



June 20, 2018

**VIA ELECTRONIC MAIL**

Melissa Golden  
Lead Paralegal and FOIA Specialist  
Office of Legal Counsel  
U.S. Department of Justice  
950 Pennsylvania Avenue NW, Room 5511  
Washington, DC 20530-0001  
usdoj-officeoflegalcounsel@usdoj.gov

**Re: Freedom of Information Act Request**

Dear Ms. Golden:

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.

**Requested Records**

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

The “Form and Legality” memorandum regarding the Executive Order signed today, June 20, 2018, entitled “Affording Congress an Opportunity to Address Family Separation,” or any substantially similar executive orders.

Please provide all responsive records from April 1, 2018, through the date the search is conducted.

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.”<sup>1</sup> If it is your position that any portion of the requested records are 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.”<sup>2</sup> Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing

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<sup>1</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

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



the sought-after information.”<sup>3</sup> 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.’”<sup>4</sup>

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.<sup>5</sup> 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.

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.<sup>6</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>7</sup>

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.”<sup>8</sup> The requested record is directly related to the work of the highest levels of leadership at DOJ. There has been extensive media coverage of and public attention on the administration’s new policy of separating immigrant parents and children when

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<sup>3</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>4</sup> *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)).

<sup>5</sup> *Mead Data Central*, 566 F.2d at 261.

<sup>6</sup> 28 C.F.R. § 16.10(k)(2).

<sup>7</sup> *Id.*

<sup>8</sup> 28 C.F.R. § 16.10(k)(2)(i), (ii)(A)–(B).

they cross at the border.<sup>9</sup> The administration's about-face today in signing the executive order and ending the separation of families has similarly received significant attention.<sup>10</sup> This request goes directly to this action by the federal government. Moreover, the requested records will significantly increase the general public's understanding of the legal basis for a policy decision that the president had previously blamed on, and said was within the control of, congressional Democrats.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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

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<sup>9</sup> See Tim Arango & Kayla Cockrel, *Marches Across the U.S. Protest Separation of Migrant Families*, N.Y. TIMES, June 14, 2018, <https://www.nytimes.com/2018/06/14/us/protest-marches-family-separation.html>; Jonathan Blitzer, *How the Trump Administration Got Comfortable Separating Immigrant Kids from Their Parents*, NEW YORKER, May 30, 2018, <https://www.newyorker.com/news/news-desk/how-the-trump-administration-got-comfortable-separating-immigrant-kids-from-their-parents>; Molly Hennessy-Fiske, *U.S. Is Separating Immigrant Parents and Children to Discourage Others, Activists Say*, L.A. TIMES (Feb. 20, 2018, 3:00 AM), <http://www.latimes.com/nation/la-na-immigrant-family-separations-2018-story.html>; Tal Kopan, *DHS: 2,000 Children Separated at Border*, CNN (June 15, 2018, 6:24 PM), <https://www.cnn.com/2018/06/15/politics/dhs-family-separation-numbers/index.html>.

<sup>10</sup> See Maggie Haberman & Michael D. Shear, *Trump Retreats on Separating Families, Signing Order to Detain Them Together*, N.Y. TIMES, June 20, 2018, <https://www.nytimes.com/2018/06/20/us/politics/trump-immigration-children-executive-order.html>.

<sup>11</sup> See David Jackson, *President Trump Continues to Blame Democrats for His Family Separation Approach to Immigration*, USA TODAY (June 19, 2018, 1:20 PM), <https://www.usatoday.com/story/news/politics/2018/06/19/donald-trump-blames-democrats-his-family-separation-policy/713499002/>.

<sup>12</sup> 28 C.F.R. § 16.10(k)(iii)(A)-(B).

<sup>13</sup> 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 June 20, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited June 20, 2018).

senior DOJ attorney,<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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](mailto: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,



Austin R. Evers  
Executive Director  
American Oversight

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<sup>14</sup> *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

<sup>15</sup> *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>.

<sup>16</sup> *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.