



March 20, 2017

VIA ELECTRONIC MAIL AND ELECTRONIC SUBMISSION PORTAL

David M. Hardy, Chief
Record/Information Dissemination Section, Records Management Division
Federal Bureau of Investigation
170 Marcel Drive
Winchester, VA 22602-4843
Online Request via <https://efoia.fbi.gov>

Arnetta Mallory
FOIA Initiatives Coordinator, National Security Division
Department of Justice
Room 6150, 950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
nsdfoia@usdoj.gov

Amanda M. Jones
Acting Chief, FOIA/PA Unit, Criminal Division
Department of Justice
Suite 1127, Keeney Building
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
crm.foia@usdoj.gov

Laurie Day
Chief, Initial Request Staff, Office of Information Policy
Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, DC 20530-0001
Online Request via FOIAonline

Re: Expedited Freedom of Information Act Request

Dear Mr. Hardy, Ms. Mallory, Ms. Jones & Ms. Day:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and Department of Justice (DOJ) implementing regulations, 28 C.F.R. Part 16, American Oversight makes the following request for records.



On March 4, 2017, the President of the United States, Donald Trump, asserted that the former President, Barack Obama, had placed wiretaps on Mr. Trump and entities or associates in Trump Tower for improper purposes during the course of the 2016 presidential campaign. This acknowledgement by the President that his campaign and associates had been subject to wiretapping, whether lawfully or unlawfully, raise significant questions about the conduct of both Mr. Obama and Mr. Trump and his associates. Mr. Trump questioned whether it was “legal for a sitting President to be ‘wire tapping’ a race for president prior to an election”;¹ compared Mr. Obama’s asserted role in the wiretapping to Nixon, Watergate, and McCarthyism;² and described Mr. Obama as a “Bad (or sick) guy!”³

Press reports indicate that, subsequent to Mr. Trump’s series of tweets on this topic, the Director of the Federal Bureau of Investigations (FBI) contacted the DOJ and requested DOJ publicly refute the tweets.⁴

At the same time, press reports also indicated that the White House Counsel, Donald McGahn, contacted the Department of Justice seeking further information regarding active investigations involving associates of Mr. Trump.⁵ Contacts between the White House and the DOJ are governed by a 2009 DOJ memorandum regarding “Communications with the White House and Congress.”⁶ There have been no reports that the memorandum has been rescinded or revised. The public is

¹ Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:49 AM), <https://twitter.com/realDonaldTrump/status/837993273679560704>.

² Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), <https://twitter.com/realDonaldTrump/status/837996746236182529> (Nixon and Watergate); Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:35 AM), <https://twitter.com/realDonaldTrump/status/837989835818287106> (McCarthyism).

³ Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), <https://twitter.com/realDonaldTrump/status/837996746236182529>.

⁴ Michael S. Schmidt & Michael D. Shear, *Comey Asks Justice Dept. to Reject Trump’s Wiretapping Claim*, N.Y. TIMES, Mar. 5, 2017, <https://www.nytimes.com/2017/03/05/us/politics/trump-seeks-inquiry-into-allegations-that-obama-tapped-his-phones.html>; Pamela Brown & Shimon Prokupecz, *FBI Director James Comey Was ‘Incredulous’ Over Trump’s Tweets*, CNN, Mar. 7, 2017, <http://www.cnn.com/2017/03/06/politics/james-comey-trump-wiretap-tweets/>.

⁵ Justin Green, *The White House Race to Figure Out Trump’s Wiretap Allegations*, AXIOS, Mar. 4, 2017, <https://www.axios.com/the-white-house-race-to-figure-out-trumps-wiretap-allegations-2299920193.html>.

⁶ Office of the Attorney General, Memorandum for Heads of Department Components & All United States Attorneys, “Communications with the White House and Congress” (May 11, 2009), available at <https://lawfare.s3-us-west-2.amazonaws.com/staging/2017/2009%20Eric%20Holder%20memo.pdf> (emphasis added); see also Jane Chong, *White House Interference with Justice Department Investigations? That 2009 Holder Memo*, LAWFARE (Feb. 22, 2017, 4:12 PM), <https://www.lawfareblog.com/white-house-interference-justice-department-investigations-2009-holder-memo>.

entitled to know whether Mr. McGahn engaged in contacts with the DOJ or FBI that were inconsistent with this guidance.

Accordingly, American Oversight is seeking records relating to these important allegations.

Requested Records

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

1. All communications between the FBI, including Director Comey, and the DOJ, including the Office of the Attorney General, the Office of the Deputy Attorney General, and the Office of Public Affairs, regarding whether the DOJ should publicly address the allegations made on Twitter by President Donald Trump that former President Barack Obama “had [Mr. Trump’s] ‘wires tapped’ in Trump Tower just before the victory” and that President Obama was “tapping [Mr. Trump’s] phones in October, just prior to Election.”
2. All communications between the White House Counsel’s Office, including Donald McGahn, and the FBI, including Director Comey, or the DOJ, including the Office of the Attorney General or the Office of the Deputy Attorney General, seeking information regarding ongoing investigations, including requests for copies of transcripts of intercepted communications involving persons affiliated with the Trump Campaign.
3. All communications, documents, or other materials exchanged between DOJ or FBI and Congress, or briefing papers or talking points prepared for congressional briefings, regarding the communications referenced in 1 & 2, *supra*.

Please provide all responsive records from June 1, 2015, to 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.

In processing this request, please note that the President of the United States has officially acknowledged that the federal government instituted wiretaps on communications at Trump Tower. Specifically, the President stated that he “[j]ust found out that Obama had my ‘wires tapped’ in Trump Tower just before the victory. Nothing found.”⁷ The President further elaborated, “[i]s it legal for a sitting President to be ‘wire tapping’ a race for president prior to an

⁷ Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:35 AM), <https://twitter.com/realDonaldTrump/status/837989835818287106>.

election? Turned down by court earlier,”⁸; “I’d bet a good lawyer could make a great case out of the fact that President Obama was tapping my phones in October, just prior to Election!”⁹; and “How low has President Obama gone to tapp [sic] my phones during the very sacred election process.”¹⁰ In light of the official acknowledgement of these activities by the President, the government may not rely on exemptions permitting the withholding of material that is classified, protected by statute, or related to an ongoing law enforcement matter. If DOJ does rely on an exemption to withhold records, whether under Exemption 1 (classified information), Exemption 3 (statutorily protected information), Exemption 7 (law enforcement information); or any so-called “Glomar” response under *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976), and its progeny, American Oversight will challenge those withholdings in court in light of the President’s acknowledgment.

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.¹¹ **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.**¹²

⁸ Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:49 AM), <https://twitter.com/realDonaldTrump/status/837993273679560704>.

⁹ Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:52 AM), <https://twitter.com/realdonaldtrump/status/837994257566863360>.

¹⁰ Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), <https://twitter.com/realDonaldTrump/status/837996746236182529>.

¹¹ 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).

¹² 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

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 DOJ’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.**¹³ 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 DOJ’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DOJ 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.”¹⁴ 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.”¹⁵ 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.”¹⁶ 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.’”¹⁷

related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

¹³ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), *available at* <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), *available at* <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

¹⁴ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹⁵ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁶ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹⁷ *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)).

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.¹⁸ 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, DOJ 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 the Department 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 28 C.F.R. § 16.10(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. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).¹⁹

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 operations and is not “primarily in the commercial interest of the requester.”²⁰ The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how public funds are spent and how officials conduct the public’s business.

¹⁸ *Mead Data Central*, 566 F.2d at 261.

¹⁹ *See, e.g., McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

²⁰ 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.10(k).

Allegations of Russian interference in the U.S. election and the Trump campaign's closeness to Russian officials has been the subject of significant media coverage. On August 27, 2016, then-Senate Minority Leader Harry Reid wrote to F.B.I. Director James Comey asking Mr. Comey to investigate evidence of planned tampering by the Russians.²¹ Then on September 8, 2016, the same day that then-Senator Jeff Sessions reportedly held a one-on-one meeting with Russian Ambassador Sergey Kislyak, the *New York Times* published an article quoting Mr. Sessions in which Mr. Trump's campaign reaffirmed its embrace of Russian president Vladimir Putin.²² More recently, a week prior to Mr. Trump's inauguration, reports surfaced that Michael T. Flynn, Mr. Trump's first National Security Advisor, spoke with Mr. Kislyak the day before the Obama administration imposed sanctions on Russia as retaliation for the election interference.²³

On March 4, 2017, Mr. Trump asserted that former President Obama had placed wiretaps on Mr. Trump and entities in Trump Tower during the course of the 2016 presidential campaign for improper purposes. Mr. Trump questioned whether it was "legal for a sitting President to be 'wire tapping' a race for president prior to an election";²⁴ compared Mr. Obama's asserted role in the wiretapping to Nixon, Watergate, and McCarthyism;²⁵ and described Mr. Obama as a "Bad (or sick) guy!"²⁶ Disclosure of the requested information is in the public interest because it would inform the public regarding these very serious allegations about the conduct of both the current and former presidents and their staffs.

This request is primarily and fundamentally for non-commercial purposes. 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

²¹ David E. Sanger, *Harry Reid Cites Evidence of Russian Tampering in U.S. Vote, and Seeks F.B.I. Inquiry*, N.Y. TIMES, Aug. 29, 2016, <https://www.nytimes.com/2016/08/30/us/politics/harry-reid-russia-tampering-election-fbi.html>.

²² Jonathan Martin & Amy Chozick, *Donald Trump's Campaign Stands By Embrace of Putin*, N.Y. TIMES, Sept. 8, 2016, <https://www.nytimes.com/2016/09/09/us/politics/hillary-clinton-donald-trump-putin.html>.

²³ Julie Hirschfeld Davis et al., *Trump National Security Adviser Called Russian Envoy Day Before Sanctions Were Imposed*, N.Y. TIMES, Jan. 13, 2017, <https://www.nytimes.com/2017/01/13/us/politics/donald-trump-transition.html>.

²⁴ Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:49 AM), <https://twitter.com/realDonaldTrump/status/837993273679560704>.

²⁵ Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), <https://twitter.com/realDonaldTrump/status/837996746236182529> (Nixon and Watergate); Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:35 AM), <https://twitter.com/realDonaldTrump/status/837989835818287106> (McCarthyism).

²⁶ Donald Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 4:02 AM), <https://twitter.com/realDonaldTrump/status/837996746236182529>.

other media. American Oversight will also make materials it gathers available on our public website.

Accordingly, American Oversight qualifies for a fee waiver.

Application for Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E)(1) and 28 C.F.R. § 16.5(b), (e)(1)(iv), American Oversight requests that the Department of Justice 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 concerning the government's integrity, which affect public confidence. There is widespread and exceptional media interest in Mr. Trump's allegations that Mr. Obama directed the tapping of the communications of Mr. Trump and persons affiliated with his campaign for purposes related to the 2016 presidential election,²⁷ and in the allegations that Mr. Trump and his campaign affiliates had contacts with Russian officials, and that those contacts are under investigation.²⁸ The requested documents will

²⁷ See, e.g., Philip Rucker et al., *Trump Accuses Obama of 'Nixon/Watergate' Wiretap - But Offers No Evidence*, WASH. POST, Mar. 4, 2017, https://www.washingtonpost.com/politics/trump-accuses-obama-of-nixonwatergate-wiretap-but-offers-no-evidence/2017/03/04/1ddc35e6-0114-11e7-8ebe-6e0dbe4f2bca_story.html?hpid=hp_hp-top-table-main_trumpwiretap-8pm%3Ahomepage%2Fstory&tid=a_inl&utm_term=.c2ab0fcc0033; Elliot Smilowitz, *Trump Accuses Obama of Wiretapping Trump Tower* (Mar. 4, 2017, 6:51 AM), <http://thehill.com/homenews/administration/322337-trump-accuses-obama-of-wiretapping-trump-tower>; Jeremy Diamond et al., *Trump's Baseless Wiretap Claim*, CNN (Mar. 5, 2017, 6:59 AM), <http://www.cnn.com/2017/03/04/politics/trump-obama-wiretap-tweet/>.

²⁸ See, e.g., Adam Entous et al., *Sessions Met with Russian Envoy Twice Last Year, Encounters He Later Did Not Disclose*, WASH. POST, Mar. 1, 2017, https://www.washingtonpost.com/world/national-security/sessions-spoke-twice-with-russian-ambassador-during-trumps-presidential-campaign-justice-officials-say/2017/03/01/77205eda-feac-11e6-99b4-9e613afeb09f_story.html; Brooke Seipel, *Bush's Ethics Lawyer On Sessions Talks with Russia Ambassador: 'Good Way To Go To Jail'*, THE HILL BLOG (Mar. 1, 2017, 10:34 PM), <http://thehill.com/blogs/blog-briefing-room/news/321936-ethics-lawyer-to-george-w-bush-on-sessions-talks-with-russia>; David E. Sanger, *Harry Reid Cites Evidence of Russian Tampering in U.S. Vote, and Seeks F.B.I. Inquiry*, N.Y. TIMES, Aug. 29, 2016, <https://www.nytimes.com/2016/08/30/us/politics/harry-reid-russia-tampering-election-fbi.html>; Julie Hirschfeld Davis et al., *Trump National Security Adviser Called Russian Envoy Day Before Sanctions Were Imposed*, N.Y. TIMES, Jan. 13, 2017, <https://www.nytimes.com/2017/01/13/us/politics/donald-trump-transition.html>; Margaret Hartmann, *What We Know about the Investigations Into Trump's Russia Scandal*, N.Y. MAG. (Mar. 7, 2017), <http://nymag.com/daily/intelligencer/2017/03/what-we-know-about-the-probes-into-trumps-russia-scandal.html>; Karen Demirjian et al., *Attorney General Jeff Sessions Will Recuse Himself from Any Probe Related to 2016 Presidential Campaign*, WASH. POST (Mar. 2, 2017), <https://www.washingtonpost.com/powerpost/top-gop-lawmaker-calls-on-sessions-to-recuse-himself->

shed light on these issues of considerable interest to the public. Both the allegation that Mr. Obama improperly instituted wiretaps for electoral purposes and the possibility that investigations established national security or criminal bases to seek court ordered wiretapping of Mr. Trump and persons affiliated with his campaign similarly raise questions about whether both the current and the former president or their associates acted unlawfully and about the very integrity of the 2016 presidential election. These are self-evidently matters “in which there exist possible questions about the government's integrity that affect public confidence.”

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 you 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,



Austin R. Evers
Executive Director
American Oversight

cc: Sarah Isgur Flores, Director, Office of Public Affairs

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