



February 22, 2019

VIA ONLINE PORTAL

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
Department of Justice
1425 New York Avenue NW
Suite 11050
Washington, DC 20530-0001
Via FOIAOnline

Re: Freedom of Information Act Request

Dear Mr. Hibbard:

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 makes the following request for records.

To date, President Trump has appointed two justices to the United States Supreme Court, each with expedited confirmation processes. The more recent process—which culminated in the confirmation of Brett Kavanaugh as a justice of the Supreme Court—concluded rapidly, despite significant concerns that the Senate had not obtained and reviewed all relevant records.¹ Federal judicial appointments, and especially appointments of justices and circuit judges, have a critical impact on how the laws are interpreted and whether the Constitution’s protections are enforced. Moreover, conservative interest groups appear to be playing an outsize role in influencing judicial nominations.² It is therefore essential that the public and lawmakers have the benefit of a robust

¹ See, e.g., Joan Biskupic, *For Kavanaugh, a ‘Formative’ Job: But for Senators, Few Records Are Available*, CNN (Sept. 2, 2018, 11:01 AM), <https://www.cnn.com/2018/08/31/politics/kavanaugh-documents-bush-katrina-roberts/index.html>; Seung Min Kim, *Debate Boils Over About ‘Confidential’ Kavanaugh Documents*, WASH. POST, Sept. 6, 2018, https://www.washingtonpost.com/politics/debate-boils-over-about-confidential-kavanaugh-documents/2018/09/06/24d2a69c-b1f2-11e8-a20b-5f4f84429666_story.html?utm_term=.7ac6aa4d7d6f; Mikhaila Fogel, *Day 1 of Brett Kavanaugh Hearings: Documents Delayed and Documents Denied*, LAWFARE (Sept. 4, 2019, 9:53 PM), <https://www.lawfareblog.com/day-1-brett-kavanaugh-hearings-documents-delayed-and-documents-denied>.

² Tucker Higgins, *Trump Tells Conservative Outlet That He Is “Confined” to List of 25 Potential Supreme Court Nominees for His Next Pick Amid Concerns About RBG’s Health*, CNBC (Jan.



record reflecting any potential nominees' qualifications and the special interests promoting their selection when considering these appointments. To ensure that such a record is available, American Oversight seeks records related to individuals whom the Trump administration is reportedly considering for future judicial appointments.

Requested Records

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

All records reflecting communications (including emails, email attachments, notes, hard copy correspondence sent through any medium including courier services, 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, talking points, any handwritten or electronic notes taken during any responsive communications, and summaries of any responsive communications) between the Office of the Attorney General or the Office of Legal Policy and any individual or entity in List A below (or anyone acting on behalf of anyone on that list) and relating to anyone in List B below. This request also seeks records reflecting communications between the individuals listed below and entities other than DOJ if those records were subsequently forwarded, or otherwise sent, to DOJ.

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

List A: Outside Individuals and Groups

- Federalist Society (fedsoc.org)
- Heritage Foundation (heritage.org)
- Heritage Action for American (heritageaction.com)
- Americans for Prosperity (americansforprosperity.org)
- Cato Institute (cato.org)
- Judicial Crisis Network (judicialnetwork.com)
- Leonard Leo
- Carrie Severino
- Senator Mitch McConnell
- Senate Judiciary Committee
- Former United States Supreme Court Justice Anthony Kennedy
- Any of the nine current justices serving on the Supreme Court (Chief Justice Roberts or Justices Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, or Kavanaugh)

31, 2019, 9:23 AM), <https://www.cnn.com/2019/01/31/trump-says-he-is-confined-to-public-list-of-scotus-nominees-report.html>.

List B: Subjects of Communications

- Steven Colloton, U.S. Circuit Judge
- Raymond Gruender, U.S. Circuit Judge
- Joan Larsen, U.S. Circuit Judge
- Amul Thapar, U.S. Circuit Judge
- Don Willett, U.S. Circuit Judge
- Amy Coney Barrett, U.S. Circuit Judge
- Thomas Hardiman, U.S. Circuit Judge
- Diane Sykes, U.S. Circuit Judge
- Kevin Newsom, U.S. Circuit Judge
- Margaret Ryan, U.S. Circuit Judge
- Timothy Tymkovich, U.S. Circuit Judge
- Raymond Kethledge, U.S. Circuit Judge
- Allison Eid, U.S. Circuit Judge
- David Stras, U.S. Circuit Judge
- Britt Grant, U.S. Circuit Judge
- Thomas Rex Lee, Utah Supreme Court Justice
- Edward Mansfield, Iowa Supreme Court Justice
- Keith Blackwell, Georgia Supreme Court Justice
- Charles Canady, Florida Supreme Court Justice
- Neomi Rao, Administrator, Office of Information and Regulatory Affairs

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.³ **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.**⁴

³ 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).

⁴ 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

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 DOJ’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.**⁵ 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 DOJ’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that DOJ 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.”⁶ 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.”⁷ 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.”⁸ Further, “the withholding agency must supply ‘a relatively detailed

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)).

⁵ 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>.

⁶ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

⁷ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁸ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

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.””

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.¹⁰ 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, DOJ is 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 and DOJ 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 28 C.F.R. § 16.10(k), 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 a better understanding of relevant government procedures by the general public in a significant way.¹¹ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹²

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

⁹ *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)).

¹⁰ *Mead Data Central*, 566 F.2d at 261.

¹¹ 28 C.F.R. § 16.10(k)(1).

¹² *Id.*

government operations and activities.¹³ The individuals identified in this request are reportedly on the “short list” for appointment to the U.S. Supreme Court, should another opening become available during the current administration.¹⁴ The composition of the nation’s highest court is clearly a matter of substantial public interest.¹⁵ The requested records relate directly to operations and activities of the government—namely, communications of DOJ personnel involved in judicial nominations with conservative advocacy groups interested in those nominations. The public has a right to understand the role that these ideologically driven outside groups are playing in shaping the future of the federal courts, including especially the Supreme Court. As noted, the subject of this request is a matter of public interest, and the public’s understanding of the government’s activities would be enhanced through American Oversight’s analysis and publication of these records.

This request is primarily and fundamentally for non-commercial purposes.¹⁶ 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.¹⁷ American

¹³ 28 C.F.R. § 16.10(k)(1), (2)(i)–(ii).

¹⁴ See, e.g., Eliana Johnson & Gabby Orr, *Trump White House Urging Allies to Prepare for Possible RBG Departure*, POLITICO (Jan. 10, 2019, 1:04 PM), <https://www.politico.com/story/2019/01/10/trump-white-house-urging-allies-to-prepare-for-possible-rbg-departure-1096102>; Jeffrey Toobin, *Ruth Bader Ginsburg Isn’t Looking to Retire Yet, But Is Another Supreme Court Justice Ready to Go?*, THE NEW YORKER, Feb. 13, 2019, <https://www.newyorker.com/news/daily-comment/ruth-bader-ginsburg-isnt-looking-to-retire-yet-but-is-another-supreme-court-justice-ready-to-go>; Ramesh Ponnuru, *Trump Already Prepping for Possible Supreme Court Pick*, Feb. 5, 2019, CHARLESTON POST COURIER, https://www.postandcourier.com/opinion/commentary/trump-already-prepping-for-possible-supreme-court-pick/article_6e1ce3fc-298a-11e9-9a1f-db7a9d3db1fe.html; Sheldon Whitehouse, *Sen. Whitehouse: There’s a ‘Crisis of Credibility’ at the U.S. Supreme Court*, N.Y. LAW J. (Feb. 19, 2019, 9:26 AM), <https://www.law.com/newyorklawjournal/2019/02/19/sen-whitehouse-theres-a-crisis-of-credibility-at-the-u-s-supreme-court-389-59002/?slreturn=20190120134626>; Ann E. Marimow, *Two Years in, Trump’s Appeals Court Confirmations at a Historic High Point*, WASH. POST, Feb. 4, 2019, https://www.washingtonpost.com/local/legal-issues/two-years-in-trumps-appeals-court-confirmations-at-a-historic-high-point/2019/02/03/574226e6-1a90-11e9-9ebf-c5fed1b7a081_story.html?utm_term=.aa705b2e076c; Ramesh Ponnuru, *The Trump Supreme Court Contingency Plan*, BLOOMBERG (Feb. 5, 2019, 7:30 AM), <https://www.bloomberg.com/opinion/articles/2019-02-05/trump-has-a-list-of-supreme-court-nominees>.

¹⁵ See, e.g., *id.*

¹⁶ 28 C.F.R. § 16.10(k)(1), (2)(iii).

¹⁷ American Oversight currently has over 12,150 page likes on Facebook and approximately 50,700 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/>

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,¹⁸ 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.¹⁹ 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.²⁰

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 DOJ 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,



Austin R. Evers
Executive Director
American Oversight

(last visited Feb. 22, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Feb. 22, 2019).

¹⁸ *Records Related to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

¹⁹ *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>.

²⁰ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.