AMERICAN OVERSIGHT

November 28, 2017

VIA ELECTRONIC MAIL

Karen McFadden
FOIA Contact
Justice Management Division
Department of Justice
Room 1111 RFK, 950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
JMDFOIA@usdoj.gov

Re: Freedom of Information Act Request

Dear Freedom of Information Act Officers:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and your agency's implementing regulations, 28 CFR Part 16, American Oversight makes the following request for records.

On March 8, 2017, American Oversight submitted a FOIA request to DOJ seeking certain information about political appointees, details, and transition team members at the agency. *See* JMD FOIA Request No. 108820. DOJ has not yet responded to that FOIA request.

American Oversight now seeks to update its earlier FOIA request to encompass information about individuals who assumed their positions after the search was conducted on Request No. 108820. American Oversight seeks responsive records from March 8, 2017, the date American Oversight filed its initial FOIA Request No. 108820. American Oversight also seeks additional categories of information about those individuals that were not encompassed by its earlier request for records.

Requested Records

American Oversight requests that DOJ produce the following within twenty business days of this request for responsive records:

1. Records sufficient to identify all employees who entered into a position at the agency as "political appointees" since March 8, 2017 and the title or position of each employee (to the extent that such individuals have held multiple titles or positions since March 8, 2017 identify each title or position). For purposes of this request, please consider any employee in a PAS position, a presidentially-appointed position, a non-career SES

position, a Schedule C position, or any administratively-determined position to be a "political appointee."

2. Records sufficient to identify all career employees who have been detailed into a leadership office or component front office since March 8, 2017; the title or position of each employee while on detail; and each employee's originating agency or component, and prior title (to the extent that such individuals have held multiple titles or positions since March 8, 2017, identify each title or position).

3. Names and resumes of anyone from the transition teams or beachhead teams who have joined the agency in full-time capacity, either as career, political, or administratively determined positions since March 8, 2017. For the purposes of this request, please include any employee who previously had a temporary or provisional appointment at DOJ before March 8, 2017, and took on a permanent appoint after that date.

4. For each individual identified in response to requests 1 to 3:

    a. The resume provided by the individual to the agency in connection with determining the appropriate salary for the individual, or, if that is not available, a recent resume contained within the agency's records. We have no objection to the redaction of contact information (addresses, telephone numbers, e-mail addresses) for the employee or references, or to the redaction of past salary information. Employment, education, and professional association information is not exempt and we object to any redactions of such information.

    b. Any conflicts or ethics waivers or authorizations for the individual, including authorizations pursuant to 5 C.F.R. § 2635.502.

    c. Records reflecting any recusal determination made or issued for the individual.

    d. Copies of any SF-50 forms for the individual reflecting any change in position or title, including when the employee enters or leaves a position. We have no objection to the redaction of home addresses, telephone numbers, or social security numbers from the SF-50s.

    Please provide all responsive records from the date of March 8, 2017.

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.[1] **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.**[2]

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.**[3] **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

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[1] *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).

[2] *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)).

[3] 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.

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."[4] 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."[5] 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."[6] 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.'"[7]

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.[8] 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.

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[4] FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).
[5] *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).
[6] *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).
[7] *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)).
[8] *Mead Data Central*, 566 F.2d at 261.

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 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. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).[19]

American Oversight requests a waiver of fees as disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding" of government operations and is not "primarily in the commercial interest of the requester."[21] The requested records "direct[ly] and clear[ly]" concern "identifiable operations or activities" of the government, namely, the disclosure of appointed, career, and transition team members who have joined DOJ in full-time capacity since January 20, 2017. Since January 20, the Trump Administration has been appointing or assigning individuals to play significant roles in shaping the agenda of every federal agency including the DOJ. Identifying who these people are, and the background and perspectives that they bring to their jobs as federal employees, is essential to informing the public regarding the operations and decisionmaking of the federal government. In particular, only with clarity regarding the identity and background of these appointees can the public make informed assessments regarding whether decisions might have been influenced by conflicts of interest among the decisionmakers and whether those employees have personal or private interests affected by their policy actions. Disclosure of the requested information will contribute to the public's understanding of these aspects of the operation of the federal government.

This request is primarily and fundamentally for non-commercial purposes.[22] 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

[19] *See, e.g.*, *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).
[21] 28 C.F.R. § 16.10(k)(2)(i)-(ii).
[22] 28 C.F.R. § 16.10(k)(2)(iii).

promotes their availability on social media platforms, such as Facebook and Twitter.[23] 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,[24] 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.[25] 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.[26]

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 your agency 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 us at foia@americanoversight.org. 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

[23] American Oversight currently has over 11,700 page likes on Facebook, and over 37,400 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited Nov. 27, 2017); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited Nov. 27, 2017).

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

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

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