



July 28, 2017

VIA ELECTRONIC MAIL

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Re: Expedited 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 the implementing regulations of the Department of Defense (DOD), 32 C.F.R. Part 286, American Oversight makes the following request for records.

On Wednesday, July 26, 2017, President Trump announced over the course of three tweets that transgender persons are no longer permitted to serve “in any capacity” in the U.S. military.¹ Reports promptly emerged that the decision was politically motivated. First, DOD officials said

¹ Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 8:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864> (“After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow.....”); Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472> (“...Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming....”); Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:08 AM), <https://twitter.com/realDonaldTrump/status/890197095151546369> (“...victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you”).



they were unaware of the president's announcement until they saw his tweets,² further evidenced by DOD's transgender non-discrimination policy still being on the agency's website.³ Second, and more directly, administration sources indicated that the announcement was politically motivated to target Democratic politicians in the Rust Belt.⁴ American Oversight submits this FOIA request to shed light on whether and to what extent DOD officials were involved in this change in DOD personnel policy.

Requested Records

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

1. Any analysis or recommendations from any general, admiral, or military expert provided to the White House regarding DOD's policy regarding the service of transgender individuals in the U.S. military from any DOD personnel in the following offices:
 - a. the Office of the Secretary of Defense, including the secretary, chief of staff, deputy secretary, and the assistant to the secretary of defense for public affairs;
 - b. the Office of the Joint Chiefs of Staff;
 - c. the Office of the Secretary of the Air Force;
 - d. the Office of the Secretary of the Army;
 - e. the Office of the Secretary of the Navy; or
 - f. the Office of the Under Secretary of Defense for Personnel & Readiness; or
 - g. the Office of the Assistant Secretary of Defense for Manpower & Reserve Affairs;
 - h. the Office of the Assistant Secretary of Defense for Health Affairs; or
 - i. the Office of the General Counsel of the Department of Defense.

Please provide all responsive records from January 20, 2017, through 8:55 AM EDT on July 26, 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 DOD uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they

² See Rebecca Ballhaus, *Trump Administration to Bar Transgender Individuals from Serving in U.S. Military*, WALL ST. J. (July 26, 2017, 11:35 AM), <https://www.wsj.com/articles/trump-administration-to-ban-transgender-individuals-from-serving-in-u-s-military-1501075174>.

³ See Asawin Suebsaeng, *Trump Bows to Religious Right, Bans Trans Troops*, DAILY BEAST (July 26, 2017, 12:33 PM), <http://www.thedailybeast.com/trump-bows-to-religious-right-bans-trans-troops>.

⁴ See Jonathan Swan (@jonathanvswan), TWITTER (July 26, 2017, 9:30 AM), <https://twitter.com/jonathanvswan/status/890202683721863168>.

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

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.”⁷ 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.”⁸ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing

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

⁸ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

the sought-after information.”⁹ 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.’”¹⁰

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.¹¹ 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)(1), 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 public understanding of those operations. Moreover, the request is primarily and fundamentally for non-commercial purposes.

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”

⁹ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹⁰ *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)).

¹¹ *Mead Data Central*, 566 F.2d at 261.

government operations.¹² On July 26, 2017, President Trump announced a reversal of DOD personnel policy and reinstated a ban on transgender individuals serving “in any capacity” in the U.S. military.¹³ The implementation of a DOD personnel practice is a government activity, and the records responsive to this request would shed light on how the White House made the decision to discriminate against thousands of service members. The subject of this request is already of demonstrated public interest,¹⁴ and, as discussed further below, American Oversight has both the ability and the intention to effectively convey the information it receives to the public.

This request is primarily and fundamentally for non-commercial purposes.¹⁵ 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 our public website and promote their availability on social media platforms, such as Facebook and Twitter.¹⁶ 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, American Oversight promptly posted the records to its website¹⁷ and published an analysis of what the records reflected about DOJ’s process for ethics waivers.¹⁸ Additionally, 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.¹⁹

Accordingly, American Oversight qualifies for a fee waiver.

¹² 32 C.F.R. § 286.12(l)(1); 32 C.F.R. § 286.12(l)(2)(i)-(ii).

¹³ See *supra* note 1.

¹⁴ See Ballhaus, *supra* note 2; Suebsaeng, *supra* note 3; Swan, *supra* note 4.

¹⁵ 32 C.F.R. § 286.12(l)(1); 32 C.F.R. § 286.12(l)(2)(iii)(A)-(B).

¹⁶ American Oversight currently has approximately 11,200 page likes on Facebook, and 33,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited July 28, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 28, 2017).

¹⁷ *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

¹⁸ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

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

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E) and 32 C.F.R. § 286.8(e), 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. Media reports indicate that DOD was caught completely off-guard by the president's announcement this morning.²⁰ Moreover, even several hours after the president's tweets, DOD's website promoting its policy of non-discrimination toward transgender service members was still up.²¹ This kind of inconsistency calls into question the thoroughness of the deliberations leading to this decision and whether the impact of the decision on the thousands of transgender individuals currently serving in the U.S. military was fully considered. There is an urgency for those individuals and the American public as a whole to have access to the requested records so they can participate in an informed manner in the immediate debate that resulted from the president's announcement.²² The

²⁰ See Ballhaus, *supra* note 2; Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. TIMES, July 26, 2017, <https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html>; Suebsaeng, *supra* note 3.

²¹ See Suebsaeng, *supra* note 3.

²² See Bill Bartel, *Trump's Ban on Transgender People in Military Draws Scorn of Three Virginia Lawmakers*, THE VIRGINIAN-PILOT, July 26, 2017, https://pilotonline.com/news/government/nation/trump-s-ban-on-transgender-people-in-military-draws-ire/article_dc0c2f1e-3691-5209-b24a-11b564d7cba4.html; *Trump Bans Transgender People from Military*, CBS ST. LOUIS (July 26, 2017, 8:34 AM), <http://stlouis.cbslocal.com/2017/07/26/breaking-trump-bans-transgender-people-from-military/>; Jeremy Diamond, *Trump to Reinstate US Military Ban on Transgender People*, CNNPOLITICS (July 26, 2017, 11:18 AM), <http://www.cnn.com/2017/07/26/politics/trump-military-transgender/index.html>; *Trump Turns Back on LGBT Community with Transgender Military Ban Tweets*, FAST COMPANY (July 26, 2017, 9:39 AM), <https://news.fastcompany.com/trump-turns-back-on-lgbt-community-with-transgender-military-ban-tweets-4045340>; W.J. Hennigan, *Trump Bars Transgender People from Serving 'in Any Capacity' in the U.S. Military*, L.A. TIMES (July 26, 2017, 7:58 AM), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-transgender-people-will-not-be-1501074883-htmstory.html>; Patrick May & Tracy Seipel, *Trump Bans Transgender People in Military; Bay Area Outraged*, THE MERCURY NEWS (July 26, 2017, 10:57 AM), <http://www.mercurynews.com/2017/07/26/trump-bans-transgenders-in-military-bay-area-outraged/>; Chris Morris, *Ivanka Said She Was 'Proud to Support' LGBT Americans. Her Dad Just Banned Them from the Military*, FORTUNE (July 26, 2017, 10:37 AM), <http://fortune.com/2017/07/26/donald-trump-ivanka-transgender-united-states-armed-forces/>; Abby Phillip et al., *Trump Announces Ban on Transgender People in the U.S. Military*, WASH. POST (July 26, 2017, 10:57 AM), https://www.washingtonpost.com/news/post-politics/wp/2017/07/26/trump-announces-ban-on-transgender-people-in-u-s-military/?utm_term=.6efe0eb41a03; David Remnick, *The Cruelty and Cynicism of Trump's*

requested records will inform the public about the president's sudden decision to re-implement a discriminatory employment policy and the level of participation by the DOD in the White House's announcement.

The information American Oversight seeks concerns "a matter of a current exigency to the American public."²³ The continued, widespread coverage of the policy change indicates Mr. Trump's announcement concerns a policy of public concern and it has not been well received by Congress,²⁴ cisgender veterans,²⁵ or members of the American public.²⁶ Information regarding DOD's role in this policy decision will inform the public on a matter of public concern, and will provide insight that can inform the public's participation in the currently ongoing debate regarding the proposed policy and its implementation by the military branches. In fact, as DOD's decision to

Transgender Ban, THE NEW YORKER (July 26, 2017, 12:43 PM), <http://www.newyorker.com/news/news-desk/the-cruelty-and-cynicism-of-trumps-transgender-military-ban>; *Carter Blasts Trump's Ban on Transgender, Says 'Social Policy'*, REUTERS (July 26, 2017, 11:52 AM), <http://www.reuters.com/article/us-usa-military-transgender-carter-idUSKBN1AB27E?il=0>; Mark Joseph Stern, *In a Stunningly Cruel and Unjustified Move, Trump Bans Transgender Military Service*, SLATE (July 26, 2017, 10:42 AM), http://www.slate.com/blogs/outward/2017/07/26/trump_bans_transgender_military_service_via_twitter.html.

²³ *Al-Fayed v. Cent. Intelligence Agency*, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795, at 26 (1996), reprinted in 1996 U.S.C.C.A.N. 3448, 3469).

²⁴ See Jessica Estepa, *Sen. Orrin Hatch: 'Transgender People Are People and Deserve the Best We Can Do for Them'*, USA TODAY (July 26, 2017, 12:06 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/07/26/sen-orrin-hatch-transgender-people-people-and-deserve-best-we-can-do-them/512333001/>; Kyle Stewart, *Veterans in Congress Criticize Trump's Military Transgender Ban*, ROLL CALL (July 26, 2017, 5:56 PM), <http://www.rollcall.com/news/politics/veterans-congress-transgender-trump>.

²⁵ See John Kirby & Mark Hertling, *Trump's Transgender Tweets Are an Affront to the All-Volunteer Military*, CNN (July 26, 2017, 8:26 PM), <http://www.cnn.com/2017/07/26/opinions/trump-trans-military-opinion-hertling-kirby/index.html>.

²⁶ See Sasha Buchert, *Trump Cannot Hold Back Progress with a Tweet: Transgender Veteran*, USA TODAY (July 27, 2017, 12:53 PM), <https://www.usatoday.com/story/opinion/2017/07/27/trumps-transgender-ban-cannot-stamp-out-progress-sasha-buchert-column/514785001/>; Jonathan Capehart, *Let Me Thank Trump for His Tweets About Transgender Personnel*, WASH. POST (July 27, 2017, 12:44 PM), https://www.washingtonpost.com/blogs/post-partisan/wp/2017/07/27/let-me-thank-trump-for-his-tweets-about-transgender-personnel/?utm_term=.032015b22e24; Daniel Hamburg, *Local Reaction to President Trump's Transgender Military Ban*, 6 WJAC, July 27, 2017, <http://wjactv.com/news/local/local-reaction-to-president-trumps-transgender-military-ban-07-27-2017>; Ruth Kimata, *Cheyenne Residents React to President Trump's Transgender Military Ban*, KGWN-TV (July 26, 2017, 6:12 PM), <http://www.kgwn.tv/content/news/Cheyenne-residents-react-to-President-436837793.html>.

withhold implementation²⁷ indicates, the subject of this request concerns a currently unfolding story that has significant implications for the American people, including the thousands of transgender service members. Expedition is appropriate because a delayed response would deprive the public an opportunity to participate in this currently ongoing debate in a fully informed manner.

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,²⁸ 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."²⁹ American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, and other media. American Oversight also makes materials it gathers available on its public website and promote their availability on social media platforms, such as Facebook and Twitter.³⁰ 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, American Oversight promptly posted the records to its website³¹ and published an analysis of what the records reflected about DOJ's process for ethics waivers.³² Additionally, 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.³³

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

²⁷ See Courtney Kube & Andrew Rafferty, *Joint Chiefs: No Transgender Policy Changes Until Trump Clarifies Tweets*, NBC NEWS (July 27, 2017, 11:37 AM), <http://www.nbcnews.com/politics/national-security/joint-chiefs-no-transgender-policy-changes-until-trump-clarifies-tweets-n787076>; Barbara Starr et al., *US Joint Chiefs Blindsided by Trump's Transgender Ban*, CNNPOLITICS (July 27, 2017, 1:53 PM), <http://www.cnn.com/2017/07/27/politics/trump-military-transgender-ban-joint-chiefs/index.html>.

²⁸ 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).

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

³⁰ American Oversight currently has approximately 11,200 page likes on Facebook, and 33,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited July 28, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 28, 2017).

³¹ *Vetting the Nominees: Solicitor General Nominee Noel Francisco*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/our-actions/vetting-nominees-solicitor-general-nominee-noel-francisco>.

³² *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/news/francisco-travel-ban-learned-doj-documents>.

³³ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with DOD 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