



September 6, 2017

VIA ONLINE PORTAL AND ELECTRONIC MAIL

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Re: Expedited Freedom of Information Act Request

Dear FOIA Officers:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, 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 September 5, 2017, Attorney General Jeff Sessions announced that the Trump administration has decided to rescind the Deferred Action for Childhood Arrivals (DACA) program, which afforded legal protections to approximately 800,000 undocumented immigrants who entered the United States as children.¹ Attorney General Sessions cited purported legal infirmities in the DACA framework as the basis for scrapping the program, asserting that DACA is “an unconstitutional exercise of authority by the Executive Branch.”² He further explained that the administration’s “collective wisdom is that the policy is vulnerable to the same legal and constitutional challenges that the courts recognized with respect to the DAPA program, which was

¹ Vanessa Romo et al., *Trump Ends DACA, Calls on Congress to Act*, NPR (Sept. 5, 2017, 12:25 PM) <http://www.npr.org/2017/09/05/546423550/trump-signals-end-to-daca-calls-on-congress-to-act>.

² Text of Attorney General Sessions’ Statement on Rescinding DACA, MARKETWATCH (Sept. 5, 2017, 11:50 AM), <http://www.marketwatch.com/story/text-of-attorney-general-sessions-statement-on-rescinding-daca-2017-09-05>.



enjoined on a nationwide basis in a decision affirmed by the Fifth Circuit.”³ Yet this position conflicts with prior government positions and legal opinions, and in shifting its stance, DOJ appears to have bowed to pressure from several state governors and attorneys general, who threatened to expand a pending lawsuit to challenge DACA if the federal government did not rescind the program by September 5, 2017.⁴

The administration announced that the program will be phased out over six months in an “orderly wind down”⁵ and shifted responsibility to Congress to replace DACA’s protections through immigration reform legislation.⁶ Unless Congress intervenes, current DACA recipients will begin to lose protection—and face deportation—as soon as March 2018.⁷ American Oversight requests records that will shed light on the process through which the government reversed its opinion on DACA and will empower the American public to participate in the debate over legislative options to replace it.

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. Any memorandum, legal opinion, analysis, or other record created, sent, or received by any political appointee, SES employee, or person holding an administratively determined position in the Office of the Attorney General or the Office of Legal Counsel reflecting DOJ’s basis for determining that DACA or any other executive action related to immigration is unconstitutional, including but not limited to DOJ’s basis for Attorney General Sessions’ public statements that:
 - DACA is “an unconstitutional exercise of authority by the Executive Branch,”⁸ or
 - DACA “is vulnerable to the same legal and constitutional challenges that the courts recognized with respect to the DAPA program, which was enjoined on a nationwide basis in a decision affirmed by the Fifth Circuit.”⁹

³ *Id.*

⁴ Letter from Hon. Ken Paxton, Attorney General of Texas, et al. to Hon. Jeff Sessions, Attorney General of the United States (June 29, 2017), https://www.texasattorneygeneral.gov/files/eypress/DACA_letter_6_29_2017.pdf?cachebuster:5.

⁵ Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES, Sept. 5, 2017, https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html?_r=0.

⁶ *Id.*; Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2017, 8:04 AM), <https://twitter.com/realDonaldTrump/status/905038986883850240> (“Congress, get ready to do your job - DACA!”).

⁷ Romo et al., *supra* note 1.

⁸ Text of Attorney General Sessions’ Statement on Rescinding DACA, MARKETWATCH (Sept. 5, 2017, 11:50 AM), <http://www.marketwatch.com/story/text-of-attorney-general-sessions-statement-on-rescinding-daca-2017-09-05>.

⁹ *Id.*

2. Any memorandum, opinion, or other written determination withdrawing or rescinding the Office of Legal Counsel's November 19, 2014 Memorandum Opinion entitled *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*.¹⁰

Please provide all responsive records from January 20, 2017, to the date the search is conducted. These requests include all individuals who are serving or have served in any of the roles listed above, including in an acting capacity, during that time period.

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.**

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

¹⁰ The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. (2014), <https://www.justice.gov/file/179206/download>.

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

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

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)).

¹³ 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>.

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 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 a 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.¹⁹ Moreover, the request is primarily and fundamentally for non-commercial purposes.²⁰

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.²¹ Immigration enforcement, including policies and procedures governing enforcement priorities and deportations, are government activities affecting millions of people. Although rescinding DACA threatens approximately 800,000 individuals directly and will have further consequences for their families, schools, and employers, the Trump administration has not adequately explained its pivot from Obama administration policy. Instead, it

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

¹⁹ 28 C.F.R. § 16.10(k)(1).

²⁰ *Id.*

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

has made conclusory statements that the program is unconstitutional, without rescinding earlier opinions to the contrary or clarifying its new reasoning. Moreover, the public has substantial reason to fear that demands and timelines dictated by a handful of state governors and attorneys general, rather than unbiased and thorough legal review, drove the administration's decision. The public has a right to information clarifying the government's basis for changing its position on this program and casting hundreds of thousands of Dreamers into an uncertain future. Therefore, the requested disclosure will be "meaningfully informative" about key government operations and activities surrounding the destruction of DACA.²² Moreover, reported "backlash" after Attorney General Sessions' announcement underscores the public's interest and investment in this subject,²³ and (as described further below) American Oversight will convey information obtained through this request to the general public via its website and social media accounts.²⁴

This request is primarily and fundamentally for non-commercial purposes.²⁵ 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.²⁶ 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 website²⁷ and published an analysis of what the records reflected about DOJ's process for ethics waivers.²⁸ Additionally, American Oversight has a project called "Audit the Wall," where the organization is gathering and analyzing information and commenting on public releases of

²² 28 C.F.R. § 16.10(k)(2)(ii)(A).

²³ Sonam Sheth, *Trump's Decision to End DACA Sparks Backlash from Both Sides of the Aisle*, BUSINESS INSIDER (Sept. 5, 2017, 2:29 PM), <http://www.businessinsider.com/trump-daca-reactions-backlash-2017-9>; Megan R. Wilson & Ali Breland, *Business Backlash Hits Trump's DACA Decision*, THE HILL (Sept. 5, 2017, 3:04 PM), <http://thehill.com/business-a-lobbying/business-a-lobbying/349270-business-backlash-hits-trumps-daca-decision>.

²⁴ 28 C.F.R. § 16.10(k)(2)(ii)(B).

²⁵ 28 C.F.R. § 16.10(k)(1), (2)(iii).

²⁶ American Oversight currently has approximately 11,300 page likes on Facebook, and 33,900 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Sept. 6, 2017); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Sept. 6, 2017).

²⁷ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²⁸ *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>.

information related to the administration’s proposed construction of a barrier along the U.S.-Mexico border.²⁹

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)(ii), 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 an urgency to inform the public about an actual or alleged Federal Government activity.³⁰ As described above, the Trump Administration has set a six-month phase-out period for DACA and has encouraged Congress to act in the interim to replace DACA with legislation.³¹ Therefore, if Congress wishes to restore protections to the 800,000 people affected by DACA’s termination—not to mention the families and businesses that rely on them—it has a very short time to assess the purported legal deficiencies in the DACA program and ensure that any legislation it sends to the president’s desk cures any legal problems. Similarly, the American people also have only a brief window to understand the government’s position, formulate their own views, and engage with their members of Congress to convey those views. Given the sweeping effects immigration policy has on individuals and on the American economy, the public must be empowered to participate fully in this legislative process. American Oversight has requested records that will inform the public during this critical time, and delaying disclosure until legislation has been enacted—or has failed and deportations have begun—would deprive the public of meaningful participation in this important national debate.

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.³² Similar to other organizations that have been found to satisfy the criteria necessary to qualify for expedition,³³ 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.”³⁴ American Oversight uses the information gathered, and its analysis of it, to

²⁹ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

³⁰ 28 C.F.R. § 16.5(e)(1)(ii).

³¹ See, e.g., Shear & Davis, *supra* note 5; Tal Kopan, *Trump Ends DACA But Gives Congress Window to Save It*, CNN (Sept. 5, 2017, 4:44 PM), <http://www.cnn.com/2017/09/05/politics/daca-trump-congress/index.html> (“The administration also announced a plan to continue renewing permits for anyone whose status expires in the next six months, giving Congress time to act before any currently protected individuals lose their ability to work, study and live without fear in the U.S.”); Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2017, 8:04 AM), <https://twitter.com/realDonaldTrump/status/905038986883850240> (“Congress, get ready to do your job - DACA!”).

³² 28 C.F.R. § 16.5(e)(1)(ii).

³³ 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).

³⁴ *ACLU*, 321 F. Supp. 2d at 29 n.5 (quoting *EPIC*, 241 F. Supp. 2d at 11).

educate the public through reports, press releases, and other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.³⁵ 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,³⁶ 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.³⁷ 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.³⁸

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 Beth France 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

³⁵ American Oversight currently has over 11,300 page likes on Facebook, and over 33,900 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight> (last visited Sept. 6, 2017); American Oversight (@weareoversight), TWITTER (last visited Sept. 6, 2017).

³⁶ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

³⁷ *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>.

³⁸ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.