



December 22, 2017

VIA ONLINE PORTAL

OSD/JS FOIA Requester Service Center
Chief, Ms. Stephanie Carr
Office of Freedom of Information
U.S. Department of Defense
1155 Defense Pentagon
Washington, DC 20301-1155
Via Online Portal

Re: Freedom of Information Act Request

Dear Ms. Carr:

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

In late August, Erik Prince, founder of private security firm Blackwater, pitched a plan to the Trump administration to hire him to privatize the war in Afghanistan using security contractors.¹ News source reported that he shared his plan with President Trump and his aides at a meeting in Camp David in late August.² Most recently, the presentation that Mr. Prince created to explain his goals and strategies related to privatizing the war has surfaced.³ As laid out in the presentation, Mr. Prince's approach is to "Curtail Endless Expenditure of US Blood and Treasure," and use Afghanistan for a "strategic mineral resource extraction funded effort that breaks the negative

¹ See Rosie Gray, *Erik Prince's Plan to Privatize the War in Afghanistan*, THE ATLANTIC, Aug. 18, 2017, <https://www.theatlantic.com/politics/archive/2017/08/afghanistan-camp-david/537324/>; Katrina Manson, *Erik Prince Offers Private Military Force in Afghanistan*, FIN. TIMES, Aug. 7, 2017, <https://www.ft.com/content/452253d2-7b8b-11e7-9108-edda0bcb928>; Andrew deGrandpre, *Blackwater's Founder Wants Trump to Outsource the Afghanistan War. Why That's So Risky.*, WASH. POST, Aug. 10, 2017, https://www.washingtonpost.com/news/checkpoint/wp/2017/08/10/blackwaters-founder-wants-trump-to-outsource-the-afghanistan-war-why-thats-so-risky/?utm_term=.6a2facf0ff07; Jim Sciutto & Zachary Cohen, *U.S. Official: Erik Prince Proposed Private Spy Network to Trump Administration*, CNN (Dec. 5, 2017, 10:10 PM), <http://www.cnn.com/2017/12/05/politics/erik-prince-private-spy-network-trump-administration/index.html>; Aram Roston, *Erik Prince Has His Eye on Afghanistan's Rare Metals*, BUZZFEED NEWS (Dec. 7, 2017, 2:29 PM), https://www.buzzfeed.com/aramroston/private-war-erik-prince-has-his-eye-on-afghanistans-rare?utm_term=.lqmZveDx9#.pdAkgNvqe.

² See Gray, *supra* note 1.

³ See Roston, *supra* note 1.



security economic cycle.”⁴ The plan to privatize the war in Afghanistan is concerning as it not only has the potential to jeopardize the current military structure, but also places defense-related decision-making in the hands of private paramilitary troops.

Questions remain open as to who would fund a private army and how such an entity could be held accountable under the laws of the United States. However, little public information is available on what the top defense officials think about privatizing the war, and whether Mr. Prince’s presentation has set in motion policy changes on how the war will be handled in the future. The public has a right to know whether the defense community is considering Mr. Prince’s presentation seriously and taking steps to change the United States’ current approach in Afghanistan.

Requested Records

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

All communications, calendar invitations/entries, meeting notices, or meeting agendas between Erik Prince and any of the following individuals at DOD:

- a. Defense Secretary, Jim Mattis
- b. Deputy Defense Secretary, Patrick M. Shanahan
- c. Under Secretary of Intelligence, Kari A. Bingen
- d. Chairman of the Joint Chiefs of Staff, General Joseph F. Dunford Jr.

Please include all communications sent on behalf of these aforementioned individuals by administrative assistants, secretaries, or personal assistants.

Please provide all responsive records from January 20, 2017, through the date the search is conducted.

For calendar entries created in Outlook or similar programs, the documents should be produced in “memo” form to include all invitees, any notes, and all attachments. Please do not limit your search to Outlook calendars—we request the production of any calendar—paper or electronic, whether on government-issued or personal devices—used to track or coordinate how these individuals allocate their time on agency business.

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 conducted searches, we also request any such records prepared in connection with the processing of this request.

⁴ *An Exit Strategy for Afghanistan*, Erik Prince (<https://www.documentcloud.org/documents/4322811-The-Prince-Pitch.html#document/p17>) (last visited Dec. 21, 2017) [hereinafter *Prince Presentation*]; see also Roston, *supra* note 1.

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

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>.

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 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.

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.

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 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 a better understanding of relevant government procedures by the general public in a significant way. 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 operations or activities of the government.”¹³ The requested records will help American Oversight and the general public to understand whether top defense officials have decided to change their approach to the war in Afghanistan, and what effect, if any, Mr. Prince’s presentation has had on the defense and intelligence communities.¹⁴ Disclosure of the requested communications between Mr. Prince and top defense officials have the potential to help the public assess how the government plans to spend their money in war-related matters, and any new policies that may be shaping the government’s approach to the war. The issue is of great public interest because many members of the public work or have family in the military who would be affected by potential moves to privatize the war in Afghanistan. Moreover, the taxpaying public, which bears the costs of foreign warfare, has an interest in knowing whether the defense community has changed its approach to international military conflicts. American Oversight is committed to transparency and makes the responses agencies provide in response to FOIA requests publicly available. As noted, the subject of this request is a matter of public interest, and the public’s understanding of the government’s activities would be enhanced through American Oversight’s analysis and publication of these records.

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 its public website and

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

¹⁴ See *Prince Presentation*, *supra* note 4.

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

promotes 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,¹⁷ 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.¹⁸ 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.¹⁹

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 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 Pooja Chaudhuri 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,



Austin R. Evers
Executive Director
American Oversight

¹⁶ American Oversight currently has approximately 11,700 page likes on Facebook, and 38,000 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Dec. 21, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Dec. 21, 2017).

¹⁷ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

¹⁸ *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>.

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