AMERICAN OVERSIGHT

November 29, 2018

VIA ELECTRONIC MAIL

U.S. Department of Education
ATTN: FOIA Public Liaison
Office of Management
Office of the Chief Privacy Officer
400 Maryland Avenue SW, LBJ 2E320
Washington, DC 20202-4536
EDFOIAManager@ed.gov

Re: Freedom of Information Act Request

Dear FOIA 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. The records requested herein may reside in multiple components or offices within your agency. We ask that you coordinate this request across your agency in your role as the agency's FOIA contact.

On November 19, 2018, the *Washington Post* reported that Ivanka Trump, Advisor to the President, made extensive and continuous use of a personal email account for official business during 2017.[1] According to the report, the only reason Ms. Trump's personal email use came to the attention of White House officials was that American Oversight submitted Freedom of Information Act requests for her communications. American Oversight submits this request for records in order to ascertain whether the heads of executive agencies have abided by the provision of the Presidential Records Act, 44 U.S.C. § 2209, that requires all government business conducted on a personal email account be copied or forwarded to an official account within twenty days.

Requested Records

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

1. All records reflecting email communications (including any email attachments) with any non-governmental email address attributed to Secretary Betsy DeVos.

[1] Carol D. Leonnig & Josh Dawsey, *Ivanka Trump Used a Personal Email Account to Send Hundreds of Emails About Government Business Last Year*, WASH. POST, Nov. 19, 2018, https://www.washingtonpost.com/politics/ivanka-trump-used-a-personal-email-account-to-send-hundreds-of-emails-about-government-business-last-year/2018/11/19/6515d1e0-e7a1-11e8-a939-9469f1166f9d_story.html?utm_term=.8afa86a8271c.

Your agency may limit its search to the following individuals:

a) Nate Bailey
b) Joshua Venable
c) Jessica Newman
d) Nate Breeding
e) Robert Eitel

2. All emails sent from (a) any non-governmental email address attributed to Secretary DeVos to (b) any governmental email address associated with Secretary DeVos. Please include all messages, including those that have been forwarded to Secretary DeVos's governmental email address or on which Secretary Devos's governmental email address is carbon copied.

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

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.[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]

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[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 [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-

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.**[4] **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."[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]

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

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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)).

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.

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.

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 the email practices of senior administration officials and the steps taken to ensure compliance federal records retention law—a matter that President Trump has suggested is sanctionable with imprisonment. There is profound interest in knowing the steps that the government took to ensure compliance with the Presidential Records Act, and the records responsive to this request will contribute significantly to the public's understanding of the government's activities.

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

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

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.[10] 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,[11] 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.[12] 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.[13]

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 me at foia@americanoversight.org or (202) 869-5244. 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,

Cerissa Cafasso
Counsel
American Oversight

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[10] American Oversight currently has approximately 12,100 page likes on Facebook and 49,100 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited Nov. 29, 2018); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited Nov. 29, 2018).

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

[12] *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.

[13] *Audit the Wall,* AMERICAN OVERSIGHT, www.auditthewall.org.