



December 20, 2018

**VIA ONLINE PORTAL**

Sabrina Burroughs  
FOIA Officer  
U.S. Customs & Border Protection  
1300 Pennsylvania Avenue NW, Room 3.3D  
Washington, DC 20229  
Via FOIAOnline

**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. 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.

In a November 27, 2018 email, the Office of Special Counsel (OSC) provided guidance to federal employees on compliance with the Hatch Act.<sup>1</sup> In that guidance, OSC indicated that use of the terms "resist" or "resistance" constituted political activity that could expose employees to criminal liability.<sup>2</sup> The guidance also indicated that expressing support for impeachment of the president was political activity for Hatch Act purposes.<sup>3</sup> On November 30, 2018, OSC issued further clarification, but reiterated its broad position that support for the "Resistance" or use of the word "resist" on its own (rather than tied to a specific action or policy, such as "#ResistKavanaugh") constituted political activity.<sup>4</sup> That purported clarification also served only to further muddle what employees may say about impeachment or impeachable offenses, effectively stating that employees could discuss whether the president should or should not be impeached but could not advocate for or against impeachment.

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<sup>1</sup> See, e.g., Eli Rosenberg & Juliet Eilperin, *No Talk of 'The Resistance' or Opinions About Impeachment at Work, Federal Employees Are Warned*, WASH. POST, Dec. 1, 2018, [https://www.washingtonpost.com/politics/2018/11/30/new-warning-federal-employees-no-talk-resistance-or-opinions-about-impeachment-work/?utm\\_term=.9b0395a248ac](https://www.washingtonpost.com/politics/2018/11/30/new-warning-federal-employees-no-talk-resistance-or-opinions-about-impeachment-work/?utm_term=.9b0395a248ac).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*



OSC’s guidance provokes many concerns. Its breadth and lack of clarity put federal employees in an untenable position of either suppressing protected, lawful speech or risking criminal prosecution. Moreover, the Hatch Act is intended to ensure that the federal government operates in a non-partisan, apolitical way, with an unwavering focus on serving the public. Thus, the Hatch Act is intended to keep all political activity—no matter the party involved—out of government buildings and off of government time. However, OSC’s guidance—which focuses on speech associated with progressive viewpoints—risks distorting the Hatch Act and using it as a tool to differentially intimidate public servants with views at odds with the current administration, while giving more leeway and protection to employees who agree with the president’s views and support him politically.

American Oversight seeks records that will provide the public with information about the pervasiveness of slogans and terms associated with the president’s political campaigns among federal employees—and whether the Hatch Act is being enforced with regard to pro-Trump speech.

### **Requested Records**

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

All communications (including emails, email attachments, calendar invitations or entries, and text messages) including any of the following terms:

- “great again”
- MAGA<sup>\*5</sup>
- #MAGA
- “drain the swamp”
- #draintheswamp
- “build the wall”
- “build that wall”
- #buildthewall
- #buildthatwall
- “promises made”
- “promises kept”
- #promiseskept
- Trump2020

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<sup>5</sup> Please note that American Oversight is using the asterisk (\*) to designate the standard use of “wildcards” in the search for responsive records. For example, a search for “MAGA\*” would return all of the following: MAGA!, MAGAnomics, etc. If your agency is unable to search for wildcards, please advise so that we may specifically include the variations that we would like searched.

- #trump2020
- “Trump Train”
- #trumptrain
- “Keep America Great”
- #keepamericagreat
- “lock her up”
- #lockherup
- “lock them up”
- #lockthemup
- #GOP

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.

The search should include the following custodians:

- Bradley Hayes, Executive Director, Office of Trade Relations
- Kevin McAleenan, Commissioner and former Acting Commissioner
- Carla Provost, Chief of the U.S. Border Patrol
- Ronald Vitiello, Former Acting Deputy Commissioner

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.<sup>6</sup> **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.**<sup>7</sup>

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.**<sup>8</sup> 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.”<sup>9</sup> If it is your position that any portion of the requested records

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<sup>6</sup> 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).

<sup>7</sup> 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)).

<sup>8</sup> 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>.

<sup>9</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

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.”<sup>10</sup> 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.”<sup>11</sup> 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.’”<sup>12</sup>

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.<sup>13</sup> 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.

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

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

<sup>12</sup> *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)).

<sup>13</sup> *Mead Data Central*, 566 F.2d at 261.

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 whether political appointees are discharging their responsibilities in the apolitical manner required by law. Promoting a partisan political agenda in the course of official activities distorts the government's operations, undercuts its mission of serving the American people, and tarnishes the public's ability to trust the government. The public does not currently have a window into the extent to which the president's hand-selected appointees are bringing their partisan positions into the halls of government or the effects such partisan advocacy are having on official activities and policies. 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.<sup>14</sup> 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.<sup>15</sup> American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after

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<sup>14</sup> See, e.g., Rosenberg & Eilperin, *supra* note 1; Ellie Kaufman, *6 White House Officials Found in Violation of the Hatch Act*, CNN (Dec. 3, 2018, 6:21 PM), <https://www.cnn.com/2018/11/30/politics/six-white-house-officials-hatch-act/index.html>; Tina Nguyen, *Government Employees Told to Keep Quiet as Trump Comes Unglued*, VANITY FAIR (Nov. 30, 2019, 1:37 PM), <https://www.vanityfair.com/news/2018/11/donald-trump-hatch-act-resistance>; Anne Flaherty, *Memo to Federal Workers: Leave That #ResistTrump Coffee Mug at Home*, ABCNEWS (Dec. 5, 2018, 10:28 AM), <https://abcnews.go.com/Politics/memos-federal-workers-leave-resisttrump-coffee-mug-home/story?id=59609400>.

<sup>15</sup> American Oversight currently has approximately 12,100 page likes on Facebook and 49,600 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Dec. 19, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Dec. 19, 2018).

receiving records regarding an ethics waiver received by a senior DOJ attorney,<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

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](mailto: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,



Austin R. Evers  
Executive Director  
American Oversight

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

<sup>17</sup> *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>.

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