



March 22, 2018

VIA ELECTRONIC MAIL

Kenneth Hendricks, Esq.
Clerk of the U.S. Office of Special Counsel
FOIA Office
1730 M Street NW
Suite 218
Washington, DC 20036-4505
FOIARequest@osc.gov

Re: Freedom of Information Act Request

Dear Mr. Hendricks:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the Office of Special Counsel (OSC), 5 C.F.R. Part 1820, American Oversight makes the following request for records.

On March 18, 2018, the *Washington Post* reported that, in the early months of the Trump administration, senior White House staff were pressed into signing nondisclosure agreements (NDAs) of expansive scope.¹ A draft of one of these proposed NDAs reportedly extended the prohibition on disclosing nonpublic information indefinitely beyond the end of the Trump presidency and imposed an astounding \$10 million penalty for violation of the agreement.² The draft agreement also apparently allowed Donald Trump to enforce the agreement in his personal capacity.³ Such sweeping NDA restrictions appear to be unprecedented,⁴ and could constitute an unconstitutional restriction on officials' First Amendment rights.⁵ OSC's primary mission is to

¹ Ruth Marcus, *Trump Had Senior Staff Sign Nondisclosure Agreements. They're Supposed to Last Beyond His Presidency.*, WASH. POST (Mar. 18, 2018, 3:56 PM), https://www.washingtonpost.com/amhtml/opinions/trumps-nondisclosure-agreements-came-with-him-to-the-white-house/2018/03/18/226f4522-29ee-11e8-b79d-f3d931db7f68_story.html?tid=ss_tw-amp&_twitter_impression=true.

² *Id.*

³ *Id.*

⁴ Ted Hesson, *Could NDA Follow Trump to White House*, POLITICO (Oct. 18, 2016, 10:00 AM), <https://www.politico.com/tipsheets/morning-shift/2016/10/could-nda-follow-trump-to-white-house-today-in-wikileaks-osha-sends-final-rule-clarifying-recordkeeping-to-omb-216921>.

⁵ *Stillman v. C.I.A.*, 517 F. Supp. 2d 32, 37 n. 4 (D.D.C. 2007) ("The Court recognizes, however, that any secrecy agreement which purports to prevent disclosure of unclassified information would contravene First Amendment rights.")



protect federal employees from prohibited personnel practices, including providing protection from the imposition of unlawful NDAs.⁶ It is unclear whether OSC is aware of these agreements and whether the agency has taken any action to ensure that White House officials are not subject to unlawful NDAs.

American Oversight seeks records to determine if federal officials are being pressured into signing NDAs that are unlawful or otherwise contrary to the public interest.

Requested Records

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

All records reflecting communications (including but not limited to emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat, and WhatsApp), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) concerning non-disclosure agreement(s) for White House staffers, or the potential creation or enforcement of any such agreements, between OSC and the White House Counsel's office, including, but not limited to, Deputy White House Counsel Stefan Passantino.

Please provide all responsive records from January 20, 2017 to May 31, 2017.

OSC is in the best position to determine which agency components and officials are likely to possess responsive records. In conducting its search, however, American Oversight does request that OSC be sure to include in its search all relevant officials who were employed by OSC during the responsive 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 OSC 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

⁶ 5 U.S.C. § 2302(b)(13).

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

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>.

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.”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, OSC 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 OSC 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

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.

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 5 C.F.R. § 1820.7(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.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 the operations or activities of the government.”¹⁷ As described above, reports suggest that President Trump may have pushed senior White House officials to sign far-reaching, indefinite NDAs with draconian penalties for violations.¹⁸ There is reason to believe that indefinite NDAs of this type would constitute an unlawful restriction of officials’ First Amendment rights.¹⁹ And, regardless of the legality of such NDAs, their imposition on senior White House officials has the effect of depriving the public of the insights and experiences of individuals who have served at the highest levels of government. Preventing such disclosures would likely be unprecedented.²⁰ The American people deserve to know if their government is unduly restricting senior officials from sharing unclassified information from their government service. Given OSC’s role as the agency primarily responsible for protecting federal employees from prohibited personnel practices, including the use of unlawful NDAs,²¹ records related to OSC’s involvement in White House NDAs plainly concern “the operations or activities of the government.”²²

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

¹⁵ 5 C.F.R. § 1820.7(k)(1)(i).

¹⁶ 5 C.F.R. § 1820.7(k)(1)(ii).

¹⁷ 5 C.F.R. § 1820.7(k)(1)(i).

¹⁸ Marcus, *supra* note 1.

¹⁹ *Stillman*, 517 F. Supp. 2d at 37 n. 4 (“any secrecy agreement which purports to prevent disclosure of unclassified information would contravene First Amendment rights.”)

²⁰ Hesson, *supra* note 4.

²¹ 5 U.S.C. § 2302(b)(13).

²² 5 C.F.R. § 1820.7(k)(1)(i).

²³ 5 C.F.R. § 1820.7(k)(1)(ii).

promotes their availability on social media platforms, such as Facebook and Twitter.²⁴ 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,²⁵ 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.²⁶ 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.²⁷

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 OSC 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 Dan McGrath at foia@americanoversight.org or 202.897.4213. 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

²⁴ American Oversight currently has approximately 11,900 page likes on Facebook and 41,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Mar. 22, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Mar. 22, 2018).

²⁵ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²⁶ *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>.

²⁷ *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.