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May 9, 2018

RE: Freedom of Information Act Request

Dear FOIA Officer:

This letter constitutes a request pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 et seq., submitted by the Lawyers’ Committee for Civil Rights Under Law (“Lawyers’ Committee”).

The Lawyers’ Committee is a non-profit, non-partisan organization formed in 1963 at the request of President John F. Kennedy to enlist the private bar’s resources in combatting racial discrimination and the resulting inequality of opportunity. The Lawyers’ Committee’s principal mission is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities.

On February 1, 2018, Acting Director Mulvaney moved the Office of Fair Lending and Equal Opportunity (OFLEO) into the office of the director, removing its authority to bring enforcement actions.¹ OFLEO’s mission is to “ensure fair, equitable, and nondiscriminatory access to credit for all consumers.”² This office plays a vital role in preventing racial discrimination in consumer lending. “The office previously used its powers to force payouts in several prominent cases, including settlements from lenders it alleged had systematically charged minorities higher interest rates than they had for whites.”³ Despite the Bureau’s explicit mandate to protect consumers from abusive creditors, Mulvaney wrote on January 23 that the CFPB serves “those who use credit cards and those who provide the credit; those who take out loans and those who

¹ Renee Merle, *Trump administration strips consumer watchdog office of enforcement powers in lending discrimination cases*, Wash. Post (Feb. 1, 2018),

https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases/?utm_term=.ac24d787de51.

² Supervision, Enforcement & Fair Lending, CFPB, <https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/supervision-enforcement-fair-lending/> (last visited March 7, 2018).

³ Merle. *See also* David Dayen, *After Boasting About Lowering Black Unemployment, Donald Trump Undermines the Federal Unit Defending Against Housing Discrimination*, The Intercept (Feb. 1, 2018), <https://theintercept.com/2018/02/01/cfpb-mick-mulvaney-lending-housing-discrimination/>.



make them; those who buy cars and those who sell them.”⁴ We are concerned that by moving the OFLEO into the office of the director, Acting Director Mulvaney has hampered the OFLEO’s ability to engage in fair lending enforcement and day-to-day oversight of companies. Now that it is within the office of the director, it will instead focus merely on “advocacy, coordination and education” without the ability to punish bad actors in the marketplace.⁵

The 2010 Dodd-Frank Act instructed the CFPB to create the OFLEO in order to oversee and enforce federal fair lending laws and coordinate the fair lending efforts of the CFPB with other federal and state agencies, such as the Department of Justice. Part of OFLEO’s mission was to promote consistent and efficient enforcement of the Equal Credit Opportunity Act (ECOA) and the Home Mortgage Disclosure Act (HMDA). OFLEO’s enforcement of fair lending laws is a vital protection for communities of color, both to rectify historic unfair practices like redlining and to counteract new forms of discrimination. OFLEO has obtained over \$400 million in remediation to harmed consumers.⁶

The Lawyers’ Committee seeks records detailing the basis for the decision to move OFLEO into the Office of the Director. We are particularly concerned whether the move was in response to requests from corporate interest groups seeking to undermine OFLEO’s historically robust enforcement activities.

Requested Records

The Lawyers’ Committee requests that CFPB produce the following within twenty business days:

- All communications, calendar entries, final drafts of memoranda, final drafts of statements, final drafts of documents, final drafts of reports, and/or other records—held by the Office of the Director—related to the decision to move the Office of Fair Lending and Equal Opportunity (OFLEO) into the Office of the Director. Please provide responsive records from November 24, 2017, to February 1, 2018.
 - In particular, in addition to other responsive records, please specifically search for “Community Financial Services Association of America,” “CFSA,” and “CFSAA.”
 - Please specifically search the records held by Acting Director Mulvaney and his chief of staff, and their direct reports, in addition to other Office staff.

⁴ Mick Mulvaney, *The CFPB Has Pushed its Last Envelope*, WSJ (Jan. 23, 2018), <https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561>.

⁵ Merle.

⁶ *Fair Lending Report of the Consumer Financial Protection Bureau*, CFPB, at 3 (April 2017), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201704_cfpb_Fair_Lending_Report.pdf.



The Lawyers' Committee is *not* interested in any records, or portions thereof, that would be subject to the (b)(4) exemption. We are also not interested in non-final drafts of documents in instances where multiple drafts or versions exist.

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 production of any calendar – paper or electronic, whether on government-issued or personal devices – used to track or coordinate how CFPB employees, including these individuals, allocate their time on agency business.

The Lawyers' Committee seeks all responsive records regardless of format, medium or physical characteristics. In conducting your search, please understand the terms "record," "document," "communication," and "calendar entry," in their broadest sense, to include any written, typed, recorded, graphic, printed or audio material of any kind. Our request includes any attachments to these records.

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.⁷ 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 Lawyers' Committee has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.⁸

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. 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.⁹ Furthermore, agencies that have adopted the

⁷ 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).

⁸ 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)).

⁹ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidentialmemorandum-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>.



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 CFPB's archiving tools would capture that email under Capstone. Accordingly, the Lawyers' Committee insists that CFPB 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. The Lawyers' Committee 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.”¹⁰ If it is your position that any portion of the requested records is exempt from disclosure, the Lawyers' Committee requests that you provide an index of those documents as required under *Vaughn v. Rosen*.¹¹ 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.”¹² 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.”¹³ 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.’”¹⁴

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonable 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.¹⁵ 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. The Lawyers' Committee intends to pursue all legal avenues to enforce its right of access under FOIA,

¹⁰ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

¹¹ 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

¹² *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹³ *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹⁴ *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)).

¹⁵ *Mead Data Central*, 566 F.2d at 261.



including litigation if necessary. Accordingly, CFPB 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, the Lawyers' Committee 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, we can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email to dbrody@lawyerscommittee.org or in PDF format on a USB drive. Please send any responsive material being sent by mail to David Brody; Lawyers' Committee for Civil Rights Under Law; 1401 New York Avenue, NW, Suite 400; Washington, DC 20005. If it will accelerate release of responsive records, please also provide responsive material on a rolling basis.

Fee Waiver Request

The Lawyers' Committee requests that all fees in connection with this FOIA request be waived in accordance with 5 U.S.C. § 552(a)(4)(A)(iii) because it does not seek the records for a commercial purpose and disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government.¹⁶

The CFPB exists to protect consumers, not banks and lenders. The OFLEO in particular is a central component of the Bureau's anti-discrimination efforts. Without enforcement authority, the OFLEO will not be able to effectively protect at-risk consumers from unlawful, discriminatory, and predatory practices. Payday and auto title lenders, for example, often prey on low-income consumers who lack access to conventional loans with reasonable interest rates.¹⁷ "[T]ypical payday loan borrowers include low-income households and those headed by minorities and single women."¹⁸ These low-income consumers are disproportionately unbanked or under-banked people of color. The public needs to know if Acting Director Mulvaney is undermining the mission of the public's financial watchdog.

The Lawyers' Committee is a 501(c)(3) nonprofit organizations and does not have a commercial purpose, and the release of the information requested is not in the Lawyers' Committee's financial interest. The Lawyers' Committee was founded in 1963 and is committed to full and fair enforcement of federal civil rights laws and ensuring equal justice under law for all. Economic justice projects and fair lending projects are core programmatic areas of the Lawyers'

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

¹⁷ See Raul Arce-Contreras, *A Word of Caution on Payday Loans*, Center for American Progress (Apr. 7, 2009), <https://www.americanprogress.org/issues/economy/news/2009/04/07/5850/a-word-of-caution-on-payday-loans/>.

¹⁸ *Id.*



Committee. The Lawyers' Committee has a strong interest in protecting the rights of minority, low-income customers who can no longer turn to the CFPB for relief and addressing predatory lending practices that stymie economic development in these communities. African Americans and other racial minorities have historically been discriminated against in the consumer financial marketplace; policies such as redlining restrict economic opportunity for minorities and contribute to present day economic disparities.

The Lawyers' Committee will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. The Lawyers' Committee will also make materials it gathers available on its public website and promote their availability on social media platforms, such as Facebook and Twitter.

Accordingly, the Lawyers' Committee qualifies for a fee waiver. If a waiver is not granted, then please advise us of the amount of any proposed search and reproduction charges before those activities are carried out.

We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

Application for Expedited Records

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 5 C.F.R. § 1303.10(d)(1)(iv).

We certify to be true and correct to the best of our knowledge and belief that expedited processing is warranted because there is a compelling and urgent need to inform the public about, and there are questions regarding, the change in CFPB leadership and the restructuring of the OFLEO. It is uniquely unusual to have one individual running both a White House office and an independent agency. In fact, there is ongoing litigation between CFPB deputy director Leandra English and Mr. Mulvaney regarding who is the rightful acting director of the CFPB pursuant to its authorizing statute; that case is being expedited at the D.C. Circuit.¹⁹ While this dispute is ongoing, Mr. Mulvaney is aggressively taking deregulatory actions at CFPB to undermine fair lending enforcement in a manner that could have immediate and disparate negative impacts on communities of color. The Lawyers' Committee intends to quickly publish responsive records so that the public can be informed about changes in the CFPB's fair lending enforcement.

Accordingly, the Lawyers' Committee qualifies for expedited processing under the statute.

Conclusion

¹⁹ Jim Puzzanghera, *Judge denies injunction to remove Mick Mulvaney as consumer bureau's acting director*, L.A. Times (Jan. 11, 2018), <http://www.latimes.com/business/la-fi-cfpb-acting-director-20180110-story.html>.



We share a common mission to promote transparency in government. The Lawyers' Committee looks forward to working with you on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully complying with this request, please contact David Brody at dbrody@lawyerscommittee.org.

Thank you very much for your attention to this matter.

Sincerely,

Kristen Clarke
President and Executive Director
The Lawyers' Committee for Civil Rights Under Law