



February 26, 2018

VIA ELECTRONIC MAIL & ONLINE PORTAL

Nicole Barksdale-Perry
Acting Senior Director of FOIA Operations
The Privacy Office
U.S. Department of Homeland Security
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Washington, DC 20528-0655
foia@hq.dhs.gov

Jill Eggleston
FOIA Officer/Public Liaison
National Records Center
U.S. Citizenship and Immigration Services
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Sabrina Burroughs
FOIA Officer
U.S. Customs & Border Protection
1300 Pennsylvania Avenue NW, Room 3.3D
Washington, DC 20229
Via FOIAonline

Re: 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, 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.

On January 27, 2017, President Trump issued Executive Order 13769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." Following legal challenges, the President issued a new executive order on March 6, 2017, Executive Order 13780 ("Second Executive Order"). The revised order permitted the grant of case-by-case waivers for individuals whose entry the Executive Order would have otherwise suspended. *See* Exec. Order No. 13780 § 3(c), 82 Fed. Reg. 13,209 (Mar. 6, 2017). After the Second Executive Order was enjoined in litigation, the President issued a proclamation entitled "Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats" ("Proclamation 9645" or the "Proclamation") on September 24, 2017. Again, like the Second Executive Order, the Proclamation included a waiver provision that permits case-by-case waivers in certain circumstances, including when denial of entry "would cause undue hardship" or when entry "would not pose a threat to national security" or "would be in the national interest." *See* Pres. Proclamation 9645 § 3(c). The Proclamation assigns responsibility to adopt guidance regarding these waivers to the Secretary of Homeland Security and the Secretary of State. *Id.* The United States has argued in court that the availability of these



waivers is an important factor that weighs in favor of the legality of the prohibitions otherwise contained in the Second Executive Order and the Proclamation. Yet there is little public information regarding these waivers, including how to apply; the criteria for granting a waiver; who decides whether to grant a waiver; or the practice of the federal government in granting or denying a waiver. We submit this request to illuminate these important issues for the public.

Requested Records

American Oversight requests that the Department of Homeland Security and its component agencies (collectively “DHS”) produce the following within twenty business days:

Any and all decisions to grant any applicant a waiver from the requirements of the January 27, 2017 Executive Order, the Second Executive Order, or the Proclamation.

Please provide all responsive records from January 27, 2017, through the date the search is conducted.

The search for responsive records should include all individuals and locations likely to contain responsive records, including but not limited to: the Office of the Secretary, the Office of the CBP Commissioner, the Office of the USCIS Director, and any CBP or USCIS field offices with authority to accept a waiver application or make a waiver determination.

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.**

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.”¹ 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

¹ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

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.”² 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.”³ 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.’”⁴

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.⁵ 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 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 a 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

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

³ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

⁴ *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)).

⁵ *Mead Data Central*, 566 F.2d at 261.

significant way.⁶ Moreover, the request is primarily and fundamentally for non-commercial purposes.⁷

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.⁸ The requested records directly and clearly concern identifiable activities of the federal government. Moreover, there is significant public interest in how the federal government has implemented the executive orders and proclamation at issue, including the waiver provisions therein. Indeed, the federal government itself has highlighted the importance of the waiver provisions in defending the legality of these presidential orders. The public has significant interests in understanding how these waiver provisions are, in fact, being implemented by the federal government.

This request is primarily and fundamentally for non-commercial purposes.⁹ 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.¹⁰ 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,¹¹ 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.¹² 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.¹³

⁶ 6 C.F.R. § 5.11(k)(1)(i).

⁷ 6 C.F.R. § 5.11(k)(1)(ii).

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

⁹ 15 C.F.R. § 2004.9(h)(1)(iv).

¹⁰ American Oversight currently has approximately 11,800 page likes on Facebook and 40,100 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Feb. 28, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Feb. 28, 2018).

¹¹ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

¹² *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>.

¹³ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

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 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 202.869.5244. 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,



Melanie Sloan
Senior Advisor
American Oversight