IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, 1030 15th Street NW, B255 Washington, DC 20005 *Plaintiff*,	)	
v.	)	Case No. 18-cv-355
U.S. DEPARTMENT OF JUSTICE, 950 Pennsylvania Avenue NW Washington, DC 20530 *Defendant*.	)	

COMPLAINT

1. Plaintiff American Oversight brings this action against the U.S. Department of Justice under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendant has failed to comply with the applicable time-limit provisions of the FOIA, American Oversight is deemed to have exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agency

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from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff American Oversight is a nonpartisan, non-profit section 501(c)(3) organization primarily engaged in disseminating information to the public. American Oversight is committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information gathered, and its analysis of it, to educate the public about the activities and operations of the federal government through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

6. Defendant the U.S. Department of Justice (DOJ) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). DOJ has possession, custody, and control of the records that American Oversight seeks.

STATEMENT OF FACTS

7. On July 18, 2017, American Oversight submitted a FOIA request to DOJ seeking the following records:

> 1. All communications between Principal Deputy Associate Attorney General Jesse Panuccio and any party or counsel for any party (other than the federal government, establishments of the federal government, or current officers or employees of the federal government) in any of the cases identified in Attachment A (including counsel for parties in the district court or on appeal). In cases where the United States was not a party, please include any communications between Mr. Panuccio and any party or counsel for any party with whom the United States had not entered into a common interest agreement at the time of the communication.

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> 2. All communications between Mr. Panuccio and any amicus or counsel for any amicus in litigation identified in Attachment A.
>
> 3. All calendars or calendar entries for Principal Deputy Associate Attorney General Jesse Panuccio, including any calendars maintained on his behalf (e.g., by an administrative assistant), reflecting any meeting or telephone call with any party, amicus, or counsel for any party or amicus in litigation identified in Attachment A. For calendar entries created in Outlook or similar programs, the documents should be produced in "memo" form to include all invitees, any notes, and all attachments. Please do not limit your search to Outlook calendars—we request the review and processing of any responsive entries from any calendar—paper or electronic, whether on government-issued or personal devices—used to track or coordinate how Mr. Panuccio allocates his time on agency business.
>
> 4. Any joint defense or common interest agreements entered into between the United States and any party or any amicus in connection with litigation identified in Attachment A.

American Oversight sought all responsive records from January 20, 2017, through the date of the search. Attachment A of the FOIA listed twenty-two litigations in which the federal government was a named or interested party. A copy of the FOIA request is attached hereto as Exhibit A and incorporated herein.

8. DOJ assigned the FOIA request tracking number DOJ-2017-005437.

Exhaustion of Administrative Remedies

9. As of the date of this complaint, DOJ has failed to (a) notify American Oversight of any determination regarding the request, including the scope of any responsive records DOJ intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

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10. Through DOJ's failure to respond to American Oversight's FOIA request within the time period required by law, American Oversight has constructively exhausted its administrative remedies and seeks immediate judicial review.

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct Adequate Search for Responsive Records

11. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

12. American Oversight properly requested records within the possession, custody, and control of DOJ.

13. DOJ is an agency subject to FOIA and must therefore make reasonable efforts to search for requested records.

14. DOJ has failed to promptly review agency records for the purpose of locating those records which are responsive to American Oversight's FOIA request.

15. DOJ's failure to conduct an adequate search for responsive records violates FOIA.

16. Plaintiff American Oversight is therefore entitled to injunctive and declaratory relief requiring Defendant to promptly make reasonable efforts to search for records responsive to American Oversight's FOIA request.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

17. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

18. American Oversight properly requested records within the possession, custody, and control of DOJ.

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19. DOJ is an agency subject to FOIA and must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

20. DOJ is wrongfully withholding non-exempt agency records requested by American Oversight by failing to produce non-exempt records responsive to its FOIA request.

21. DOJ is wrongfully withholding non-exempt agency records requested by American Oversight by failing to segregate exempt information in otherwise non-exempt records responsive to American Oversight's FOIA request.

22. DOJ's failure to provide all non-exempt responsive records violates FOIA.

23. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to its FOIA request and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, American Oversight respectfully requests the Court to:

(1) Order Defendant to conduct a search or searches reasonably calculated to uncover all records responsive to American Oversight's FOIA request;

(2) Order Defendant to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to American Oversight's FOIA request and indexes justifying the withholding of any responsive records withheld under claim of exemption;

(3) Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to American Oversight's FOIA request;

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(4) Award American Oversight the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and

(5) Grant American Oversight such other relief as the Court deems just and proper.

Dated: February 15, 2018

Respectfully submitted,

/s/ Cerissa Cafasso
Cerissa Cafasso
D.C. Bar No. 1011003

/s/ Austin R. Evers
Austin R. Evers
D.C. Bar No. 1006999

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Counsel for Plaintiff

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Exhibit A

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July 18, 2017

VIA ONLINE PORTAL

Laurie Day
Chief, Initial Request Staff, Office of Information Policy
Department of Justice
Suite 11050
1425 New York Avenue NW
Washington, DC 20530-0001
Online Request via FOIAonline

Re: Freedom of Information Act Request

Dear Ms. Day:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of the Department of Justice (DOJ), 28 C.F.R. Part 16, American Oversight makes the following request for records.

The Trump administration has made news on multiple occasions for changing litigation positions that the government had taken under President Obama.[1] Traditionally it is unusual for the federal government to change a position once it has taken that position in a case. American Oversight makes this FOIA request to shed light on the conversations and potential influences behind these changes.

Requested Records

American Oversight requests that DOJ produce the following within twenty business days:

1. All communications between Principal Deputy Associate Attorney General Jesse Panuccio and any party or counsel for any party (other than the federal government, establishments of the federal government, or current officers or employees of the federal government) in any of the cases identified in Attachment A (including counsel for parties in the district court or on appeal). In cases where the United States was not a party, please include any communications between Mr. Panuccio and any party or counsel for any party with whom the United States had not entered into a common interest agreement at the time of the communication.

[1] *See, e.g.*, Marianne Levine, *Justice Department Switches Sides in Supreme Court Case*, POLITICO (June 16, 2017, 6:30 PM), http://www.politico.com/story/2017/06/16/justice-department-supreme-court-labor-relations-board-239653.

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2. All communications between Mr. Panuccio and any amicus or counsel for any amicus in litigation identified in Attachment A.

3. All calendars or calendar entries for Principal Deputy Associate Attorney General Jesse Panuccio, including any calendars maintained on his behalf (e.g., by an administrative assistant), reflecting any meeting or telephone call with any party, amicus, or counsel for any party or amicus in litigation identified in Attachment A. For calendar entries created in Outlook or similar programs, the documents should be produced in "memo" form to include all invitees, any notes, and all attachments. Please do not limit your search to Outlook calendars—we request the review and processing of any responsive entries from any calendar—paper or electronic, whether on government-issued or personal devices—used to track or coordinate how Mr. Panuccio allocates his time on agency business.

4. Any joint defense or common interest agreements entered into between the United States and any party or any amicus in connection with litigation identified in Attachment A.

Please provide all responsive records from January 20, 2017, to the date the search is conducted.

In addition to the records requested above, American Oversight 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 DOJ 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 seeks 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.[2] **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**

[2] *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).

official systems or if officials have, through negligence or willfulness, failed to meet their obligations.[3]

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 DOJ'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.[4] 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 DOJ's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DOJ 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."[5] 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 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."[6] Moreover, the *Vaughn* index "must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing

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[3] *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)).

[4] 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.

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

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

the sought-after information."[7] 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.'"[8]

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.[9] 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 intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, DOJ 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 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, American Oversight and DOJ 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 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k), American Oversight 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.[10] Moreover, the request is primarily and fundamentally for non-commercial purposes.[11]

American Oversight requests 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

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[7] *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).
[8] *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)).
[9] *Mead Data Central*, 566 F.2d at 261.
[10] 28 C.F.R. § 16.10(k)(1).
[11] *Id.*

government operations and activities.[12] The requested records will help American Oversight and the general public understand how the government transitions legal positions between administrations through shedding light on the operations of federal litigation and how the government changes its legal position and strategy.. The cases and subjects of the litigation listed in Attachment A have been the subject of significant media coverage.[13]

This request is primarily and fundamentally for non-commercial purposes.[14] 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 will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight will also make materials it gathers available on our public website and promote their availability on social media platforms, such as Facebook and Twitter.[15] 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, American Oversight promptly posted the records to its website[16] and published an analysis of what the records reflected about DOJ's process for ethics waivers.[17] Additionally, American Oversight has a project called "Audit the Wall," where the

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[12] 28 C.F.R. § 16.10(k)(1), (2)(i)-(ii).

[13] *See* Pam Fessler, *Justice Department Reverses Position on Texas Voter ID Law Case*, NPR (Feb. 27, 2017, 3:57 PM), http://www.npr.org/2017/02/27/517558469/justice-department-reverses-position-on-texas-voter-id-law-case; David A. Graham, *Can Trump's Justice Department Undo Police Reform?*, THE ATLANTIC, Apr. 4, 2017, https://www.theatlantic.com/politics/archive/2017/04/the-beginning-of-the-end-of-federal-police-reform/521847/; Levine *supra* note 1 (change in position in *NLRB v. Murphy Oil*); Robert Pear, *White House Acts to Roll Back Birth-Control Mandate for Religious Employers*, N.Y. Times, May 29, 2017, https://www.nytimes.com/2017/05/29/us/politics/birth-control-trump-obamacare-religion.html; *Trump Revokes Obama Guidelines on Transgender Bathrooms*, REUTERS (Feb. 23, 2017, 10:24 AM), http://www.reuters.com/article/us-usa-trump-lgbt-idUSKBN161243; Reuters, *Trump Officials to Unveil 'Hit List' This Week to Cut Factory Rules, with Focus on Environmental Regulations*, CNBC (June 12, 2017, 10:14 AM), http://www.cnbc.com/2017/06/12/trump-officials-to-cut-manufacturing-rules-with-focus-on-environmental-permitting-regulations.html; Rebecca Shabad, *DHS Formally Rolls Back Obama's DAPA Immigration Program*, CBS NEWS (June 16, 2017, 9:41 AM), http://www.cbsnews.com/news/dhs-formally-rolls-back-obamas-dapa-immigration-program/.

[14] 28 C.F.R. § 16.10(k)(1), (2)(iii).

[15] American Oversight currently has approximately 11,100 page likes on Facebook, and 33,400 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited July 18, 2017); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited July 18, 2017).

[16] *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco.

[17] *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents.

organization is gathering and analyzing information and commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.[18]

Accordingly, American Oversight qualifies for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with DOJ 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 Cerissa Cafasso at 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

Attachment

[18] *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

Attachment A

1. *NLRB v. Murphy Oil USA, Inc.*
    a) NLRB Case No. 10-CA-38804
    b) Fifth Circuit No. 14-60800
    c) Supreme Court No. 16-307

2. *United States v. HVI Cat Canyon, Inc.*
    a) Central District of California Civil Action No. 11-5097

3. *Geneva College v. Burwell*
    a) Western District of Pennsylvania Civil Action No. 12-207
    b) Third Circuit Nos. 13-3536, 14-1374
    c) Supreme Court No. 15-191

4. *East Texas Baptist University v. Price*
    a) Southern District of Texas Civil Action No. 12-3009
    b) Fifth Circuit No. 14-20112
    c) Supreme Court No. 15-35

5. *Veasey v. Abbott*
    a) Southern District of Texas Civil Action No. 13-193*
    b) Fifth Circuit No. 14-41127
    c) Supreme Court No. 16-393

6. *Priests for Life v. Burwell*
    a) District of the District of Columbia Civil Action No. 13-1261
    b) D.C. Circuit No. 13-5368*
    c) Supreme Court No. 14-1453

7. *Roman Catholic Archbishop of Washington v. Burwell*
    a) District of the District of Columbia Civil Action No. 13-1441
    b) D.C. Circuit No. 13-5368*
    c) Supreme Court No. 14-1505

8. *Southern Nazarene University v. Burwell*
    a) Western District of Oklahoma Civil Action No. 13-1015
    b) Tenth Circuit No. 14-6026
    c) Supreme Court No. 15-119

9. *Little Sisters of the Poor Home for the Aged v. Burwell*
    a) District of Colorado Civil Action No. 13-2611
    b) Tenth Circuit No. 13-1540
    c) Supreme Court No. 15-105

*These suits consist of consolidated cases. American Oversight provides here the lead case name, number, and filing date.

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10. *Zubik v. Burwell*
    a) Western District of Pennsylvania Civil Action No. 13-303,* 13-1459
    b) Third Circuit No.14-1376,* 14-1377
    c) Supreme Court No. 14-418

11. *Texas v. United States*
    a) Southern District of Texas Civil Action No. 14-254
    b) Fifth Circuit No. 15-40238
    c) Supreme Court No. 15-674

12. *G.G. v. Gloucester County School Board*
    a) Eastern District of Virginia Civil Action No. 15-54
    b) Fourth Circuit Nos. 15-2056, 16-1733
    c) Supreme Court No. 16-273

13. *Murray Energy Corp. v. EPA*
    a) D.C. Circuit No. 15-1385*

14. *United States v. City of Ferguson*
    a) Eastern District of Missouri Civil Action No. 16-180

15. *United States v. North Carolina*
    a) Middle District of North Carolina Civil Action No. 16-425*
    b) Fourth Circuit No. 16-2120

16. *Texas v. United States*
    a) Northern District of Texas Civil Action No. 16-54
    b) Fifth Circuit No. 16-11534

17. *North Dakota v. EPA*
    a) D.C. Circuit No. 16-1242*

18. *West Virginia v. EPA*
    a) D.C. Circuit No. 16-1264

19. *United States v. City of Eastpointe*
    a) Eastern District of Michigan Civil Action No. 17-10079

20. *United States v. Baltimore Police Department*
    a) District of Maryland Civil Action No. 17-99

21. Chicago Police Department consent decree negotiations, announced January 13, 2017

22. *Campbell v. City of Chicago*
    a) Northern District of Illinois Civil Action No. 17-4467

*These suits consist of consolidated cases. American Oversight provides here the lead case name, number, and filing date.

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