



May 16, 2017

VIA ONLINE PORTAL

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

Re: Expedited Freedom of Information Act Request

Dear Ms. Day:

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.

Until Tuesday, May 9, 2017, it had been reported that the Federal Bureau of Investigation (FBI), under the leadership of Director James Comey, was investigating potential ties between the Trump presidential campaign and Russian operatives.¹ President Trump's abrupt decision to fire Mr. Comey has sent shockwaves of confusion and suspicion of foul play throughout the country² and has drawn attention from international media.³ The *New York Times* is now reporting that

¹ Matt Apuzzo et al., *F.B.I. Is Investigating Trump's Russia Ties, Comey Confirms*, N.Y. TIMES, Mar. 20, 2017, <https://www.nytimes.com/2017/03/20/us/politics/fbi-investigation-trump-russia-comey.html>.

² See Davlin Barrett et al., *President Trump Fires FBI Director*, WASH. POST, May 10, 2017, https://www.washingtonpost.com/world/national-security/comey-misstated-key-clinton-email-evidence-at-hearing-say-people-close-to-investigation/2017/05/09/074c1c7e-34bd-11e7-b373-418f6849a004_story.html?utm_term=.3a6f62a0cda7; *James Comey Fired: Ousted FBI Director Learned He Was Fired from TV*, FOX NEWS, May 10, 2017, <http://www.foxnews.com/politics/2017/05/10/james-comey-fired-ousted-fbi-director-learned-was-fired-from-tv.html>; David Jackson et al., *President Trump Fires FBI Director James Comey*, USA TODAY, May 9, 2017, <https://www.usatoday.com/story/news/politics/2017/05/09/trump-fires-fbi-director-james-comey/101485500/>; Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump*, N.Y. TIMES, May 9, 2017, <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html>.

³ See *James Comey, FBI Director, Fired by Donald Trump*, ALJAZEERA, May 10, 2017, <http://www.aljazeera.com/news/2017/05/fbi-director-james-comey-fired-170509215238322.html>;



Mr. Trump asked Mr. Comey to cease the FBI investigation into former National Security Adviser Michael T. Flynn's ties to Russia.⁴ The *Times* also reports that Attorney General Jeff Sessions was in the room when Mr. Trump requested the one-on-one conversation with Mr. Comey.⁵ American Oversight submits this FOIA request for records that would inform the public as to the circumstances surrounding Mr. Comey's firing.

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:

All communications from Attorney General Jeff Sessions discussing or regarding President Trump's conversation with then-FBI Director James Comey as reported in the *New York Times*.⁶

Please provide all responsive records from February 13, 2017, 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 DOJ 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.**

FBI Chief James Comey Fired by Trump, BBC, May 10, 2017, <http://www.bbc.com/news/world-us-canada-39866170>; *Trump Feuert FBI-Direktor Comey*, SPIEGEL ONLINE, (May 9, 2017, 11:51 PM), <http://www.spiegel.de/politik/ausland/donald-trump-feuert-fbi-direktor-james-comey-a-1146914.html>; Gilles Paris, *Le Coup de Force de Trump Contre le FBI*, LE MONDE, May 10, 2017, http://www.lemonde.fr/donald-trump/article/2017/05/10/donald-trump-limoge-james-comey-le-directeur-du-fbi_5125141_4853715.html.

⁴ Michael S. Schmidt, *Comey Memo Says Trump Asked Him to End Flynn Investigation*, N.Y. TIMES, May 16, 2017, <https://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html>.

⁵ *Id.*

⁶ *See id.*

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 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”

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>.

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 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

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.

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 activities.¹⁷ The president fired the director of the FBI.¹⁸ There is significant public interest in Mr. Trump’s decision,¹⁹ and questions have been raised as to the extent to which, and for how long, the decision to fire Mr. Comey was discussed.²⁰ The requested records will help American Oversight and the general public understand the steps taken leading to the extraordinary decision to fire Mr. Comey.

This request is primarily and fundamentally for non-commercial purposes.²¹ 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.²² For 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.²³

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(e)(1)(ii), (iv), American Oversight requests that the FBI expedite the processing of this request.

¹⁵ 28 C.F.R. § 16.10(k)(1).

¹⁶ *Id.*

¹⁷ 28 C.F.R. § 16.10(k)(1), (2)(i)-(ii).

¹⁸ *See supra* note 2.

¹⁹ *See, e.g., supra* notes 2 and 3.

²⁰ *See* Josh Dawsey, *Behind Comey’s Firing: An Enraged Trump, Fuming about Russia*, POLITICO, May 10, 2017, <http://www.politico.com/story/2017/05/10/comey-firing-trump-russia-238192>.

²¹ 28 C.F.R. § 16.10(k)(1), (2)(iii).

²² American Oversight currently has over 10,800 page likes on Facebook, and over 32,300 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 11, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited May 11, 2017).

²³ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

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 that affect public confidence. As discussed above, this matter already has been the subject of widespread media interest and attention.²⁴ Nearly all of the coverage in the first hours after the news broke referenced the questionable grounds on which the decision was made.²⁵ Moreover, the White House has suggested that Mr. Comey was fired to hasten an end to the FBI's investigation into the Trump campaign's ties with Russia.²⁶ A position that is bolstered by the *New York Times*' report of Mr. Comey's memorandum memorializing Mr. Trump's request that the FBI end its investigation of Mr. Flynn.²⁷ The circumstances under which Mr. Comey was fired is a quintessential example of "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence."²⁸

Moreover, 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. The president has taken the unprecedented position of firing multiple high-level DOJ

²⁴ Matt Apuzzo et al., *F.B.I. Is Investigating Trump's Russia Ties, Comey Confirms*, N.Y. TIMES, Mar. 20, 2017, <https://www.nytimes.com/2017/03/20/us/politics/fbi-investigation-trump-russia-comey.html>.

²⁴ See Barrett et al., *supra* note 2; FOX NEWS, *supra* note 2; David Jackson et al., *supra* note 2; Michael D. Shear & Matt Apuzzo, *supra* note 2; ALJAZEERA, *supra* note 3; BBC, *supra* note 3; SPIEGEL ONLINE, *supra* note 3; Paris, *supra* note 3.

²⁵ See, e.g., Barrett et al., *supra* note 2; David Jackson et al., *supra* note 2; Michael D. Shear & Matt Apuzzo, *supra* note 2; Josh Gerstein, *Trump Shocks with Ouster of FBI's Comey*, POLITICO, May 10, 2017, <http://www.politico.com/story/2017/05/09/trump-fires-fbi-director-james-comey-238175>; Perry Bacon, Jr., *Why Did Trump Fire Comey?*, FIVETHIRTYEIGHT (May 9, 2017, 8:51 PM), <https://fivethirtyeight.com/features/why-did-trump-fire-comey/>; John McCain: "Not Sufficient Rationale" for Firing Comey, CNNPOLITICS (May 10, 2017, 9:53 AM), <http://www.cnn.com/2017/05/10/politics/trump-fires-comey-latest?lf-content=195591701:lb-post-d0c3f9e2ac46345f96ee16cd117b1360@livefyre.com&hubRefSrc=permalink>; Tessa Stuart, *Comey Firing 'Worse Than Watergate,' Says Former White House Ethics Lawyer*, ROLLING STONE, May 9, 2017, <http://www.rollingstone.com/politics/features/comey-firing-worse-than-watergate-white-house-ethics-expert-w481537>; Anthony Zurcher, *Did President Trump Fire James Comey As Part of a Cover-Up?*, BBCNEWS, May 10, 2017, <http://www.bbc.com/news/world-us-canada-39866645>.

²⁶ Alexandra Wilts, *White House Says Firing James Comey Will Help Bring Trump-Russia Investigation to End 'With Integrity,'* THE INDEPENDENT, May 12, 2017, <http://www.independent.co.uk/news/world/americas/us-politics/trump-comey-russia-investigation-firing-help-bring-end-with-integrity-a7731496.html>; Kevin Liptak, *Trump Contradicts Spokeswoman on Effect of Comey Firing, Says It May 'Lengthen Out the Investigation,'* CNN (May 11, 2017, 9:46 PM), <http://www.cnn.com/2017/05/11/politics/comey-fbi-investigation-russia-sarah-huckabee-sanders/>.

²⁷ Schmidt, *supra* note 4.

²⁸ 28 C.F.R. § 16.5(e)(1)(iv).

officials who were participating in investigations related to him and his associates.²⁹ He did not even directly inform Mr. Comey of his termination, but rather Mr. Comey learned of his fate based on an audience reaction to seeing the news on a nearby television.³⁰ Knowledge of the circumstances that led to this decision is essential to the public's understanding of the decision. The information sought in this request will meaningfully further public discourse on this issue of national concern.

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,³¹ 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."³² 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 its public website and promote their availability on social media platforms, such as Facebook and Twitter.³³ One example of American Oversight's demonstrated public disclosure of documents and creation of editorial content is in its "Audit the Wall" effort, where the organization is gathering and analyzing information and commenting on public releases of information related to the administrations proposed construction of a barrier along the U.S.-Mexico border.³⁴

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 DOJ 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

²⁹ Euan McKirdy, *Preet Bharara, Sally Yates and James Comey: Fired While Investigating Donald Trump*, CNNPOLITICS (May 10, 2017, 5:46 AM), <http://www.cnn.com/2017/05/10/politics/comey-yates-bharara-fired-after-investigations/>.

³⁰ Jordan Fabian, *Comey Learned He Was Fired from TV, Thought It Was Prank: Reports*, THE HILL, May 9, 2017, <http://thehill.com/homenews/administration/332662-comey-learned-he-was-fired-from-tv-reports>.

³¹ 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).

³² *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

³³ See *supra* note 22.

³⁴ See *supra* note 23.

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, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight

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