



December 18, 2018

**VIA ELECTRONIC MAIL**

Melissa Golden  
Lead Paralegal and FOIA Specialist  
U.S. Department of Justice  
950 Pennsylvania Avenue NW, Room 5511  
Washington, DC 20530-0001  
[usdoj-officeoflegalcounsel@usdoj.gov](mailto:usdoj-officeoflegalcounsel@usdoj.gov)

**Re: Freedom of Information Act Request**

Dear Ms. Golden:

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 and National Security Action make the following request for records from the Office of Legal Counsel (OLC).

The Trump administration politicized the issue of the so-called migrant caravan—Central Americans migrating north through Mexico in order to seek asylum in the U.S.—in the runup to the midterm elections on November 6, 2018, and press reporting suggests the administration stepped up hardline immigration rhetoric in order to rally the president’s base.<sup>1</sup>

The Trump administration updated guidance for the active duty military deployed to border regions authorizing use of force to protect border patrol officers,<sup>2</sup> and on November 25, 2018, U.S. border agents responded with tear gas to a group of migrants—many women and children—engaged

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<sup>1</sup> Jeremy Peters & Julie Hirschfield Davis, *With Migrant Caravan, Trump Stokes a Familiar Fire: Immigration*, N.Y. TIMES, Oct. 20, 2018, <https://www.nytimes.com/2018/10/20/us/politics/trump-migrant-caravan-midterm.html>.

<sup>2</sup> White House Decision Memorandum, *Department of Defense Support for Border Security*, JUST SECURITY, November 2018, <https://www.justsecurity.org/wp-content/uploads/2018/11/decision-memorandum-department-of-defense-support-for-border-security.pdf>



in peaceful protest.<sup>3</sup> The active military deployment, initially set to end on December 15, 2018, has been extended through the end of January.<sup>4</sup>

Given the administration's track record of haphazard immigration policy<sup>5</sup> combined with the lack of a clear threat from the migrant caravan as well as the president's encouragement of nationalist sentiment<sup>6</sup> and recent political violence,<sup>7</sup> it is in the public interest to understand how the administration plans to manage and deescalate the situation at our border.

### **Requested Records**

American Oversight and National Security Action request that OLC produce the following records within twenty business days:

All records reflecting communications regarding the White House policy guidance issued on November 20, 2018, regarding the use of force by active military personnel to protect border control officers.<sup>8</sup>

Please produce all responsive records from October 12, 2018, to the date the search is conducted.

In addition to the records requested above, we also request 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

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<sup>3</sup> Megan Specia & Rick Gladstone, *Border Agents Shot Tear Gas Into Mexico. Was it Legal?*, N.Y. TIMES, Nov. 28, 2018, <https://www.nytimes.com/2018/11/28/world/americas/tear-gas-border.html>.

<sup>4</sup> Amanda Macias, *Pentagon Extends Active-Duty Troop Deployment to the Southwest Border Until the End of January*, CNBC, Dec. 4, 2018, <https://www.cnbc.com/2018/12/04/pentagon-extends-active-duty-troop-deployment-to-the-southwest-border.html>.

<sup>5</sup> Associated Press, *Trump's 'Zero Tolerance' Policy Sowed Confusion From Start*, CBS NEWS (July 1, 2018, 9:34 PM), <https://www.cbsnews.com/news/trump-administration-zero-tolerance-policy-immigration-confusion/>.

<sup>6</sup> Chris Cillizza, *Donald Trump Used a Word He's 'Not Supposed To.' Here's Why.*, CNN POLITICS (Oct. 23, 2018, 1:53 PM), <https://www.cnn.com/2018/10/23/politics/donald-trump-nationalism/index.html>.

<sup>7</sup> David Nakamura, *Critics Say Trump Has Fostered the Toxic Environment for the Political Violence He Denounces*, WASH. POST, Oct. 27, 2018, [https://www.washingtonpost.com/politics/the-central-premise-of-his-presidency-critics-say-trump-has-fostered-the-toxic-environment-for-the-political-violence-he-denounces/2018/10/27/cd45e43e-dale-11e8-a10f-b51546b10756\\_story.html](https://www.washingtonpost.com/politics/the-central-premise-of-his-presidency-critics-say-trump-has-fostered-the-toxic-environment-for-the-political-violence-he-denounces/2018/10/27/cd45e43e-dale-11e8-a10f-b51546b10756_story.html).

<sup>8</sup> White House Decision Memorandum, "Subject: Department of Defense Support for Border Security," Just Security, November 2018, <https://www.justsecurity.org/wp-content/uploads/2018/11/decision-memorandum-department-of-defense-support-for-border-security.pdf>

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 and National Security Action seek 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>9</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 and National Security Action have 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>10</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>11</sup> Furthermore, agencies that have adopted the National Archives and

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<sup>9</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>10</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>11</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,

**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 and National Security Action insist 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. We are 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>12</sup> If it is your position that any portion of the requested records are exempt from disclosure, American Oversight and National Security Action request 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>13</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>14</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>15</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>16</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.

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“Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

<sup>12</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

<sup>13</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>14</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original).

<sup>15</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>16</sup> *Mead Data Central*, 566 F.2d at 261.

**You should institute a preservation hold on information responsive to this request.** We intend 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.

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 and National Security Action, 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 and National Security Action request 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.<sup>17</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>18</sup>

American Oversight and National Security Action request 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 the operations or activities of the government. In the leadup to the 2018 midterm elections, President Trump has repeatedly emphasized the alleged dangers of a caravan of immigrants moving north through Mexico, going so far as to that perceived threat by sending potentially tens of thousands of soldiers to the U.S.-Mexico border, with apparently unclear guidelines as to their authorization to use force—lethal or otherwise—against migrants at the border. The requested records will help the general public understand the factors influencing decisions surrounding the government’s response to the caravan. American Oversight is committed to transparency and makes the responses agencies provide in response to FOIA requests publicly available. The subject of this request is a matter of public interest, and American Oversight would make these records publicly available.

This request is primarily and fundamentally for non-commercial purposes.<sup>19</sup> 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

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<sup>17</sup> 28 C.F.R. § 16.10(k)(2).

<sup>18</sup> *Id.*

<sup>19</sup> 28 C.F.R. § 16.10(k)(iii)(A)–(B).

promotes their availability on social media platforms, such as Facebook and Twitter.<sup>20</sup> 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,<sup>21</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>22</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>23</sup>

National Security Action's interest in the disclosure of the requested records is purely non-commercial. National Security Action is a 501(c)(4) non-profit public interest organization dedicated to using the power of information to advocate for strong, principled American leadership on the global stage. National Security Action will use the information gathered in furtherance of this mission. National Security Action is comprised of national security experts, and publishes informational materials and commentary to educate the public on contemporary national security issues.<sup>24</sup> Like American Oversight, National Security Action plans to use the information gathered, and its analysis of it, to educate the public through various media including reports and press releases.

Accordingly, American Oversight and National Security Action qualify for a fee waiver.

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<sup>20</sup> American Oversight currently has approximately 12,100 page likes on Facebook, and 49,500 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Dec. 13, 2018); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Dec. 13, 2018).

<sup>21</sup> *DOJ Civil Division Response Noel Francisco Compliance*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

<sup>22</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>23</sup> *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

<sup>24</sup> *See, e.g., In Response to Release of Former CIA Officer's Confidential Information*, NAT'L SECURITY ACTION (Aug. 30, 2018), available at <https://nationalsecurityaction.org/newsroom-blog/spanberger-letter>; *Takeaways from the Trump-Putin Summit*, NAT'L SECURITY ACTION (July 16, 2018), available at <https://nationalsecurityaction.org/newsroom-blog/trump-putin-summit-meeting-helsinki>.

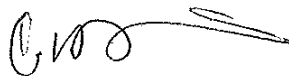
Conclusion

We share a common mission to promote transparency in government. American Oversight and National Security Action look forward to working with OLC 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 Hart Wood at [foia@americanoversight.org](mailto:foia@americanoversight.org) or 202.873.1743. Also, if our 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



Jeff Prescott  
Executive Director  
National Security Action