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April 18, 2022

VIA ELECTRONIC MAIL ONLY (schilling@allhookedup.com)

Rob Schilling
P.O. Box 5471
Charlottesville, Virginia 22905-5471

Re: Public Records Request

Dear Mr. Schilling:

I write on behalf of the House Committee on Oversight and Reform and its Subcommittee on Environment (collectively, “the Committees”), in response to your request seeking both email communications and recordings of video conferences between Members of Congress, Congressional staff, and various members of the public, from September 1, 2021 through November 8, 2021, related to the House Committee on Oversight and Reform’s October 28, 2021 hearing entitled “Fueling the Climate Crisis: Exposing Big Oil’s Disinformation Campaign to Prevent Climate Action.” Your request seeks access to these materials pursuant to the common law right of access.

As an initial matter, other than official Committee proceedings, recordings of which are maintained on a public website, neither the full Committee on Oversight and Reform, nor its Environment Subcommittee, record or maintain other video recordings of any other videoconference meetings between staff, Members, and outside persons or parties. Consequently, no such video recordings exist that can be produced.

Furthermore, as explained below, the common law right of access does not entitle you to the email communications requested for several reasons.

First, it bears noting that the Constitution in both the Rulemaking and Journal Clauses authorizes Congress to make its own determinations as to which of its materials shall be made available to the public by expressly providing that “[e]ach House [of Congress] may determine the Rules of its Proceedings . . .,” U.S. Const., Art I, § 5, cl. 2, and that “[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy,” *id.* at Art I, § 5, cl. 3. The House has delegated by rule authority over all such materials to its component entities, including its Committees. *See generally*, Rule VII, Rules of the House of Representatives (117th Cong.) (2021) (governing House Documents); *see also* Rule XI.2(e) (governing Committee records). In addition, while the D.C. Circuit has generally stated that the common law right of access applies to all three branches of government, we are unaware of any case holding the right applicable to either the House or any of its component entities, such as Committees or Subcommittees, much less one requiring production of congressional records.

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Here, to the extent any responsive materials exist, the Committees, like all House Committees, are authorized, consistent with Congress's constitutional authority, to determine for themselves which documents and what information is made publicly available. *See, e.g., Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420 (D.C. Cir. 1995) (holding Congress may "insist on the confidentiality of investigative files."); *Goland v. Central Intelligence Agency*, 607 F.2d 339, 346 (D.C. Cir. 1978) ("Congress has undoubted authority to keep its records secret, authority rooted in the Constitution."). Nothing in either the House Rules or the Committee's rules require that the requested materials be made publicly available.

Second, the materials requested, to the extent any exist, are absolutely protected by the Speech or Debate Clause of the Constitution, which provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const., Art. I, § 6, cl. 1. The Speech or Debate Clause has consistently been construed broadly to include far more than words spoken in debate; it covers all activities that fall "within the sphere of legitimate legislative activity." *See, e.g., Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975); *Doe v. McMillan*, 412 U.S. 306, 311-12 (1973); *Gravel v. United States*, 408 U.S. 606, 613-22 (1972); *Judicial Watch, Inc. v. Schiff*, 998 F.3d 989, 991 (D.C. Cir. 2021).

Of particular relevance here, the Speech or Debate Clause has been held to protect information-gathering and fact-finding by Members and Committees regarding legislation, whether formal or informal. *See, e.g., Brown & Williamson*, 62 F.3d at 411-12, 423 (documents voluntarily delivered to committee by private citizen protected by Clause); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 860 (D.C. Cir. 1988) ("Thus, the process by which a committee takes statements and prepares them for publication clearly qualifies as an activity within the legislative sphere." (quotation marks omitted)); *United States v. Biaggi*, 853 F.2d 89, 102-03 (2d Cir. 1988) (legislative fact-finding during Congressional trip protected by Clause); *McSurely v. McClellan*, 553 F.2d 1277, 1286 (D.C. Cir. 1976) (en banc) ("We have no doubt that information gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation.").

The materials requested here, to the extent any exist, would all relate to preparations for a Committee hearing or other information-gathering on the topic of climate change and the business practices that lead to disinformation on climate change. Accordingly, the requested material would be, without question, part of the due functioning of the legislative process and absolutely protected by the Speech or Debate Clause. As the District Court for the District of Columbia recently held, "information gathering ... constitute[s] protected legislative acts," *Association of American Physicians & Surgeons v. Schiff*, 518 F. Supp. 3d 505, 518 (D.D.C. 2021), *aff'd on other grounds*, 23 F.4th 1028 (D.C. Cir. 2021), and are thus not subject to required disclosure pursuant to the common law right of access.

Third, in any event, none of the materials requested qualify as public records subject to the common law right of access. To be a public record, a document must be a "government document created and kept for the purpose of memorializing or recording an official action, decision, statement, or other matter of legal significance, broadly conceived." *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 905 (D.C. Cir. 1996). In fact, the D.C. Circuit in *Washington Legal Foundation* excluded from the definition of public record "documents that are preliminary, advisory,

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or, for one reason or another, do not eventuate in any official action or decision being taken.” *Id.* at 905-06.

To the extent any responsive records exist, none would evidence, memorialize, or be records of any official governmental action. At best, the requested materials involving Committee staff would be preliminary or advisory to official actions or decisions made by the Members of the Committees regarding what information to seek as part of its investigation or how to conduct the October 28 Committee hearing. It is unlikely that any of the requested materials would memorialize or record any official action taken by the Committees and thus the requested materials are not public records subject to the common law right of access. See *Pentagen Techs. Int’l, Ltd. v. Comm. on Appropriations of the U.S. House of Representatives*, 20 F. Supp. 2d 41, 45 (D.D.C. 1998), *aff’d*, 194 F.3d 174 (D.C. Cir. 1999).

Finally, your example of the Capitol Police’s production of records to BuzzFeed News is inapposite. The U.S. Capitol Police is a separate and distinct legal entity from the House of Representatives, see 2 U.S.C. § 1901 *et. seq.*, and makes its own independent determinations regarding document productions. Thus, what the Capitol Police has or has not produced in other instances has no bearing on how the Committees respond to requests pursuant to the common law right of access.

Accordingly, for the reasons noted above, no materials will be produced. If any further correspondence is required, please direct your response to this e-mail (Douglas.Letter@mail.house.gov), and not by regular mail. Thank you for your attention to this matter.

Sincerely,



Douglas N. Letter
General Counsel

cc: House Committee on Oversight and Reform (*via electronic mail only*)
Attn: Russ Anello

Matthew D. Hardin, Esq. (*via electronic mail only*)
Christopher C. Horner, Esq. (*via electronic mail only*)