



April 7, 2017

VIA ELECTRONIC MAIL & ONLINE PORTAL

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Sabrina Burroughs
FOIA Officer
U. S. Customs & Border Protection
1300 Pennsylvania Avenue NW, Room 3.3D
Washington, DC 20229
Online Request at FOIAonline

Re: Expedited Freedom of Information Act Request

Dear Ms. Barksdale-Perry, Ms. Burroughs, and Ms. Eggleston:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and your agency's implementing regulations, 6 C.F.R. Part 5 and 19 C.F.R. § 103.2, American Oversight makes the following request for records.

In the days immediately following President Donald Trump's inauguration, reports surfaced of a hyper-politicization of public communications from federal agencies.¹ In response, several "alternative" government Twitter accounts were created by anonymous users purporting to be

¹ Coral Davenport, *Federal Agencies Told to Halt External Communications*, N.Y. TIMES, Jan. 25, 2017, <https://www.nytimes.com/2017/01/25/us/politics/some-agencies-told-to-halt-communications-as-trump-administration-moves-in.html>; Juliet Eilperin & Brady Dennis, *Federal Agencies Ordered to Restrict Their Communications*, WASH. POST, Jan. 24, 2017, https://www.washingtonpost.com/politics/federal-agencies-ordered-to-restrict-their-communications/2017/01/24/9daa6aa4-e26f-11e6-ba11-63c4b4fb5a63_story.html?utm_term=.37c8013f2d0e; Dina Fine Maron, *Trump Administration Restricts News from Federal Scientists at USDA, EPA*, SCIENTIFIC AMERICAN, Jan. 24, 2017, <https://www.scientificamerican.com/article/trump-administration-restricts-news-from-federal-scientists-at-usda-epa/>.



current federal employees, former employees, and advocates.² The accounts, frequently made to look like their official, federal-agency counterparts, are often critical of the new administration's policies and actions.³ Yesterday, Twitter, Inc., filed a federal lawsuit alleging that the Department of Homeland Security served an administrative summons on the social-media company for information related to one such "alternative" account: @ALT_USCIS.⁴ The government's use of its law-enforcement authority to unmask critical, anonymous speech is a paradigmatic violation of the constitution's free-speech protections. The American people deserve to know the origins of this overreaching abuse of power.

Requested Records

American Oversight requests that the Department of Homeland Security and its component agencies (collectively "DHS") produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

1. All records relating to the decision to use administrative or law-enforcement tools to seek information regarding the @ALT_USCIS Twitter account or to serve on Twitter the summons that is the subject of the lawsuit. (Copies of the summons and the complaint are attached here for reference.)
2. Any analysis concerning any basis for using CBP's subpoena authority under 19 U.S.C. § 1509 for purposes other than obtaining information about the importation of goods.
3. All policies, guidelines, or procedures regarding the circumstances where DHS or its component agencies may use administrative or law-enforcement authorities to seek to unmask or reveal anonymous speech concerning DHS or its operations.

The search for responsive records should include individuals and locations where responsive records are likely to exist, including but not limited to: John F. Kelly and the Office of the Secretary of Homeland Security; Kevin K. McAleenan and the Office of the Commissioner of CBP; James McCament and the Office of the Director of the U.S. Citizenship and Immigration Services; Stephen P. Caruso and the Office of the Special Agent in Charge based in Miramar, Florida; and Adam Hoffman and the CBP Office of Professional Responsibility. 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

² James Griffiths, *Unverified 'Alternative' Government Accounts Target Trump on Twitter*, CNN.COM (Jan. 27, 2017, 3:26 PM), <http://www.cnn.com/2017/01/27/politics/twitter-alt-government-accounts/>.

³ *Id.*

⁴ *Twitter, Inc. v. U.S. Dep't of Homeland Sec.*, No. 3:17-cv-01916, ECF No. 1 (N.D. Cal. Apr. 6, 2017).

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.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 DHS’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

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>.

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 DHS's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DHS 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.”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, DHS 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

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.

duplication costs. By working together at the outset, American Oversight and DHS 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 rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(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.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.¹⁵ The requested records directly and clearly concern identifiable and questionable activities of the federal government, and their disclosure would meaningfully inform the public regarding the government’s apparent abuse of its law-enforcement authority to chill free speech. Moreover, DHS’s actions are now the subject of a lawsuit from Twitter, a social-media company whose platform has 313 million monthly active users.¹⁶

This request is primarily and fundamentally for non-commercial purposes.¹⁷ 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 will use the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight will also make materials it gathers available on our public website and promote the availability on social media platforms, such as Facebook and Twitter.¹⁸ One example of American Oversight’s demonstrated public disclosure of documents and creation of editorial content is in its recently launched “Audit the Wall” effort, where the organization is

¹³ 6 C.F.R. § 5.11(k)(1)(i).

¹⁴ 6 C.F.R. § 5.11(k)(1)(ii).

¹⁵ 6 C.F.R. § 5.11(k)(1)(i); 6 C.F.R. § 5.11(k)(2)(i)-(iv).

¹⁶ *Company*, TWITTER, <https://about.twitter.com/company> (last visited Apr. 6, 2017).

¹⁷ 6 C.F.R. § 5.11(k)(1)(ii); 6 C.F.R. § 5.11(k)(3)(i)-(ii).

¹⁸ American Oversight currently has over 10,400 page likes on Facebook, and over 11,000 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Apr. 7, 2017); American Oversight (@weareoversight), TWITTER (last visited Apr. 7, 2017).

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.¹⁹

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 6 C.F.R. § 5.5(e), American Oversight requests that DHS expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief, that there is widespread and exceptional media interest and there exist possible questions about the government's integrity, which affect public confidence. Twitter alleges that DHS's actions "would have a grave chilling effect on the speech of [the @ALT_USCIS] account in particular and on the many other 'alternative agency' accounts that have been created to voice dissent to government policies."²⁰ In the first hours after the social-media giant filed suit, several news outlets began covering the litigation.²¹ The government's use of its law-enforcement authority to unmask critical, anonymous speech is a quintessential example of "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence."²²

¹⁹ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

²⁰ *Twitter, Inc. v. U.S. Dep't of Homeland Sec.*, No. 3:17-cv-01916, ECF No. 1 at *4 (N.D. Cal. Apr. 6, 2017).

²¹ David Ingram, *Twitter Refuses U.S. Order to Reveal User Behind Anti-Trump Account*, REUTERS (Apr. 6, 2017, 6:18 PM), <http://www.reuters.com/article/us-twitter-lawsuit-idUSKBN1782PH>; Joe Palazzolo, *Twitter Sues U.S. Homeland Security Department*, WALL ST. J. (Apr. 6, 2017, 6:06 PM), <https://www.wsj.com/articles/twitter-sues-u-s-homeland-security-department-1491515142>; Seth Fiegerman, *Twitter Sues Government to Stop Unmasking of Anti-Trump Account*, CNN.COM (Apr. 6, 2017, 4:59 PM), <http://money.cnn.com/2017/04/06/technology/twitter-lawsuit-rogue-accounts/index.html>; Thomas Fox-Brewster, *Twitter Sues Government for Attempts to Unmask Anti-Trump Tweeter*, FORBES (Apr. 6, 2017, 4:38 PM), <https://www.forbes.com/sites/thomasbrewster/2017/04/06/twitter-sues-government-border-force-deanonymize-user/#70f3009a38e1>; Kartikay Mehrotra, *Twitter Sues U.S. to Block Unmasking of Anti-Trump User*, BLOOMBERG LAW, Apr. 6, 2017, <https://bol.bna.com/twitter-sues-u-s-to-block-unmasking-of-anti-trump-user/>; Harper Neidig, *Twitter Alleges Trump Administration Tried to Unmask Critical Account*, THE HILL (Apr. 6, 2017, 4:09 PM), <https://origin-nvi.thehill.com/policy/technology/327677-twitter-alleges-trump-administration-tried-to-unmask-critical-account>; Sam Biddle, *The U.S. Government Is Trying to Unmask an Anonymous Anti-Trump Twitter Account*, THE INTERCEPT (Apr. 6, 2017, 4:23 PM), <https://theintercept.com/2017/04/06/the-u-s-government-is-trying-to-unmask-an-anonymous-anti-trump-twitter-account/>; Colin Lecher & Russell Brandom, *Twitter Sues US Government over Attempt to Unmask Anti-Trump Account*, THE VERGE (Apr. 6, 2017, 3:53 PM), <http://www.theverge.com/2017/4/6/15211092/twitter-trump-lawsuit-customs-alt-government>.

²² 6 C.F.R. § 5.5(e)(1)(iv).

Accordingly, American Oversight's request satisfies the criteria for expedition.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with DHS 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 Cerissa Cafasso at foia@americanoversight.org or 202.869.5246. 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 blue ink that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight

Attachments