



May 21, 2018

VIA ONLINE PORTAL & ELECTRONIC MAIL

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
U.S. Department of Justice
1425 New York Avenue NW
Suite 11050
Washington, DC 20530-0001
Via FOIAOnline

Valerie H. Yancey
FOIA Officer and Executive Officer
Office of the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Room 6627
Washington, DC 20530-0001
OSGFOIA@usdoj.gov

Re: Freedom of Information Act Request

Dear Mr. Hibbard & Ms. Yancey:

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 May 20, 2018, President Trump published a number of tweets relating to former Secretary of State Hillary Clinton, Ms. Clinton's emails, the Special Counsel investigation, former FBI Deputy Director Andrew McCabe, Mr. McCabe's wife, the Steele Dossier, FISA warrants, former lobbyist Tony Podesta, the Democratic National Committee, Russia, and the overall "Witch Hunt." The president concluded his tweetstorm with a directive to DOJ: "I hereby demand, and will do so officially tomorrow, that the Department of Justice look into whether or not the FBI/DOJ infiltrated or surveilled the Trump Campaign for Political Purposes - and if any such demands or requests were made by people within the Obama Administration!"¹ American Oversight seeks records to shed light on DOJ's response to the president's directive.

Requested Records

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

All email communications on May 20 and 21, 2018, concerning, discussing, or related to the president's tweet of May 20, 2018 "demand[ing] . . . that the Department of Justice look into whether or not the FBI/DOJ infiltrated or surveilled the Trump Campaign for

¹ Donald J. Trump (@realdonaldtrump), TWITTER (May 20, 2018, 1:37 PM), <https://twitter.com/realDonaldTrump/status/998256454590193665>.



Political Purposes - and if any such demands or requests were made by people within the Obama Administration!,” including any related directives.

DOJ may limit its search to the following offices and persons:

- a. All political appointees in the Office of the Attorney General;
- b. All political appointees in the Office of the Deputy Attorney General;
- c. Jesse Panuccio, Acting Associate Attorney General;
- d. Noel Francisco, Solicitor General; and
- e. Sarah Isgur Flores, Director, Office of Public Affairs.

DOJ may exclude emails to or from media outlets.

*“Political appointee” should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a non-career SES, any Schedule C employees, or any persons hired under Temporary Non-Career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

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.² **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.**³

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**

² 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).

³ 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)).

custodian-driven searches.⁴ 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."⁵ 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."⁶ 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."⁷ 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.'"⁸

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.⁹ Claims of nonsegregability must be made with the same degree of detail as required for

⁴ 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>.

⁵ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁶ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁷ *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

⁸ *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)).

⁹ *Mead Data Central*, 566 F.2d at 261.

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.¹⁰ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹¹

American Oversight requests a waiver of fees because disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government.”¹² The requested records are directly related to the work of DOJ. The disclosure of the information sought under this request will document and reveal the activities of the federal government, including whether and to what extent the president is interfering with the independent investigation authority of the DOJ. The American people deserve to know to what extent the president has politicized what has historically been an independent body.¹³ In this case, disclosures of the requested information would contribute to the understanding

¹⁰ 28 C.F.R. § 16.10(k)(2).

¹¹ *Id.*

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

¹³ See Kevin Breunger, *Rosenstein’s Quick Assent to Trump’s Unprecedented Demand for a Probe May Have Been the Best Option: Experts*, CNBC, May 21, 2018, <https://www.cnbc.com/2018/05/21/experts-doj-agreeing-to-trump-demand-for-probe-might-have-been-best-move.html>; Sean Illing, *8 Legal Experts on Whether Trump’s Demand for an*

of a reasonably broad audience of persons interested in the subject, as demonstrated by the significant interest in the subject matter of this request.¹⁴ American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available. As noted, the subject of this request is a matter of public interest, and the public's understanding of the government's activities would be enhanced through American Oversight's analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.¹⁵ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight's financial interest. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.¹⁶ American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a senior DOJ attorney,¹⁷ American Oversight promptly posted the records to its website and published an analysis of what the records reflected about DOJ's process for ethics waivers.¹⁸ As

Investigation into the FBI Is Legal, VOX (May 21, 2018, 2:50 pm),

<https://www.vox.com/2018/5/21/17376154/trump-fbi-doj-brennan-rosenstein-mueller-probe>.

¹⁴ See, e.g., Rebecca Ballhaus et al., *Justice Department to Review FBI Probe of Trump Campaign*, WALL ST. J. (May 20, 2018, 8:28 PM), <https://www.wsj.com/articles/trump-to-demand-investigation-into-whether-fbi-infiltrated-his-campaign-1526849292>; Breuinger, *supra* note 13; Illing, *supra* note 13; Jonathan Lemire & Darlene Superville, *Trump to DOJ: Investigate Whether FBI Infiltrated Campaign*, WASH. POST (May 21, 2018, 10:46 AM), https://www.washingtonpost.com/politics/federal-government/as-trump-pressure-doj-giuliani-says-probe-may-end-by-sept/2018/05/20/5acfbe40-5c90-11e8-b656-236c6214ef01_story.html?utm_term=.c53d8165f285; Deirdre Shesgreen, *President Trump Says He Will Demand Justice Department Probe into FBI's Use of Informant*, USA TODAY (May 20, 2018, 8:36 PM), <https://www.usatoday.com/story/news/politics/2018/05/20/president-trump-says-he-demand-justice-department-probe-into-fbi-informant/627162002/>.

¹⁵ 28 C.F.R. § 16.10(k)(iii)(A)-(B).

¹⁶ American Oversight currently has approximately 11,900 page likes on Facebook, and 43,900 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 21, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited May 21, 2018).

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

¹⁸ *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

another example, American Oversight has a project called “Audit the Wall,” where the organization is gathering and analyzing information and commenting on public releases of information related to the administration’s proposed construction of a barrier along the U.S.-Mexico border.¹⁹

Accordingly, American Oversight qualifies for a fee waiver.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with DOJ on this request. If you do not understand any part of this request, Cerissa Cafasso at foia@americanoversight.org or 202.869.5244. 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 that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal line extending to the left.

Austin R. Evers
Executive Director
American Oversight

¹⁹ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.