



February 1, 2019

VIA ELECTRONIC MAIL

Charis Wilson, Ph.D.
NPS FOIA Officer
12795 W. Alameda Parkway
P.O. Box 25287
Denver, CO 80225
npsfoia@nps.gov

Re: Freedom of Information Act Request

Dear Dr. Wilson:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations of the U.S. Department of the Interior (DOI), 43 C.F.R. Part 2, American Oversight makes the following request for records from the National Park Service (NPS).

On December 22, 2018, a dispute between President Trump and congressional Democrats over funding for the president's proposed wall along the country's southern border resulted in the expiration of funding for a number of federal agencies—including to varying degrees, the General Services Administration (GSA) and DOI, including NPS—forcing them to cease certain functions for the next several weeks.¹ Among the suspended services were care and maintenance of many national parks, monuments, and other sites maintained by NPS.²

However, just over a week into the lapse in appropriations, on January 2, 2019, news outlets reported that the Old Post Office Tower, an NPS site at the Trump International Hotel in Washington, D.C., would reopen, through funding provided by GSA.³ In a statement to *The Hill*,

¹ See Erica Werner *et al.*, *Major Parts of the Federal Government Begin Shutting Down for an Indefinite Closure*, WASH. POST, Dec. 22, 2018, https://www.washingtonpost.com/politics/trump-leans-on-mcconnell-to-pass-spending-bill-with-border-funding-in-senate/2018/12/21/31bb453a-0517-11e9-b5df-5d3874f1ac36_story.html?utm_term=.b624ccc58f24.

² See, e.g., Editors, *Full Toilets, No Pay: The Shutdown in Action*, USA TODAY (Jan. 2, 2019, 5:04 PM), <https://www.usatoday.com/story/news/2019/01/02/government-shutdown-feces-national-parks-paychecks-hold/2462286002/>; Transcript, *How the Government Shutdown Is Affecting National Parks*, NPR MORNING EDITION (Jan. 2, 2019, 4:58 AM), <https://www.npr.org/2019/01/02/681535260/how-the-government-shutdown-is-affecting-national-parks>; Emanuella Grinberg & Linh Tran, *When He Broke His Leg at a National Park, Strangers Had to Carry Him to Safety Because of the Government Shutdown*, CNN, Jan. 3, 2019, <https://www.cnn.com/2019/01/02/us/big-bend-injury-shutdown/index.html>.

³ Tal Axelrod, *Old Post Office Tower on Trump Property to Remain Open During Shutdown*, THE HILL (Jan. 2, 2019, 6:51 PM), <https://thehill.com/homenews/administration/423605-old-post->



GSA initially indicated that the site “remains open as the funds needed to operate the Old Post Office tower are not associated with the current fiscal year’s (FY 2019) appropriations bill. The overall operation of the tower was a part of the government’s lease signed in August 2013, and in response to the ‘Old Post Office Building Redevelopment Act of 2008.’”⁴ Two days later, GSA provided an apparently different explanation on its website, stating that a 1983 law requiring GSA to enter into an agreement with NPS for operating the tower “also authorizes GSA to pay NPS for this service from the Federal Buildings Fund,” which remained available to operate federal facilities “notwithstanding a lapse in appropriations.”⁵ The statement went on to note that:

upon realization of the observation tower closure, GSA advised NPS that operations at the observation tower would continue to be funded. In this process, it was discovered that the interagency agreement required by the 1983 law had expired earlier in the year. GSA and NPS subsequently renewed the interagency agreement, and NPS resumed operation of the tower as required by law.⁶

GSA’s statement also claimed that “the reopening of the observation tower at GSA’s Old Post Office facility was unrelated to the facility’s tenant.”⁷ However, as subsequent public reports noted, opening an NPS site at the president’s hotel, while many other sites were shuttered, created “at least the appearance of a conflict of interest.”⁸

[office-tower-on-trump-property-to-reopen-during-shutdown](#); see also Jennifer Yachnin, *Old Post Office Tower at Trump Hotel to Open During Shutdown*, E&E NEWS, Jan. 2, 2019, <https://www.eenews.net/greenwire/2019/01/02/stories/1060110755>.

⁴ See Axelrod, *supra* note 3.

⁵ Press Release, *GSA Statement on Old Post Office Tower Operations*, Jan. 4, 2019, <https://www.gsa.gov/about-us/newsroom/news-releases/gsa-statement-on-old-post-office-tower-operations>.

⁶ *Id.*

⁷ *Id.*

⁸ See Ellen Knickmeyer & Stephen Braun, *Shutdown Spares Federal Park Rangers at Site in Trump Hotel*, ASSOCIATED PRESS, Jan. 4, 2019, <https://www.apnews.com/a92b044703354064a34217492c5a0923>; see also Hamza Shaban, *Here’s Why a Historic Site Remained Open at Trump’s Hotel Despite the Government Shutdown*, WASH. POST, Jan. 25, 2019, https://www.washingtonpost.com/business/2019/01/25/heres-why-historic-site-remained-open-trump-hotel-despite-government-shutdown/?utm_term=.ab2734daa43a; Mary Papenfuss, *Historic Federal Post Office Tower at Trump Hotel Reopening During Shutdown*, HUFFINGTON POST (Jan. 4, 2019, 2:42 AM), https://www.huffingtonpost.com/entry/old-post-officer-tower-reopens-during-shutdown-at-trump-hotel_us_5c2edd41e4b05c88b707aee9; Igor Derysh, *Old Post Office Tower in D.C. Mysteriously Reopens Despite Shutdown*, SALON (Jan. 4, 2019, 11:00 AM), <https://www.salon.com/2019/01/04/old-post-office-tower-in-d-c-mysteriously-reopens-despite-shutdown/>; Peter Overby, *Shutdown Shuttters Many D.C. Tourist Attractions – But not the One in Trump’s Hotel*, NPR (Jan. 10, 2019, 5:01 AM),

American Oversight seeks records with the potential to shed light on the source of funding for the operations of the Old Post Office tower, including whether and to what extent the president's personal financial interests are being favored over those of the general public.

Requested Records

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

All records reflecting any final analysis or determination, including legal analysis, concerning the use of funds from the Federal Building Fund for the operations of the Old Post Office Tower during the partial federal government shutdown that commenced on December 22, 2018.

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 NPS 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.⁹ **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.**¹⁰

<https://www.npr.org/2019/01/10/683638056/shutdown-shutters-many-d-c-tourist-attractions-but-not-the-one-in-trumps-hotel>.

⁹ 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).

¹⁰ 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

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 NPS’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.**¹¹ 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 NPS’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that NPS 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.”¹² 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.”¹³ 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.”¹⁴ 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.’”¹⁵

[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)).

¹¹ 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>.

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

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

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

¹⁵ *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)).

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.¹⁶ 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 that we 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 43 C.F.R. § 2.45(a), 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 in a significant way.¹⁷ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁸

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 the operations or activities of the federal government.¹⁹ The requested records are directly related to the operations of federal sites and services—in particular how a specific NPS site was funded during the lapse in appropriations, and the circumstances surrounding a related interagency agreement and fund.²⁰ The records will help American Oversight and the general public understand whether

¹⁶ *Mead Data Central*, 566 F.2d at 261.

¹⁷ 43 CFR § 2.45(a)(1).

¹⁸ 43 CFR § 2.45(a)(2).

¹⁹ 43 C.F.R. § 2.48(a)(1)-(4).

²⁰ *See* 43 C.F.R. § 2.48(a)(1).

and to what extent the president's personal financial interests²¹ influenced those operations at a time when hundreds of thousands of federal workers were left without pay and the general public without numerous services. There has been significant and ongoing interest in the shutdown and its impact on federal operations—including operation of NPS sites—continuing even after funding was restored and operations resumed.²² Furthermore, GSA's statements concerning the source of funding for operations of the Old Post Office Tower during the lapse in appropriations have not been entirely consistent, and particularly where GSA's analysis of legal issues related to the Old Post Office Tower has been recently called into question,²³ the need for additional information on the subject—including any NPS records that may clarify GSA's statements and activities—grows even more clear. Thus, the public's understanding "will be enhanced to a significant extent by the disclosure."²⁴

In sum, the public's understanding of the government's activities would be enhanced through American Oversight's analysis and publication of these records, and as described in more detail below, American Oversight has the intention and ability to disseminate any records received in response to this request to a reasonably broad audience of interested parties.²⁵

²¹ Notably, the president's personal financial interests in the Trump International Hotel have been the subject of prior ethical concerns. *See, e.g., e.g., Julie Bykovicz, Trump Hotel Is Ground Zero for Conflict-of-Interest Concerns*, PBS (Jan. 22, 2017, 11:28 AM), <https://www.pbs.org/newshour/politics/trump-international-hotel-ethics>.

²² *See, e.g., Werner et al., supra* note 1; USA Today Editors, *supra* note 2; NPR Morning Edition Transcript, *supra* note 2; Grinberg & Tran, *supra* note 2; Axelrod, *supra* note 3; Yachmin, *supra* note 3; *see also* Meg Wagner *et al., The Government Is STILL Shut Down: Live Updates*, CNN (Jan. 3, 2019, 11:07 AM), <https://www.cnn.com/politics/live-news/government-shutdown-january-2019/index.html>; Ellen Knickmeyer & Stephen Braun, *National Park Site Located in Trump Hotel Stays Open Despite Government Shutdown*, USA TODAY (Jan. 6, 2019, 12:11 PM), <https://www.usatoday.com/story/news/politics/2019/01/06/old-post-office-open-shutdown/2495664002/>; Peter Overby, *Shutdown Shuttters Many D.C. Tourist Attractions – But not the One in Trump's Hotel*, NPR (Jan. 10, 2019, 5:01 PM), <https://www.npr.org/2019/01/10/683638056/shutdown-shuttters-many-d-c-tourist-attractions-but-not-the-one-in-trumps-hotel>; Antonia Blumberg, *Joshua Tree May Feel the Effects of Government Shutdown for Hundreds of Years*, HUFFINGTON POST (Jan. 28, 2019, 2:27 PM), https://www.huffingtonpost.com/entry/joshua-tree-damage-government-shutdown_us_5c4f3c70e4b0d9f9be67c9c6; Aria Bendix, *The Government Shutdown May Be Over, but the Damage to National Parks Such as Joshua Tree and Yellowstone Could Be Permanent*, BUSINESS INSIDER, Jan. 28, 2019, <https://www.businessinsider.com/national-parks-damage-government-shutdown-2019-1>.

²³ *See* Erica Orden & Cristina Alesci, *GSA Ignored Constitutional Issues Raised by Trump's Interest in DC Hotel, Report Says*, CNN (Jan. 16, 2019, 6:15 PM), <https://www.cnn.com/2019/01/16/politics/trump-hotel-gsa-inspector-general/index.html>.

²⁴ 43 C.F.R. § 2.48(a)(4).

²⁵ *See* 43 C.F.R. § 2.48(a)(2)-(3).

This request is primarily and fundamentally for non-commercial purposes.²⁶ 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.²⁷ 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,²⁸ 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.²⁹ 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.³⁰

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 NPS 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.

²⁶ 43 CFR § 2.45(a)(2).

²⁷ American Oversight currently has approximately 12,100 page likes on Facebook, and 49,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Feb. 1, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Feb. 1, 2019).

²⁸ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²⁹ *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>.

³⁰ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

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 and right of the name.

Austin R. Evers
Executive Director
American Oversight