



October 25, 2018

VIA ELECTRONIC MAIL

The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
STOP-0655
Washington, DC 20528-0655
foia@hq.dhs.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 your agency's implementing regulations, American Oversight makes the following request for records.

Following the devastating hurricanes in September 2017, storms judged to be among the most damaging in U.S. history,¹ many have questioned the adequacy of the federal government's response efforts.² Democratic members of the House of Representatives Committee on Oversight and Government Reform have been among those seeking clarity into what went wrong, having issued a number of document requests to federal agencies, and requests to the Republican Chairman of the Committee, Trey Gowdy, to issue subpoenas when the agencies did not comply.³

¹ AJ Willingham, *A Look at Four Storms from One Brutal Hurricane Season*, CNN (Nov. 21, 2017, 3:32 PM), <https://www.cnn.com/2017/10/10/weather/hurricane-nate-maria-irma-harvey-impact-look-back-trnd/index.html>; Angela Fritz, *Harvey, Irma and Maria Now in the Top Five Costliest Hurricanes on Record, NOAA Says*, WASH. POST, Jan. 30, 2018, https://www.washingtonpost.com/news/capital-weather-gang/wp/2018/01/30/harvey-irma-and-maria-now-in-the-top-5-costliest-hurricanes-on-record-noaa-says/?utm_term=.4453e88c2dc2.

² See, e.g., Nicole Einbinder, *How the Response to Hurricane Maria Compared to Harvey and Irma*, FRONTLINE, May 1, 2018, <https://www.pbs.org/wgbh/frontline/article/how-the-response-to-hurricane-maria-compared-to-harvey-and-irma/>; Associated Press, *FEMA Ignored Puerto Rico in Aftermath of Hurricane Maria*, N.Y. POST (Mar. 21, 2018, 1:47 PM), <https://nypost.com/2018/03/21/fema-ignored-puerto-rico-in-aftermath-of-hurricane-maria/>.

³ See generally *A Failure of Oversight: How Republicans Blocked a Credible Investigation of the Trump Administration's Response to the 2017 Hurricanes*, Democratic Staff Report, Committee on Oversight and Government Reform, U.S. House of Representatives, Sept. 2018, available at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/A%20FAILURE%20OF%20OVERSIGHT%20-%20STAFF%20REPORT.pdf>.



Contrasting Chairman Gowdy’s anemic investigation with that of his predecessor Chairman Tom Davis’s investigation into the Bush Administration’s response to Hurricane Katrina, Democratic members of the Committee have criticized Chairman Gowdy for refusing to issue document requests to certain offices and individuals, including the White House, for refusing to issue subpoenas, even when he had signed off on initial document requests to the agency in question, and for refusing to hold even close to the number of interviews, briefings, and full-committee hearings as Chairman Davis before him.⁴ As a result, as of September 2018, “the Committee has not received any email communications regarding the hurricanes from many top Trump Administration officials, including Acting Secretary of Homeland Security Elaine Duke, or FEMA Administration Brock Long,” nor has the Committee “obtained any emails between the White House and federal agencies.”⁵

American Oversight seeks records reflecting agency communications concerning the hurricanes in order to shed light on the administration’s response efforts.

Requested Records

American Oversight requests that the Department of Homeland Security (DHS) produce the following within twenty business days:

1. All email communications (including emails, email attachments, calendar entries or invitations) sent or received by Acting Secretary of Homeland Security Elaine Duke (including messages where she is carbon copied or blind carbon copied) concerning the administration’s response to Hurricanes Harvey, Irma, Maria, and/or Nate, including but not limited to:
 - a. Hurricane preparation and response efforts by DHS, the Federal Emergency Management Administration (FEMA), the Department of Defense (DOD), the Department of Health and Human Services (HHS), and/or the Center for Disease Control (CDC); and
 - b. Public statements by any administration officials (including President Trump) concerning preparation and response efforts.

2. All email communications (including emails, email attachments, calendar entries or invitations) sent or received by any political appointees* in (1) the immediate Office of the Secretary, (2) the immediate Office of the Deputy Secretary, (3) or the Office of Public Affairs with the White House Office (including anyone with an email address ending in @who.eop.gov), concerning any of the following topics related to Hurricanes Harvey, Irma, Maria, and/or Nate:
 - a. Emergency meal contracts, delivery, and/or shortages;

⁴ *See id.*

⁵ *Id.* at 13.

- b. Emergency fuel supplies, requests, deliveries, and/or shortages;
- c. Hurricane-related logistics challenges, distribution of commodities, or power restoration following the storms; and
- d. Hurricane threat assessments, mitigation measures, emergency preparedness, or other contingency plans.

For both portions of this request, please provide all responsive records from August 1, 2017, through November 1, 2017.

*“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.

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 are subject to the Federal Records Act and FOIA.⁶ **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**

⁶ 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).

moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.⁷

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 your agency’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.⁸ Furthermore, agencies that have adopted the National Archives and Records Administration (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 your agency’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that your agency 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.”⁹ 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

⁷ 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)).

⁸ 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>.

⁹ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

actually exempt under FOIA.”¹⁰ 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.”¹¹ 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.’”¹²

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.¹³ 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, you are 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 hopes to 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 your agency’s implementing regulations, 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. Moreover, the request is primarily and fundamentally for non-commercial purposes.

¹⁰ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹¹ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

¹² *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)).

¹³ *Mead Data Central*, 566 F.2d at 261.

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 activities of the government. The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how the federal government prepared for and responded to a series of devastating storms last fall. The adequacy of the federal government's response to the storms is a topic of widespread public interest, as demonstrated by the significant media coverage this matter has received.¹⁴ The American people deserve to know the extent of the challenges the administration faced in responding to the storm, what went wrong, and who was responsible, so that mistakes may be avoided in the future. This is particularly true where members of Congress have been thwarted in their efforts to uncover more information about these issues.¹⁵ As described below, American Oversight has the intention and ability to disseminate the records it receives to a broad audience.

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.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

¹⁴ See, e.g., Wallingham, *supra* note 1; Fritz, *supra* note 1; Einbinder, *supra* note 2; Emily Atkin, *The Troubling Failure of America's Disaster Response*, NEW REPUBLIC, July 17, 2018, <https://newrepublic.com/article/149899/troubling-failure-americas-disaster-response>; see also Linda Qiu, *Trump's False Claims Rejecting Puerto Rico's Death Toll From Hurricane Maria*, N.Y. TIMES, Sept. 13, 2018, <https://www.nytimes.com/2018/09/13/us/politics/trump-fact-check-hurricane.html>.

¹⁵ See Democratic Staff Report, *supra* note 3.

¹⁶ American Oversight currently has approximately 11,900 page likes on Facebook and 45,300 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Oct. 24, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Oct. 24, 2018).

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

reflected about DOJ's process for ethics waivers.¹⁸ 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.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 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 Katherine Anthony 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,



Austin R. Evers
Executive Director
American Oversight

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>.

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