



April 7, 2017

VIA ELECTRONIC MAIL AND ONLINE PORTAL

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Re: Expedited Freedom of Information Act Request

Dear Freedom of Information Officers:

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

On March 7, 2017, President Donald Trump announced his intention to nominate Noel Francisco to be Solicitor General of the United States.¹ Mr. Francisco served as acting solicitor

¹ Richard Wolf, *Noel Francisco to Inherit Supreme Court Lectern as Solicitor General, USA TODAY*, Mar. 8, 2017, <https://www.usatoday.com/story/news/politics/2017/03/08/noel-francisco-solicitor-general-supreme-court-trump/98904262/>.



general until his nomination was announced, and reportedly continues to work in DOJ in the Office of the Associate Attorney General. Prior to January 20, 2017, Mr. Francisco was a partner at the Jones Day law firm in Washington, DC, and a DOJ official during the George W. Bush administration.²

While acting as solicitor general, Mr. Francisco appeared on behalf of the federal government in the challenge to Mr. Trump's travel ban executive order by the State of Washington, one of the highest profile cases handled by DOJ since Mr. Francisco's return. On Monday, February 6, 2017, at 11:01 AM, after Mr. Francisco's appearance, his former law firm, Jones Day, entered the case as counsel to *amici* opposed to the government's action.³ Under Office of Government Ethics regulations, a DOJ employee may not participate, without authorization, in a particular matter having specific parties where an organization which the employee has served, as an employee or in another capacity, within the past year is a party or represents a party.⁴

Although the reply brief filed by the government the next day indicated that Mr. Francisco had "refrained from signing the brief, out of an abundance of caution, in light of a last-minute filing of an amicus brief by [his] former law firm,"⁵ Mr. Francisco did not withdraw his appearance and subsequently has continued to participate in the case.⁶

Particularly in light of the weighty responsibilities of the solicitor general, American Oversight seeks records regarding Mr. Francisco's compliance with ethics and conflict of interest laws, including any recusals or waivers applying to Mr. Francisco's work on this matter.

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. Records reflecting any recusal or disqualification of Noel Francisco from any matter, or from matters involving any particular parties or participants.
2. Any conflicts or ethics waivers or authorizations issued for Mr. Francisco, including authorizations pursuant to 5 C.F.R. § 2635.502.
3. Any record reflecting a determination by DOJ that 5 C.F.R. § 2635.502 or any other ethics requirement did not preclude Mr. Francisco's continued participation in the Ninth Circuit appeal or other litigation regarding the travel ban, including any determination by the

² *Id.*

³ Mot. for Leave to File Br. of Constitutional Scholars as *Amici Curiae* in Supp. of Appellees, *Washington v. Trump*, No. 17-35105, ECF No. 43 (9th Cir. Feb. 6, 2017).

⁴ See 5 C.F.R. § 2635.502.

⁵ Reply Supp. Emergency Mot. Stay Pending Appeal, *Washington v. Trump*, No. 17-35105, ECF No. 70 at *1 (9th Cir. Feb. 6, 2017, at 2:52 PM).

⁶ See, e.g., Supplemental Br. *En Banc* Consideration, *Washington v. Trump*, No. 17-35105, ECF No. 154 (9th Cir. Feb. 16, 2017).

Office of the Attorney General, the Office of the Deputy Attorney General, the Office of Legal Counsel, or the Departmental Ethics Office.

4. All records reflecting Mr. Francisco's participation in litigation regarding the travel ban, including but not limited to the appeal in the U.S. Court of Appeals for the Ninth Circuit regarding the State of Washington's challenge to that ban, between 11:01 AM on Monday, February 6, 2017, and the earlier of (i) the date and time of any written waiver or authorization received by Mr. Francisco authorizing him to continue to participate in that particular matter responsive to Item 2 or (ii) February 16, 2017. Please include:
 - a. Any documents or emails during this period concerning the travel ban litigation, including talking points, legal analysis, argument, briefing, or strategy for the Ninth Circuit appeal sent or received by Mr. Francisco or upon which he was copied.
 - b. Any documents or e-mails during this period exchanged among lawyers participating in the matter—including but not limited to Catherine Dorsey, Lowell Sturgill, Sharon Swingle, Douglas Letter, H. Thomas Byron, Edwin Kneedler, and August Flentje—discussing or concerning Mr. Francisco's participation in the matter, including any oral comments received from Mr. Francisco regarding the briefing, argument, strategy, or legal analysis for the Ninth Circuit appeal.
 - c. Calendar entries, meeting agendas, or notes during this period reflecting Mr. Francisco's attendance or participation in any meeting or call regarding the Ninth Circuit appeal or other litigation regarding the travel ban.
 - d. Records reflecting hand-written notes or comments regarding the Ninth Circuit appeal or other litigation regarding the travel ban from Mr. Francisco prepared during this period, such as edits on a draft brief.
5. Any communications with the Office of Government Ethics regarding Mr. Francisco's continued participation in the Ninth Circuit appeal or other litigation regarding the travel ban.

Records regarding Mr. Francisco's recusals, disqualifications, waivers, and authorizations might be located in the Offices of the Solicitor General and of the Associate Attorney General, where Mr. Francisco has worked, as well as in the Office of the Deputy Attorney General and the Office of the Attorney General, to the extent that officials in those offices served as the agency designee for authorizations or waivers received by Mr. Francisco, including pursuant to 5 C.F.R. § 2635.502.

Please provide all responsive records from January 20, 2017, 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.

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.⁷ **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.**⁸

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.**⁹ Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form

⁷ 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).

⁸ 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)).

⁹ 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>.

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.”¹⁰ 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.”¹¹ 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.”¹² 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.’”¹³

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.¹⁴ 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

¹⁰ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹¹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹² *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹³ *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)).

¹⁴ *Mead Data Central*, 566 F.2d at 261.

duplication costs. By working together at the outset, American Oversight and DOJ 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.¹⁵ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁶

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.”¹⁷ Mr. Francisco’s nomination to be solicitor general has drawn widespread media interest.¹⁸ Information regarding any recusals, disqualifications, waivers, and authorizations received by Mr. Francisco will shed light on how he would approach his legal and ethical obligations as solicitor general. The information would also inform the public regarding the background and influences that might shape his performance in that important role. Moreover, any evidence that Mr. Francisco participated in the conduct of a matter in which his former firm represented *amici* without express

¹⁵ 28 C.F.R. § 16.10(k)(2).

¹⁶ 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.10(k)(2).

¹⁷ 28 C.F.R. § 16.10(k)(2)(i), (ii)(A)–(B).

¹⁸ Robert Barnes, *Trump Nominates D.C. Lawyer Noel Francisco as Solicitor General*, WASH. POST, Mar. 8, 2017, https://www.washingtonpost.com/politics/courts_law/trump-nominates-dc-lawyer-noel-francisco-as-solicitor-general/2017/03/08/c62b0774-040f-11e7-b9fa-ed727b644a0b_story.html?utm_term=.1873ccff0e5f; Olivia Beavers, *Trump to Nominate Noel Francisco for Solicitor General*, THE HILL (Mar. 7, 2017, 6:54 PM), <http://thehill.com/homenews/administration/322854-trump-to-nominate-noel-francisco-for-solicitor-general>; Ariane de Vogue & Dan Merica, *Trump Announces Noel Francisco as Solicitor General Pick*, CNN.COM (Mar. 7, 2017, 10:25 PM), <http://www.cnn.com/2017/03/07/politics/solicitor-general-noel-francisco/>; Shane Goldmacher & Eliana Johnson, *Trump Will Name Francisco Solicitor General, Sources Say*, POLITICO (Mar. 7, 2017, 5:53 PM), <http://www.politico.com/story/2017/03/trump-solicitor-general-noel-francisco-235797>; Amy Howe, *Trump to Nominate Francisco to Serve as Solicitor General*, SCOTUSBLOG (Mar. 8, 2017, 10:56 AM), <http://www.scotusblog.com/2017/03/trump-nominate-francisco-serve-solicitor-general/>; Wolf, *supra* note 1.

authorization would raise significant questions regarding his integrity and the application of ethics requirements by DOJ.

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 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 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. Mr. Francisco's nomination to be Solicitor General has drawn widespread media interest.²² The Senate is expected to soon take up Mr. Francisco's nomination and information regarding how he approaches his legal and ethical obligations to avoid conflicts of interest is critical to assisting the Senate and the public to make informed decisions about his integrity and his nomination. Moreover, any evidence that Mr. Francisco participated in the conduct of a matter in which his former firm represented *amici* without express authorization would raise significant questions regarding his integrity and the application of ethics requirements by DOJ.

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

¹⁹ 28 C.F.R. § 16.10(k)(iii)(A)-(B).

²⁰ American Oversight currently has over 10,400 page likes on Facebook, and over 11,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Apr. 7, 2017); American Oversight (@weareoversight), TWITTER (last visited Apr. 7, 2017).

²¹ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

²² Barnes, *supra* note 18; Beavers, *supra* note 18; de Vogue & Merica, *supra* note 18; Goldmacher & Johnson, *supra* note 18; Howe, *supra* note 18; Wolf, *supra* note 1.

to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,²³ 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.”²⁴ 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 media platforms, such as Facebook and Twitter.²⁵ 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.²⁶

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 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,



Austin R. Evers
Executive Director
American Oversight

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

²³ 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).

²⁴ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

²⁵ American Oversight currently has over 10,400 page likes on Facebook, and over 11,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Apr. 7, 2017); American Oversight (@weareoversight), TWITTER (last visited Apr. 7, 2017).

²⁶ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.