



September 12, 2017

VIA ONLINE PORTAL

U.S. Department of Housing and Urban Development
Freedom of Information Act Office
451 7th Street SW, Room 10139
Washington, DC 20410-3000
Submitted via Online Portal

Re: Freedom of Information Act Request

Dear FOIA Public Liaison:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations for the Department of Housing and Urban Development (HUD), 24 C.F.R. Part 15, American Oversight makes the following request for records.

American Oversight promotes accountability in government through transparency, informing the public about government activities and compliance with rules and regulations critical for maintaining integrity in government. Recent media reports indicate a number of “alarming” hires at HUD, including individuals whose qualifications and job responsibilities are not clear.¹ These reports raise concerns that HUD is not appropriately staffed to serve the millions of Americans who rely on its programs and that ideology, rather than policy expertise, is driving decisions that affect community development across the country. American Oversight seeks documents that will shed light on these officials and the roles they play in shaping federal housing policy.

Requested Records

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

1. All emails sent or received (including carbon copies or blind carbon copies) between any of the individuals listed below and anyone from the Executive Office of the President (including anyone using an cop.gov email address). Emails forwarding otherwise responsive records to or from a personal email account are responsive to this request.
 - o Beth van Duyne
 - o John Gibbs
 - o Christopher Bourne
 - o Lynne Patton

¹ Alec MacGillis, *Is Anybody Home at HUD?*, N.Y. MAG. (Aug. 22, 2017, 8:00 AM), <http://nymag.com/daily/intelligencer/2017/08/ben-carson-hud-secretary.html>.



2. All calendar entries for the individuals listed below that also include any individual from the Executive Office of the President (including anyone using an cop.gov email address) as an invitee or participant. For calendar entries created in Outlook or similar programs, the documents should be produced in “memo” form to include all invitees, any notes, and all attachments. Please do not limit your search to Outlook calendars—we request the production of any calendar—paper or electronic, whether on government-issued or personal devices—used to track or coordinate how these individuals allocate their time on agency business.
 1. Beth van Duyne
 2. John Gibbs
 3. Christopher Bourne
 4. Lynne Patton

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.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

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

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 HUD’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.**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 HUD’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that HUD 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

[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)).

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)).

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 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, HUD 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 HUD 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 24 C.F.R. § 15.106(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 operations and activities by the general public in a significant way.¹⁰ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹¹

Disclosure of the requested records is “likely to contribute significantly to public understanding” of government operations and activities.¹² Housing and community development decisions and activities affect millions of Americans across the country.¹³ The records American Oversight seeks

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

¹⁰ 24 C.F.R. § 15.106(k)(1)-(2).

¹¹ 24 C.F.R. § 15.106(k)(3).

¹² 24 C.F.R. § 15.106(k)(1)(i).

¹³ See, e.g., Yamiche Alcindor, *Ben Carson Is Confirmed as HUD Secretary*, N.Y. TIMES, Mar. 2, 2017, https://www.nytimes.com/2017/03/02/us/politics/ben-carson-housing-urban-development.html?_r=0; U.S. DEPT. OF HOUSING AND URBAN DEV., PROGRAMS OF HUD:

are “a direct and clear” reflection of “identifiable operations or activities of the Federal Government,” specifically the responsibilities held by federal officials shaping housing policy and the ways in which those officials are discharging those responsibilities.¹⁴ As described above, media reports raise substantial concerns that officials at HUD have been selected for ideological reasons rather than for relevant qualifications and may not be exercising their authority in the best interest of the American people. Because these nonpublic records reflect official communications of these individuals involved in shaping federal housing policy, these records will be “meaningfully informative about” their operations or activities.¹⁵ As described in more detail below, American Oversight will use its public website and social media accounts to ensure the disclosed records “contribute to the understanding of a reasonably broad audience of persons interested in” or affected by HUD policies and decisions. In sum, the requested records would provide significant new understanding of key influences on official decision-making and activities at an agency responsible for assisting millions of American households and investing in communities across the country.¹⁶

This request is primarily and fundamentally for non-commercial purposes.¹⁷ 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.¹⁸ 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,¹⁹ 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.²⁰ As another example, American Oversight’s has a project called “Audit the Wall,” where the organization is gathering and analyzing information and commenting on public releases of

MAJOR MORTGAGE, GRANT, ASSISTANCE, AND REGULATORY PROGRAMS (2016), <https://portal.hud.gov/hudportal/documents/huddoc?id=HUDPrograms2016.pdf>.

¹⁴ 24 C.F.R. § 15.106(k)(2)(i).

¹⁵ 24 C.F.R. § 15.106(k)(2)(ii).

¹⁶ 24 C.F.R. § 15.106(k)(2)(iv).

¹⁷ 24 C.F.R. § 15.106(k)(1)(ii), (3)(i)-(ii).

¹⁸ 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. 12, 2017); American Oversight (@weareoversight), TWITTER (last visited Sept. 12, 2017).

¹⁹ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²⁰ *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.²¹

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 your agency 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,

A handwritten signature in blue ink that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight

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