AMERICAN OVERSIGHT

October 19, 2018

VIA Online Portal

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
Department of Justice
1425 New York Avenue NW
Suite 11050
Washington, DC 20530-0001
Via FOIAOnline

Re: Freedom of Information Act Request

Dear Mr. Hibbard:

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.

During the controversial confirmation hearings for Supreme Court Justice Brett Kavanaugh, a number of incidents and scandals from decades ago resurfaced. Not least among these was the Manuel "Manny" Miranda scandal from approximately 2002, in which Miranda, a former Republican counsel on the Senate Judiciary Committee, was accused of accessing computer records stored by Democrats on the Committee and leaking them to the White House Counsel's office, where Kavanaugh was employed as an Associate Counsel.[1] Public debate concerning Justice Kavanaugh's nomination and hearings continues to roil, even now, after his confirmation, with significant questions remaining as to the integrity of the process in general, and Justice Kavanaugh's qualifications and integrity in particular.[2] Justice Kavanaugh's potential involvement in the Manny

[1] Michael Kranish, *Hacking Controversy From Early 2000s Resurfaces During Kavanaugh Hearings*, WASH. POST, Sept. 5, 2018, https://www.washingtonpost.com/politics/hacking-controversy-from-early-2000s-resurfaces-during-kavanaugh-hearings/2018/09/05/3b7565d2-b15d-11e8-a20b-5f4f84429666_story.html?utm_term=.43a6ee3cb721.

[2] *See, e.g.*, Emily Birnbaum, *Hillary Clinton: Kavanaugh Swearing-In 'Further Undermined the Image and Integrity of the Court,'* THE HILL (Oct. 9, 2018, 7:55 AM), https://thehill.com/homenews/senate/410515-hillary-clinton-calls-kavanaugh-swearing-in-ceremony-a-political-rally; Clare Foran & Stephen Collinson, *Brett Kavanaugh Sworn in as Supreme Court Justice*, CNN (Oct. 6, 2018, 8:02 PM), https://www.cnn.com/2018/10/06/politics/kavanaugh-final-confirmation-vote/index.html; Geoffrey R. Stone, *Confirming Brett Kavanaugh Now Would Destroy the Supreme Court As We Know It*, HUFFINGTON POST (Oct. 1, 2018, 4:47 PM),

Miranda scandal is one important piece of the puzzle for the public to assess both Justice Kavanaugh's fitness to serve a lifetime appointment on our nation's highest court and to assess the integrity of that institution following the controversies of the last several months.

American Oversight requests the following records to shed light on DOJ knowledge of and/or efforts to determine whether members of the White House Counsel's office, potentially including Justice Kavanaugh, knowingly received information hacked from Democrats on the Senate Judiciary Committee.

Requested Records

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

1. All communications (including but not limited to emails, email attachments, calendar invitations/entries, and hard copy correspondence) between (i) Manuel "Manny" Miranda, and (ii) any political appointees* in the following DOJ offices:

    a. The Office of the Attorney General
    b. The Office of the Deputy Attorney General
    c. The Office of the Associate Attorney General
    d. The Office of Legal Policy
    e. The Office of Legislative Affairs

    Please provide all records from December 1, 2001, through March 31, 2004.

2. All records reflecting communications (including emails, email attachments, notes, hard copy correspondence, telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, talking points, any handwritten or electronic notes taken during any responsive communications, and summaries of any responsive communications) concerning or mentioning Manuel "Manny" Miranda, between or among any political appointees* in the following DOJ offices:

    a. The Office of the Attorney General
    b. The Office of the Deputy Attorney General
    c. The Office of the Associate Attorney General
    d. The Office of Legal Policy
    e. The Office of Legislative Affairs

    Please provide all records from December 1, 2001, through March 31, 2004.

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https://www.huffingtonpost.com/entry/opinion-kavanaugh-supreme-court_us_5bb25981e4b0343b3dc2f7d3.

*"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.

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.[3] **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.**[4]

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 DOJ'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.**[5] **Furthermore, agencies that have adopted the National Archives and**

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[3] *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).

[4] *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)).

[5] Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-

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 DOJ's archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DOJ 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."[6] 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."[7] 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."[8] 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.'"[9]

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.[10] 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.

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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.

[6] FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

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

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

[9] *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)).

[10] *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, DOJ 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 DOJ 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 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.[11] Moreover, the request is primarily and fundamentally for non-commercial purposes.[12]

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 government operations and activities.[13] The requested records will elucidate the official activities of DOJ personnel related to the Manny Miranda scandal. As described above, there is continuing public debate concerning the integrity of the Supreme Court and Justice Kavanaugh's nomination and confirmation process and qualifications.[14] The Miranda scandal is directly relevant to these issues,[15] and records reflecting DOJ's role in that controversy will significantly contribute to public understanding of the ongoing debate. As discussed below, American Oversight has the capacity and intention to inform a broad audience about government activities that are the subject of these records.

[11] 28 C.F.R. § 16.10(k)(1).
[12] *Id.*
[13] 28 C.F.R. § 16.10(k)(1), (2)(i)–(ii).
[14] *See* Birnbaum, *supra* note 2; Foran & Collinson, *supra* note 2; Stone, *supra* note 2.
[15] *See* Kranish, *supra* note 1.

This request is primarily and fundamentally for non-commercial purposes.[16] 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.[17] 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,[18] 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.[19] 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.[20]

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, 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.

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[16] 28 C.F.R. § 16.10(k)(1), (2)(iii).

[17] 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. 19, 2018); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited Oct. 19, 2018).

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

[19] *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.

[20] *Audit the Wall,* AMERICAN OVERSIGHT, https://www.americanoversight.org/investigation/audit-the-wall.

Sincerely,

Austin R. Evers
Executive Director
American Oversight