



U.S. Department
of Transportation

1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

**Pipeline and Hazardous
Materials Safety Administration**

8/27/2019

FOIA Control Number: 2019-0166

Transmitted via Electronic Mail – Read Receipt Requested

Austin Evers
American Oversight
1030 15th St. NW, Suite B255
Washington, DC - 20005

Dear Mr. Evers:

This letter responds to your Freedom of Information Act (FOIA) request dated 6/4/2019 and received in the Pipeline and Hazardous Materials Safety Administration's (PHMSA's) FOIA Office on the same date. You requested all email communications between specific PHMSA employees and any employee or representative of Amtrak, BNSF Railway, Canadian Pacific Railway, CSX, Kansas City Southern Railway, Norfolk Southern Railway and Union Pacific Railway related to the term “electronically controlled pneumatic” or “ECP” from January 2017 to present.

A search of the email accounts for the PHMSA employees you listed in your request did not locate any responsive records. As a courtesy, the document outlining how we conducted the search for responsive records is attached (11 pages). No fees were assessed to process your request.

Because we did not locate responsive records, you may consider this determination a denial of your record request and file an appeal. *See* Department of Transportation’s FOIA regulations, 49 C.F.R. § 7.32(d). I am the official responsible for this determination.

If you choose to appeal, your appeal must be made in writing and postmarked or transmitted within ninety calendar days from the date of the final response. In order to be considered an official appeal, it must be addressed as follows:

Howard R. Elliott
Administrator, Pipeline and Hazardous Materials Safety Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Both the appeal and the envelope should be plainly marked "FOIA APPEAL." Please make reference to your assigned FOIA Reference Number 2019-0166 so that we may identify your case promptly. In addition, you should include all information and arguments that form the basis of your appeal. For more information on your right to an administrative appeal, refer to the Department's FOIA regulations, 49 C.F.R. § 7.32(d).

Furthermore, the 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation, nor does it affect the timing of filing an appeal. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: <https://ogis.archives.gov>
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

This concludes our response to your request. If you have any questions about your request, you may contact Madeline Van Nostrand, FOIA Officer, by phone at 202-366-0273 or by email to PHMSA.FOIA@dot.gov. You also may seek the services of our FOIA Public Liaison, Darius Kirkwood, Office of Governmental, International and Public Affairs, by phone at 202-366-4831 or by email to phmsapublicaffairs@dot.gov.

Sincerely,
**MADELINE M VAN
NOSTRAND**

FOIA Office, Office of Chief Counsel
Pipeline and Hazardous Materials Safety Administration (PHMSA)

 Digitally signed by MADELINE M
VAN NOSTRAND
Date: 2019.08.27 09:40:35 -04'00'

Attachment: 2019-0166 Response Package 2019.08.27.pdf

From: [Van Nostrand, Madeline \(PHMSA\)](#)
To: [Elliott, Skip \(PHMSA\)](#); [Pearce, Drue \(PHMSA\)](#); [McMillan, Howard \(PHMSA\)](#); [Schoonover, William \(PHMSA\)](#)
Cc: [Roberti, Paul \(PHMSA\)](#); [Tsaganos, Vasiliki \(PHMSA\)](#); [Hollingshead, Brandon \(PHMSA\)](#); [Byrd, Pauline \(PHMSA\)](#)
Subject: Action: FOIA Search - American Oversight FOIA 2019-0166 (ECP)
Date: Monday, June 10, 2019 4:44:00 PM
Attachments: [2019-0166 FOIA Request.pdf](#)
[2019-0166 Search Instructions.docx](#)

Good afternoon Skip, Drue, Mac, and Bill:

The FOIA request submitted by American Oversight requires that the listed PHMSA employees (Howard Elliott, Drue Pearce, Howard McMillan, and William Schoonover) conduct a search of their email accounts for responsive emails. The attached search instructions outline how to conduct the search in Outlook.

Once you have completed the search, please provide the records to Pauline Byrd by email to pauline.byrd@dot.gov. If the records you locate are too voluminous to email, Pauline can stop by your desk to retrieve a copy of the records for the FOIA file. If you conduct a search and do not locate responsive emails, please notify Pauline by email.

If you would like for the FOIA Office to conduct the search for you, please contact Pauline, Pauline.byrd@dot.gov.

We would appreciate it if you could have the search completed by **Monday, 6/24/2019**. Please let me know if you have any questions or if we can be of any additional assistance.

Thanks!

~M

Madeline Van Nostrand

FOIA Officer

Office of Chief Counsel

Pipeline and Hazardous Materials Safety Administration (PHMSA)

From: Van Nostrand, Madeline (PHMSA)
Sent: Tuesday, June 4, 2019 3:57 PM
To: Roberti, Paul (PHMSA) <paul.roberti@dot.gov>; Tsaganos, Vasiliki (PHMSA) <vasiliki.tsaganos@dot.gov>; Hollingshead, Brandon (PHMSA) <brandon.hollingshead@dot.gov>; Fraser, Bobby (PHMSA) <bobby.fraser@dot.gov>; Elliott, Skip (PHMSA) <howard.elliott@dot.gov>; Pearce, Drue (PHMSA) <drue.pearce@dot.gov>; McMillan, Howard (PHMSA) <howard.mcmillan@dot.gov>; Schoonover, William (PHMSA) <william.schoonover@dot.gov>
Subject: FYI - American Oversight FOIA 2019-0166 regarding ECP brakes

Good Afternoon All,

I wanted to provide you with a heads-up on a new request that we received from American

Oversight on “the reversal of the ECP rule.”

Skip, Drue, Mac, and Bill’s email communications were requested (please refer to the attached request). I will contact you all later this week with more details on the search for responsive emails. In the meantime, please let me know if you have any questions or concerns.

Thanks!

~M

Madeline Van Nostrand

FOIA Officer

Office of Chief Counsel

Pipeline and Hazardous Materials Safety Administration (PHMSA)

From: PHMSA FOIA

Sent: Tuesday, June 4, 2019 3:33 PM

To: Van Nostrand, Madeline (PHMSA) <madeline.vannostrand@dot.gov>; Byrd, Pauline (PHMSA) <pauline.byrd@dot.gov>; Umeaku, Marilyn CTR (PHMSA) <marilyn.umeaku.ctr@dot.gov>

Cc: Weaver, Antoine CTR (PHMSA) <antoine.weaver.CTR@dot.gov>

Subject: FW: FOIA Request 2019-0166

PHMSA FOIA Case # 2019-0166

From: American Oversight FOIA [<mailto:foia@americanoversight.org>]

Sent: Tuesday, June 4, 2019 1:29 PM

To: PHMSA FOIA <PHMSA.FOIA@dot.gov>

Subject: FOIA Request (DOT-19-0679)

Dear FOIA Officer:

Please find attached a request for records under the Freedom of Information Act.

Sincerely,

Clay M. Goode

Paralegal

American Oversight

foia@americanoversight.org

www.americanoversight.org | @weareoversight

FOIA: DOT-19-0679



June 4, 2019

VIA ELECTRONIC MAIL

PHMSA FOIA Officer
Office of Chief Counsel
U.S. Department of Transportation
Building, 2nd Floor, E-26-105
1200 New Jersey Avenue SE
Washington, DC 20590
PHMSA.FOIA@dot.gov

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Transportation (DOT), 49 C.F.R. Part 7, American Oversight makes the following request for records.

In September 2018, the Pipeline and Hazardous Materials Safety Administration (PHMSA) rolled back an Obama-era safety rule that would have required trains carrying hazardous material to have electronically controlled pneumatic (ECP) braking systems by 2021.¹ American Oversight submits this request to shed light on whether and to what extent major rail industry interests played a role in the reversal of the ECP rule.

Requested Records

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

All email communications (including email messages, attachments, or calendar invitations) between (1) Howard Elliott, Drue Pearce, Howard McMillan, and/or William Schoonover and (2) any employee or representative of the entities listed below, containing either of the terms “electronically controlled pneumatic” or “ECP”.

¹ Glenn Fleishman, *Trump Rolls Back Train-Braking Rule Meant to Keep Oil Tankers from Exploding Near Communities*, FORTUNE, Sept. 25, 2018, <http://fortune.com/2018/09/24/train-explosion-prevention-rule-reversed-by-trump-officials/>; Letter from Sen. Ron Wyden and Sen. Jeffrey A. Merkley to Lance M. Fritz, Oct. 15, 2018, <https://www.wyden.senate.gov/imo/media/doc/Letter%20to%20UP%20on%20ECP%20break%20regulation%20roll%20back.pdf>.

- a. Amtrak (amtrak.com)
- b. BNSF Railway (bnsf.com)
- c. Canadian National Railway (cn.ca)
- d. Canadian Pacific Railway (cpr.ca)
- e. CSX (csx.com)
- f. Kansas City Southern Railway (kcsouthern.com)
- g. Norfolk Southern Railway (nscorp.com)
- h. Union Pacific Railroad (up.com)

Please provide all responsive records from January 20, 2017, through 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 your agency 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 are 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 official systems or if officials have, through negligence or willfulness, failed to meet their obligations.**³

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).

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

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 your agency’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 Administration (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 your agency’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that your agency 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 the sought-after information.”⁷ Further, “the withholding agency must supply ‘a relatively detailed

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).

⁷ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

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, your agency 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 your agency 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 a rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 49 C.F.R. §§ 7.42(i), 7.43(c), 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

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 49 C.F.R. § 7.43(c).

¹¹ *Id.*

government operations and activities.¹² The requested records are correspondence between PHMSA and major railroad companies concerning federal rulemaking. The records definitionally “concern[] the operations or activities of the Federal Government,”¹³ and will assist the public in understanding whether and to what extent such private interests exerted influence over the roll-back of a safety rule intended to prevent the derailment of trains carrying hazardous material. Every member of the public living and working near railroads where hazardous and flammable materials are carried has a significant interest in ensuring that industry interests do not have undue influence over safety rulemaking. And, as described in more detail below, American Oversight’s website and social media accounts demonstrate its ability and intention to effectively convey information to the public.

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 uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes 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,¹⁶ American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ’s process for ethics waivers.¹⁷ As another example, American Oversight has a project called “Audit the Wall,” where the 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

¹² 49 C.F.R. § 7.43(c)(1)-(4).

¹³ 49 C.F.R. § 7.43(c)(1).

¹⁴ *Id.*

¹⁵ American Oversight currently has approximately 12,600 followers on Facebook and 54,100 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited June 3, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited June 3, 2019).

¹⁶ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

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

¹⁸ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

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 you 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 Hart Wood at foia@americanoversight.org or 202.873.1743. 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,

A handwritten signature in black ink, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight

Search Instructions for FOIA 2019-0166 – response due 6/24/2019

1. Request

All email communications (including email messages, attachments, or calendar invitations) between (1) Howard Elliott, Drue Pearce, Howard McMillan, and/or William Schoonover and (2) any employee or representative of the entities listed below, containing either of the terms “electronically controlled pneumatic” or “ECP”.

- a. Amtrak (amtrak.com)
- b. BNSF Railway (bnsf.com)
- c. Canadian National Railway (cn.ca)
- d. Canadian Pacific Railway (cpr.ca)
- e. CSX (csx.com)
- f. Kansas City Southern Railway (kcsouthern.com)
- g. Norfolk Southern Railway (nscorp.com)
- h. Union Pacific Railroad (up.com)

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

2. Search Instructions

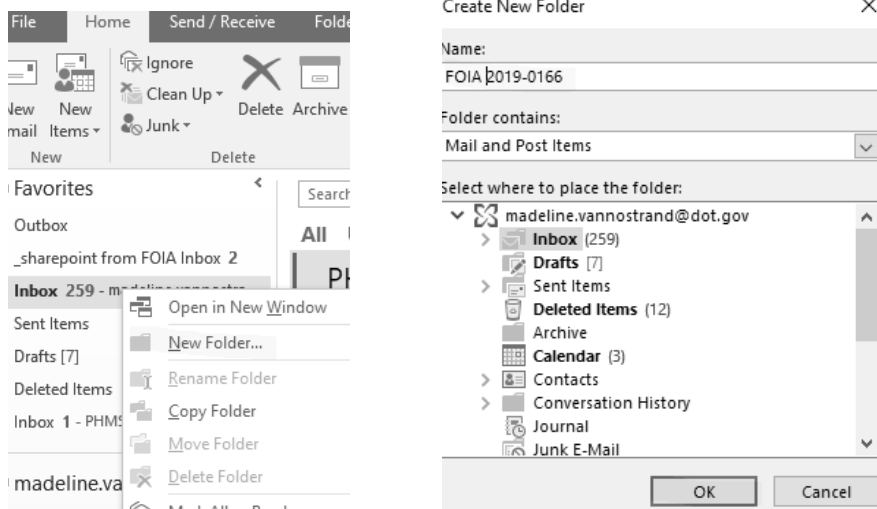
The request requires that the listed PHMSA employees (Howard Elliott, Drue Pearce, Howard McMillan, and William Schoonover) conduct a search of their email accounts for responsive emails. You will need to conduct two searches to locate responsive emails. Folder set-up in Outlook will help facilitate the search.

Once you have completed the search, please provide the records to Pauline Byrd by email to pauline.byrd@dot.gov. If the records you locate are too voluminous to email, Pauline can stop by your desk to retrieve a copy of the records for the FOIA file. If you conduct a search and do not locate responsive emails, please notify Pauline by email.

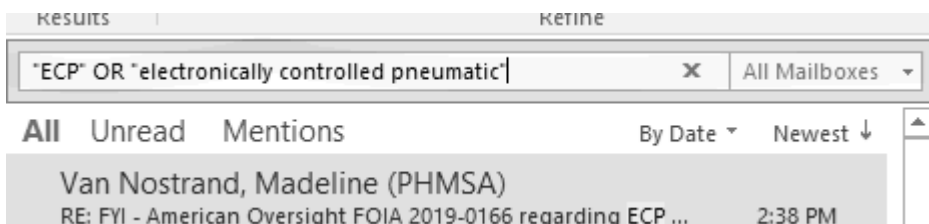
If you would like for the FOIA Office to conduct the search for you, please contact Pauline, Pauline.byrd@dot.gov.

Part One

1. To facilitate the search for responsive records, create a new folder in your Outlook inbox by right-clicking your “Inbox” and from the selection clicking on “New Folder.” Name the new folder “FOIA 2019-0166” and click “OK.” You will now see the new folder listed under your inbox.



2. Go up to the Search box at the top of your Outlook message list and click on it. To the right of the Search box, select “All Mailboxes.” Now copy (Ctrl C) and paste (Ctrl P) this search into the search box: **“ECP” OR “electronically controlled pneumatic”** and press “Enter.”



3. You should now see all emails meeting the search criteria you entered in the search box. Copy your records that meet the date criteria (**1/20/2017 to current**), to the “FOIA 2019-0166” folder you created.
 - a. An easy way to copy the records is to highlight all emails you located in step two above that meet the date requirement. Start by clicking on the first email. Now while holding down the “Shift” key, scroll down to the last

email that meets your search criteria. Next, click on that last email and enter “Ctrl C.”

- b. Click on the “FOIA 2019-0166” folder you created and enter “Ctrl P”
 - i. You will now see a copy of all the records you located in Part One of your search that met the date criteria.

Part 2

1. The second part of the search will be to search the emails you located in Part One of your request for emails with the entities listed in the request.
2. Create another new folder as you did in Part 1, Step 1, only label the folder “FOIA 2019-0166 Final Results.”
3. Now, click on the first “FOIA 2019-0166” folder you created.
 - a. As a default, the search function will search the folder that you highlighted, “FOIA 2019-0166,” which Outlook designates the “Current Folder.”



4. Next, copy (Ctrl C) and paste (Ctrl P) this search into the search box:
“amtrak.com” OR “bnsf.com” OR “cn.ca” OR “cpr.ca” OR “csx.com” OR “kcsouthern.com” OR “nscorp.com” OR “up.com” and press “Enter.”
5. You will now see the emails that meet the search criteria you used above in Step 4.
6. Copy (Ctrl C) and paste (Ctrl P) all emails you located in Step 4 into the second folder you created, “FOIA 2019-0166 Final Results.”
7. Send your search results to the FOIA Office by email and certify your search. If your search results are too voluminous to email, please contact Pauline Byrd, Pauline.byrd@dot.gov. She will stop by to retrieve the responsive records.