process for the loan, or if, as it appears, the loan project was in the works for some time prior to the June 22 request for proposals. Critically, Continenza told CNBC that Kodak had been in negotiations "for a few months" and had been having high-level talks "since May".¹⁹ If Kodak was truly engaging in negotiations "since May," it is unlikely that the process included bids on the contract, as the President only signed the delegation of authority in mid-May.

Therefore, it is critical that the public understands the process that went into the DFC's decision, in partnership with the DOD, to use the delegated authority under the May Executive Order for the first time to extend this large loan to such a struggling partner. Additionally, it is critical for the public to understand the extent of DOD's contacts with Kodak's lobbyists, and with other agencies, in formulating this plan given the exigencies of the current moment and the opportunities for fraud and mismanagement during the rush to fund pandemic-related programs. DOD's process in selecting Kodak for this first of its kind loan appears in this regard highly suspect, with the potential to cost taxpayers millions of dollars should Kodak continue its recent trend of burning through cash and face a liquidity crisis before it can become profitable.

¹³ Michael J. De La Merced, "Eastman Kodak Files for Bankruptcy," *New York Times*, January 19, 2012, available at <https://dealbook.nytimes.com/2012/01/19/eastman-kodak-files-for-bankruptcy/>

¹⁴ Matt Levine, "Kodak Is Relevant Again," *Bloomberg*, July 30, 2020 available at <https://www.bloomberg.com/opinion/articles/2020-07-30/kodak-is-relevant-again>

¹⁵ Eastman Kodak Company, SEC Form 10-K, March, 2020 available at <https://seekingalpha.com/filing/4887530>

¹⁶ William Ebbs, "Here's Why You Need to Dump Your Kodak Stock Immediately," *CCN*, July 30, 2020 available at <https://www.ccn.com/sell-your-kodak-stock-now/>

¹⁷ Leslie Wayne, "Kodak Agrees to Buy Sterling for \$5.1 Billion," *New York Times*, January 23, 1988 available at <https://www.nytimes.com/1988/01/23/business/kodak-agrees-to-buy-sterling-for-5.1-billion.html>

¹⁸ "Kodak to Sell Remaining Sterling Drug Unit," *LA Times*, August 30, 1994 available at <https://www.latimes.com/archives/la-xpm-1994-08-30-fi-32940-story.html>

¹⁹ "Eastman Kodak CEO James Continenza on CNBC," July 29, 2020, available at <https://www.youtube.com/watch?v=-OyP7BqldZU>

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 blogposts that report on and analyze 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 the documents it receives under the FOIA on its website.

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 (917) 675-2509 or at glezra@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.

Where possible, please produce records in electronic format. Please send the requested records to me at glezra@citizensforethics.org. If you cannot produce the records electronically please contact me by email to arrange an alternative method of delivery.

Sincerely,



Gabriel W. Lezra
Counsel