



March 14, 2018

VIA ONLINE PORTAL

Vernon Curry
FOIA Officer
U.S. Census Bureau, Room 3J235
4600 Silver Road
Washington, D.C. 20233-3700

Re: Freedom of Information Act Request

Dear Mr. Curry:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Department of Commerce (Commerce), 15 C.F.R. Part 4, American Oversight makes the following request for records.

With the 2020 U.S. Census approaching, the Census Bureau (the Bureau) is currently conducting the 2018 End-to-End Test to ensure that the Bureau's procedures and infrastructure are adequate to conduct the 2020 Census.¹ However, as the Bureau conducts this test—the only comprehensive opportunity to assess the readiness of its systems before the Census—there appear to be significant deficiencies with the Bureau's Information Technology (IT) systems. The Government Accountability Office (GAO) has expressed concerns that many Census IT systems would likely not be ready to be employed and assessed in the 2018 End-to-End Test.² Over the past several months lawmakers of both parties have repeatedly sought additional information from the Bureau about possible IT system shortcomings. Most recently, the U.S. House of Representatives Committee on Oversight and Government Reform (HOCR) reiterated its request for records related to the Bureau's Census IT systems.³

¹ U.S. CENSUS BUREAU, 2018 End-to-End Census Test, <https://www.census.gov/2018censustest>.

² Chase Gunter, *Census Delays IT Contracts, Plays Catchup on Systems*, FCW, Oct. 27, 2017, <https://fcw.com/articles/2017/10/27/census-delays-catchup-2020.aspx>; Jory Heckman, *House Lawmakers: Census Bureau's Delayed Status Report 'Unacceptable'*, FEDERAL NEWS RADIO (Feb. 22, 2018, 6:11 AM), <https://federalnewsradio.com/technology-main/2018/02/house-lawmakers-census-bureaus-delayed-status-reports-unacceptable/>.

³ Letter from Representative Trey Gowdy, Chairman, Comm. on Oversight and Government Reform, House of Representatives, to Ron S. Jarmin, Ph.D., Acting Dir., U.S. Census Bureau (Feb. 20, 2018), <https://oversight.house.gov/wp-content/uploads/2018/02/2018-02-20-TG-MM-GC-to-Jarmin-Census-due-3-2.pdf>.



American Oversight seeks records to determine whether the Bureau is adequately preparing for the 2020 U.S. Census.

Requested Records

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

1. Records sufficient to show the IT systems necessary for carrying out the Bureau's 2020 Census redesign, including, if such a record exists, a list of these necessary IT systems.
2. Records sufficient to show the most recent delivery schedule, or schedules, for all IT systems that will be a part of the Bureau's 2018 End-to-End Test for the 2020 Census.
3. Records sufficient to show the most up-to-date delivery and testing schedule, or schedules, for all IT systems that will be used, or may be used, in the 2020 Census.
4. Records sufficient to show the Bureau's contingency plans for additional testing of IT systems that are not fully tested by the completion of the 2018 End-to-End Test.
5. All records deemed responsive to the U.S. House of Representatives Committee on Oversight and Government Reform's February 20, 2018 letter⁴ requesting documents related to the Bureau's IT system testing and deployment for the 2018 End-to-End Test, and any records produced to the Committee related to the Bureau's IT systems and the 2018 End-to-End Test.

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 the Bureau 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.**

⁴ Gowdy, *supra* note 3.

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.⁵ **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.**⁶

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 the Bureau’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.**⁷ 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 the Bureau’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that the Bureau 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.**

⁵ 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).

⁶ 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)).

⁷ 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>.

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.”⁸ 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.”⁹ 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.”¹⁰ 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.’”¹¹

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.¹² 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, the Bureau 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 the Bureau 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.

⁸ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁰ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹¹ *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)).

¹² *Mead Data Central*, 566 F.2d at 261.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 15 C.F.R. § 4.11(l), 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.¹³ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁴

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 government operations or activities.”¹⁵ As detailed above, for at least six months there has been consistent reporting on potential problems with the Bureau’s procurement and development of Census IT systems.¹⁶ Contrary to GAO assessments and public reporting, however, Commerce Secretary Wilbur Ross has maintained that Census IT systems are “reasonably on-schedule.”¹⁷ Secretary Ross has called the Census “the bedrock upon which we construct our system of democratic representation” and has requested over \$3 billion in additional taxpayer funds to complete the Census.¹⁸ Taxpayers deserve to know if the Bureau is effectively spending taxpayer dollars on the IT systems designed for the 2020 Census, and the American people deserve to know if the Bureau is adequately prepared to carry-out the 2020 Census.

This request is primarily and fundamentally for non-commercial purposes.¹⁹ 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.²⁰ American

¹³ 15 C.F.R. § 4.11(l)(1)(i).

¹⁴ 15 C.F.R. § 4.11(l)(1)(ii).

¹⁵ 15 C.F.R. § 4.11(l)(1)(i), (2)(i)-(iv).

¹⁶ See, e.g., *supra* notes 1-2; Chase Gunter, *Census Pares Down Critical Dress Rehearsal*, FCW, Jul. 11, 2017, <https://fcw.com/articles/2017/07/11/census-cuts-dress-rehearsal.aspx>.

¹⁷ Tajha Chappellet-Lanier, *Congress Clashes with Census’ Claim that 2020 Systems Are ‘Reasonably On-Schedule,’* FEDSCOOP, Oct. 12, 2017, <https://www.fedscoop.com/2020-census-congress-hearing/>.

¹⁸ Lauren Rosenblatt, *Commerce Secretary Wilbur Ross Asks Congress for More Funds for 2020 Census*, L.A. TIMES (Oct. 12, 2017, 2:55 PM), <http://www.latimes.com/politics/la-na-pol-ross-census-20171012-story.html>.

¹⁹ 15 C.F.R. § 4.11(l)(1)(ii), (3)(i)-(ii).

²⁰ American Oversight currently has approximately 11,800 page likes on Facebook and 41,100 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/>

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,²¹ 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.²² 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.²³

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 the Bureau 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 Dan McGrath at foia@americanoversight.org or 202.897.4213. 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

(last visited Mar. 13, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Mar. 13, 2018).

²¹ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²² *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>.

²³ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.