



March 31, 2017

VIA ONLINE PORTAL

OSD/JS FOIA Requester Service Center
Office of Freedom of Information
Department of Defense
1155 Defense Pentagon
Washington, DC 20301-1155
Submitted via Online Portal

Re: Expedited Freedom of Information Act Request

Dear Freedom of Information Act Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and Department of Defense (DOD) implementing regulations, 32 C.F.R. Part 286, American Oversight makes the following request for records.

The Emoluments Clause of the U.S. Constitution prohibits any person “holding any Office of Profit or Trust” from accepting gifts or payments from any foreign country.¹ The DOD has made clear that retired military officers are subject to the Emoluments Clause because they are subject to recall and, therefore, hold an “Office of Profit or Trust.”² Furthermore, the definition of “foreign state” extends to commercial entities owned or controlled by a foreign government, including Russia Today (RT), Russia’s state-sponsored propaganda outlet.³

Retired Lt. General Michael Flynn was paid on at least one occasion to travel to Russia and speak at an event hosted by RT.⁴ American Oversight seeks information related to those and other payments, from which it could be determined whether Mr. Flynn violated the Emoluments Clause.

¹ U.S. CONST. art. 1, § 9, cl. 8.

² Department of Defense, *Application of the Emoluments Clause to DoD Civilian Employees and Military Personnel* at 4 (June 2013), www.dod.mil/dodgc/defense_ethics/resource_library/emoluments_clause_applications.pdf.

³ *See id.* at 6.

⁴ Rosalind Helderman & Tom Hamburger, *Trump Adviser Flynn Paid by Multiple Russia-Related Entities, New Records Show*, WASH. POST, Mar. 16, 2017, https://www.washingtonpost.com/politics/new-details-released-on-russia-related-payments-to-flynn-before-he-joined-trump-campaign/2017/03/16/52a4205a-0a55-11e7-a15f-a58d4a988474_story.html?utm_term=.18a1331777da.



Requested Records

American Oversight requests that DOD produce the following within twenty business days and seeks expedited review of this request for the reasons identified below:

1. All communications between Retired Lt. General Michael Flynn and Russian government officials, representatives, affiliates, or agents, or those of any other foreign state in DOD's possession.
2. All communications between Mr. Flynn and RT officials, representatives, affiliates, or agents in DOD's possession.
3. All documents reflecting payments received by Mr. Flynn from any foreign source.
4. All documents reflecting efforts by Mr. Flynn to seek permission or approval for the direct or indirect receipt of payments from *any* foreign source, including but not limited to RT, and any documents reflecting the approval or denial of such requests.
5. A copy of Mr. Flynn's contract with Leading Authorities (LAI), as well as any documents relating to Mr. Flynn's work on behalf of LAI.

Please provide all responsive records from August 7, 2014 (the date of Mr. Flynn's retirement from the U.S. Army), 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 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 DOD’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 DOD’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DOD 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

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>.

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

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, DOD 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 DOD 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 32 C.F.R. § 286.12(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

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.

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 There has been significant public reporting on Mr. Flynn’s contacts with Russian entities prior to the 2016 election.¹⁶ Mr. Flynn’s later communications with Russian officials after the election appear to have contributed to his resignation from the position of National Security Adviser less than one month into that job.¹⁷ The importance of this issue is also evident from the fact that several members of the U.S. Senate asked DOD to provide the requested information in a letter sent on February 1, 2017.¹⁸ To the best of American Oversight’s knowledge, to date, Congress has received no response to that letter. And even were DOD to respond to Congress, that would not necessarily be adequate to satisfy the public interest in this matter because Congress does not routinely release all documents it receives.

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 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 their availability on social media platforms, such as Facebook and Twitter.²⁰

¹³ 32 C.F.R. § 286.12(l)(1).

¹⁴ 32 C.F.R. § 286.12(l)(1).

¹⁵ 32 C.F.R. § 286.12(l)(2)(i), (ii)(A)-(B).

¹⁶ See, e.g., Helderman & Hamburger, *supra* note 4; Ben Brody, *Flynn Paid Thousands for Work with Russian Firms, Documents Show*, BLOOMBERG POLITICS (Mar. 16, 2017, 2:00 PM), <https://www.bloomberg.com/politics/articles/2017-03-16/flynn-got-56-250-from-russian-tv-cyber-firm-documents-show>; Associated Press, *Russian Companies Paid Michael Flynn Nearly \$70,000 Before the U.S. Election, Documents Show*, L.A. TIMES (Mar. 17, 2017, 6:40 AM), <https://www.bloomberg.com/politics/articles/2017-03-16/flynn-got-56-250-from-russian-tv-cyber-firm-documents-show>.

¹⁷ Sara Murray et al., *Flynn Resigns Amid Controversy Over Russia Contacts*, CNN POLITICS (Feb. 14, 2017, 9:54 AM), <http://www.cnn.com/2017/02/13/politics/michael-flynn-white-house-national-security-adviser/>.

¹⁸ Letter from Congressman Elijah E. Cummings et al. to The Honorable James Mattis (Feb. 1, 2017), https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2017-02-01.%20EEC%20Smith%20Conyers%20Thompson%20Schiff%20%26%20engel%20to%20Mattis.DOD_re_Flynn_.pdf.

¹⁹ 32 C.F.R. § 286.12(l)(2)(iii)(A)-(B).

²⁰ American Oversight currently has over 9,600 followers on Facebook, and over 7,200 on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Mar. 28, 2017); American Oversight (@weareoversight), TWITTER (last visited Mar. 28, 2017).

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 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.²¹

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 32 C.F.R. § 286.8(e)(1)(i)(B), American Oversight requests that DOD expedite the processing of this request.

I certify to be true and correct to the best of my knowledge and belief, that there is an urgent need to inform the public about the federal government activity that is the subject of this request. This request concerns a potential violation of the Constitution by a retired military official and the former National Security Adviser. It is an issue that several members of Congress have attempted to look into, to no avail thus far.²² Moreover, in light of the ongoing investigation into potential Russian interference in the 2016 election,²³ there is an urgent need for the public to understand Mr. Flynn’s ties to Russia in the months preceding the 2016 election.

I further certify that American Oversight is primarily engaged in disseminating information to the public. 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. Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,²⁴ American Oversight “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.”²⁵ American Oversight will use the information gathered, and its analysis of it, to educate the public through reports, press releases, and other media. American Oversight will also make materials it gathers available on our public website and promote their availability on social

²¹ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org (last visited Mar. 27, 2017).

²² See Letter from Congressman Elijah E. Cummings et al. to The Honorable James Mattis (Feb. 1, 2017), https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2017-02-01.%20EEC%20Smith%20Conyers%20Thompson%20Schiff%20%26%20engel%20to%20Mattis.DOD_re_Flynn_.pdf.

²³ See, e.g., Ellen Nakashima et al., *FBI Director Comey Confirms Probe of Possible Coordination Between Kremlin and Trump Campaign*, WASH. POST, Mar. 20, 2017, https://www.washingtonpost.com/world/national-security/fbi-director-to-testify-on-russian-interference-in-the-presidential-election/2017/03/20/cdea86ca-0ce2-11e7-9d5a-a83e627dc120_story.html?utm_term=.9d8be8c4668f.

²⁴ See *ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 30–31 (D.D.C. 2004); *EPIC v. Dep’t of Defense*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

²⁵ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

media platforms, such as Facebook and Twitter.²⁶ 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 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.²⁷

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 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 Sara Creighton 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

²⁶ American Oversight currently has over 9,600 followers on Facebook, and over 7,200 on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Mar. 28, 2017); American Oversight (@weareoversight), TWITTER (last visited Mar. 28, 2017).

²⁷ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org (last visited Mar. 27, 2017).