



July 23, 2018

VIA ELECTRONIC MAIL

U.S. Department of Veterans Affairs
Office of Assistant Secretary for Management
810 Vermont Avenue NW (004A)
Washington, DC 20420
vacofoiaservice@va.gov

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and Department of Veterans Affairs (VA) implementing regulations, 38 C.F.R. § 1.500, American Oversight makes the following request for records.

In the year leading up to the 2016 election, Thayer Verschoor, Deputy Assistant Secretary for Intergovernmental Affairs, authored and shared several posts on Facebook.com reflecting prejudices against certain minority groups. For example, on February 25, 2016, Mr. Verschoor wrote in support of the candidacy of Donald Trump that “[h]e realizes we have a Muslim [sic] problem in this nation,” “[h]e thinks Obama’s birth certificate is a fraud,” and “a nation without [a] language . . . is not a nation.”¹ Similarly, Mr. Verschoor shared a picture from the group “Arizona Supporters of President Trump” approvingly noting that “Trump Came in First... ‘Among Natural-Born-American Candidates’.”² These posts, in addition to Mr. Verschoor’s anti-LGBT+ record as an Arizona state senator,³ suggest that Mr. Verschoor may have prejudicial attitudes against minority groups and vulnerable populations—to which many veterans and beneficiaries belong—that could prevent Mr. Verschoor from carrying out his duties within VA in a reasonable, fair, and equitable manner.

¹ Thayer Verschoor, Facebook (Feb. 25, 2016), <https://www.facebook.com/thayer.verschoor/posts/10207787307514992>.

² Arizona Supporters of President Trump, Facebook (Feb. 2, 2016), <https://www.facebook.com/AZforTrump2016/photos/a.897133140360254.1073741828.895763493830552/999820820091485/?type=3>

³ See, e.g., Daniel Scarpinato, *Lawmaker’s Actions on Gay-Nuptial Vote Probed*, TUCSON.COM (July 29, 2008), https://tucson.com/news/local/govt-and-politics/lawmaker-s-actions-on-gay-nuptial-vote-probed/article_8da62b2d-8c8c-514a-996e-9f907f3fcd5f.html; Paula Aboud, *Discriminatory Gay Marriage Ban Has No Place in AZ*, TUCSON CITIZEN (Sept. 8, 2008), <http://tucsoncitizen.com/morgue/2008/09/08/95925-discriminatory-gay-marriage-ban-has-no-place-in-az/>.



Requested Records

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

- 1) All emails sent from Thayer Verschoor to Joe Arpaio, Steve Pierce, any employee or representative of Alliance Defending Freedom (@adflegal.org), or any employee or representative of Center for Arizona Policy (@azpolicy.org).
- 2) All emails sent from Thayer Verschoor to any individual or organization (including those copied or blind copied on such emails) with an email address ending in .com, .org, .net, or .edu. For this portion of this request, only records that contain the following search terms in the subject line, body of the email, or attachment should be considered responsive:
 - a. alien
 - b. immigra*
 - c. illegals
 - d. “illegal immigrant”
 - e. MAGA
 - f. “make America great again”
 - g. “America First”
 - h. “birth certificate”
 - i. Muslim
 - j. muslin
 - k. Islam*
 - l. gay
 - m. lesbian
 - n. homosexual
 - o. transgender*
 - p. transsexual*
 - q. LGBT*

Please note that American Oversight is here using the asterisk (*) to designate the standard use of “wildcards” in the search for responsive records. For example, a search for “separat*” would return all of the following: separate, separates, separated, separation, etc. If EPA is unable to search for wildcards, please advise so that we may specifically include the variations that we would like searched.

Please provide all responsive records from January 20, 2017, to the date of the search.

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 VA 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.⁴ **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.**⁵

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 VA’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.**⁶ Furthermore, agencies that have adopted the National Archives and

⁴ 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).

⁵ 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)).

⁶ 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

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 VA's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that VA 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.”⁷ 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.”⁸ 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.”⁹ 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.’”¹⁰

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.¹¹ 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.

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>.

⁷ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁸ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁹ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

¹⁰ *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)).

¹¹ *Mead Data Central*, 566 F.2d at 261.

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, VA 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 VA 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 38 C.F.R. § 1.561(n), 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 public understanding of those operations.¹² Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).¹³

As required by VA's regulations at 38 C.F.R. § 1.561(n)(3) and the factors listed in 38 C.F.R. § 1.561(n)(3)(i)-(iv), the subject of the requested records clearly and directly "concern[s] identifiable operations or activities of the federal government," and the disclosure of the requested information is likely to meaningfully inform the understanding of a reasonably broad audience of persons and significantly enhance the public's understanding of the operations or activities of the government. Specifically, the requested records are likely to inform the public about a high-ranking VA official, including, among other topics, his views about religious liberty, the rights of LGBT+ individuals, and the rights of immigrants and non-native people. The subject matter of this request clearly concerns identifiable government operations as the request seeks to determine whether the views and perspectives the VA's Deputy Assistant Secretary for Intergovernmental Affairs brings to his work might affect his ability to work with and advocate effectively on behalf of veterans and other beneficiaries of all backgrounds.¹⁴ Further, the records sought by this request will likely inform a broad audience of people, including veterans and other beneficiaries, of views held by a high-ranking VA official. And the records sought by this request will likely significantly enhance the public's understanding of government operations and activities, as any illumination of the views

¹² 38 C.F.R. § 1.561(n)(2)(i).

¹³ 38 C.F.R. § 1.561(n)(2)(ii); *see, e.g., McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

¹⁴ 38 C.F.R. § 0.601(a)-(d).

and perspectives that the Deputy Assistant Secretary brings to his work will provide important context to his work at VA. And, as described in more detail below, American Oversight's website and social media accounts demonstrate its ability and intention to effectively convey information to the public.

As required by VA's regulations at 38 C.F.R. § 1.561(n)(4) and the factors listed at 38 C.F.R. § 1.561(n)(4)(i)-(ii), this request is primarily and fundamentally not for commercial purposes, but rather the primary interest is in public disclosure of responsive records. 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.¹⁵ 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,¹⁶ 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.¹⁷ 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.¹⁸

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 VA 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 Hart

¹⁵ American Oversight currently has approximately 11,800 page likes on Facebook and 43,900 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited July 16, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited July 16, 2018).

¹⁶ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

¹⁷ *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>.

¹⁸ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

Wood at foia@americanoversight.org or (202) 897-3918. 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 stroke extending to the left.

Austin R. Evers
Executive Director
American Oversight