



November 28, 2018

VIA ELECTRONIC MAIL AND ONLINE PORTAL

FOIA Requester Service Center
U.S. Department of Energy
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Sabrina Burroughs
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U.S. Customs & Border Protection
1300 Pennsylvania Avenue NW, Room 3.3D
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Via FOIAOnline

Dionne Hardy
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Office of Management and Budget
725 17th Street NW, Suite 9204
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Chief, FOIA/Privacy Act Office
U.S. Small Business Administration
409 3rd Street SW, 8th Floor
Washington, DC 20416
Via FOIAOnline

USTR FOIA Office, GSD/RDF
Attn: Chief FOIA Officer, Janice Kaye
Office of the U.S. Trade Representative
Anacostia Naval Annex, Bldg. 410/Door 123
250 Murray Lane SW
Washington, DC 20509
FOIA@ustr.eop.gov

Re: Freedom of Information Act Request

Dear Freedom of Information Officers:

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.

Media reports indicate that the president's former personal attorney, Michael Cohen, peddled his access to the president for profit.¹ For example, Mr. Cohen's company, Essential Consultants,

¹ Rosalind S. Helderman *et al.*, *Cohen's \$600,000 Deal with AT&T Specified He Would Advise on Time Warner Merger, Internal Company Records Show*, WASH. POST (May 10, 2018, 6:41PM), <https://www.washingtonpost.com/politics/cohens-600000-deal-with-atandt-specified-he->



made a \$600,000 deal with AT&T to advise it as it attempted to win federal approval for its massive proposed merger with Time Warner. Pharmaceutical giant Novartis AG made its own \$1.2 million deal with Mr. Cohen. Mr. Cohen is not the first of the president's associates to attempt to cash in on his connections to Mr. Trump: former Trump campaign manager Corey Lewandowski has reportedly sold his access and influence, too.² American Oversight seeks records to shed light on how these associates of the president have influenced federal activities, including whether they have secured special treatment for their high-paying clients.

Requested Records

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

All records reflecting communications (including emails, email attachments, text messages, messages on messaging platforms (such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between any political appointee³ at your agency and any of the following:

- Michael Cohen
- Essential Consultants⁴
- Corey Lewandowski
- Jason Osborne (jason@turnberrysolutionsllc.com)
- Mike Rubino (mike@turnberrysolutionsllc.com)
- Barry Bennett (barry@turnberrysolutionsllc.com)
- Turnberry Solutions LLC (turnberrysolutionsllc.com)

[would-advise-on-time-warner-merger-internal-company-records-show/2018/05/10/cd541ae0-5468-11e8-a551-5b648abe29ef_story.html?utm_term=.14a97e2d5bf1](https://www.wsj.com/articles/novartis-gave-1-2-million-to-trump-lawyer-cohens-company-1525888193); Drew FitzGerald & Jonathan D. Rockoff, *Novartis and AT&T Bet \$1.8 Million on Cohen's Policy Advice*, WALL ST. J. (May 9, 2018, 5:33 PM), <https://www.wsj.com/articles/novartis-gave-1-2-million-to-trump-lawyer-cohens-company-1525888193>.

² Theodoric Meyer & Daniel Lippman, *Corey Lewandowski Appears to be Working with Another Lobbying Firm*, POLITICO (Sept. 22, 2017, 7:33 PM), <https://www.politico.com/story/2017/09/22/corey-lewandowski-lobbying-trump-243043>.

³ "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, any career employee detailed to the immediate office of the agency head since January 20, 2017, or any persons hired under Temporary Non-career SES Appointments, Limited Term SES Appointments, Temporary Transitional Schedule C Appointments, or an administratively determined appointment.

⁴ The search for Essential Consultants should include all stemmed variations of "consult" including "consulting."

- Avenue Strategies (avenuestrategies.com)

For calendar entries created in Outlook or similar programs, the documents should be produced in “memo” form to include all invitees, any notes, and all attachments. Please do not limit your search to Outlook calendars. We request the production of any calendar—paper or electronic, whether on government-issued or personal devices—used to track or coordinate how these agency officials allocate their time on agency business.

The search should include the listed individuals and entities both as keyword search terms and as entries in the to/from/cc/bcc fields of emails or calendar entries/invitations.

American Oversight seeks all records from January 20, 2017, to the date the search is conducted.

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.⁵ **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**

⁵ 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.⁶

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.⁷ 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.”⁸ 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

⁶ 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)).

⁷ 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>.

⁸ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

actually exempt under FOIA.”⁹ 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.”¹⁰ 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.’”¹¹

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.¹² 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.

⁹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁰ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

¹¹ *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)).

¹² *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 well-connected stakeholders influence government regulatory activities and policies. Selling access to wealthy and powerful individuals and corporations distorts the government's operations, undercuts its mission of serving the American people, and tarnishes the public's ability to trust the government. The news reports to date cover only efforts by a small number of companies to curry favor with federal officials, and the requested records will provide the public with critical new information about the scope of this problem. The requested records reflect directly on the integrity of federal officials, institutions, and activities, and significant media interest in these issues show that the requested disclosures will contribute significantly to the understanding of the American people.¹³ And, 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.¹⁴ American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after

¹³ See, e.g., Helderman *et al.*, *supra* note 1; FitzGerald & Rockoff, *supra* note 1; Meyer & Lippman, *supra* note 2; Drew FitzGerald, *AT&T Executive Who Oversaw Michael Cohen's Contract Forced Out*, WALL ST. J. (May 11, 2018, 12:20 PM), <https://www.wsj.com/articles/at-t-exec-who-oversaw-michael-cohens-contract-forced-out-1526046307>; Alexis C. Madrigal, *The Strange Case of AT&T's Payments to Michael Cohen*, THE ATLANTIC, May 8, 2018, <https://www.theatlantic.com/technology/archive/2018/05/the-strange-case-of-atts-payments-to-michael-cohen/559994/>; MJ Lee *et al.*, *Inside Michael Cohen's Aggressive Pitch Promising Access to Trump*, CNN (May 10, 2018, 8:21 AM), <https://www.cnn.com/2018/05/09/politics/michael-cohen-trump-lobbying/index.html>; Michael Kranish *et al.*, *Cohen, Touting His Access to President Trump, Convinced Companies to Pay Millions*, CHI. TRIB. (May 9, 2018, 8:43 PM), <http://www.chicagotribune.com/news/nationworld/ct-porn-lawyer-russian-att-trump-20180508-story.html>.

¹⁴ American Oversight currently has approximately 12,000 page likes on Facebook and 49,000 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Nov. 28, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Nov. 28, 2018).

receiving records regarding an ethics waiver received by a senior DOJ attorney,¹⁵ 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.¹⁶ 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.¹⁷

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 Beth France at foia@americanoversight.org or (202) 897-2465. 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 line extending to the left.

Austin R. Evers
Executive Director
American Oversight

¹⁵ *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

¹⁶ *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>.

¹⁷ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.