UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, *Plaintiff*, v. U.S. DEPARTMENT OF JUSTICE, *Defendant*.	)	Case No. 18-cv-319 (CRC)

PLAINTIFF'S MOTION TO STAY SUMMARY JUDGMENT BRIEFING AND FOR LEAVE TO SEEK LIMITED DISCOVERY PURSUANT TO RULE 56(d)

Plaintiff American Oversight, by counsel, pursuant to Rule 56(d) respectfully requests that the Court stay briefing for the parties' motions for summary judgment and permit time for limited discovery of facts Plaintiff needs to substantively oppose Defendant's motion for summary judgment. Plaintiff consulted with Defendant U.S. Department of Justice pursuant to Local Rule 7(m); Defendant opposes the motion for discovery and the motion to stay summary judgment briefing and intends to file an opposition to both motions.

Dated: April 15, 2019

Respectfully submitted,

/s/ Cerissa Cafasso

Cerissa Cafasso
D.C. Bar No. 1011003
Daniel A. McGrath
D.C. Bar No. 1531723
Austin R. Evers
D.C. Bar No. 1006999

AMERICAN OVERSIGHT
1030 15th Street NW, B255
Washington, DC 20005
(202) 869-5244
cerissa.cafasso@americanoversight.org
daniel.mcgrath@americanoversight.org
austin.evers@americanoversight.org

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, *Plaintiff*, v. U.S. DEPARTMENT OF JUSTICE, *Defendant*.	)	Case No. 18-cv-319 (CRC)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO STAY SUMMARY JUDGMENT BRIEFING AND FOR LEAVE TO SEEK LIMITED DISCOVERY PURSUANT TO RULE 56(d)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Treatises

INTRODUCTION

Shortly before Defendant was due to file its reply and cross-opposition in the course of summary judgment briefing, during which Defendant vigorously defended its claim that no documents responsive to American Oversight's Freedom of Information Act (FOIA) request existed (a "no-records response"), Defendant informed American Oversight that it had in fact located a responsive record. When that record was eventually produced, it directly contradicted the agency's sworn representations to the Court and raised grave questions regarding both the thoroughness of Defendant's search and whether the agency has complied in good faith with its duties under FOIA. In order to resolve those serious questions, American Oversight respectfully seeks a stay of the briefing schedule currently in place and the Court's leave to seek limited discovery.

Although FOIA cases are typically resolved without discovery and rely instead on detailed declarations from the agency, this reliance rests on the presumption of regularity, that is, the assumption that government officials are properly discharging their official duties in good faith. *See United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). That presumption is no longer appropriate here, where the sworn declaration submitted by Defendant U.S. Department of Justice ("DOJ" or "the Department") in support of its motion for summary judgment relied upon material representations by senior DOJ officials that are directly contradicted by the facts revealed in the belatedly produced responsive record. Any presumption of regularity is fully rebutted by this record: it is directly responsive and was located firmly

within any reasonable target search area, and its very existence is clearly at odds with multiple, specific representations to the contrary contained in DOJ's sworn declaration.

American Oversight's FOIA request sought documentation of a decision by the Attorney General to deputize the U.S. Attorney for the District of Utah to investigate a panoply of politically charged allegations identified by members of Congress related to former Secretary of State Hillary Clinton and allegations of abuse by officials at DOJ and the Federal Bureau of Investigation (FBI) surrounding the 2016 presidential election—matters of great import to the American people. The importance and sensitivity of this extraordinary delegation of authority have only been further highlighted by now-Attorney General William Barr's recent testimony that he believes "spying"—carried out by federal law enforcement—occurred during the 2016 election period.

Contrary to logic and common sense regarding a matter of this magnitude, senior DOJ officials represented that no written guidance or directives existed in connection with this extraordinarily broad and politically sensitive investigation delegated by the Attorney General to the U.S. Attorney for the District of Utah. Per the Department's declaration, these senior DOJ officials, including the former Chief of Staff to the Attorney General Matthew Whitaker and U.S. Attorney John Huber himself, affirmatively represented that any guidance and direction given to the U.S. Attorney in connection with this highly sensitive review, which falls outside the Utah U.S. Attorney's ordinary statutory jurisdiction, was only provided orally during "meetings and discussions." The responsive record that was belatedly produced shows that all of these representations were flatly untrue. Indeed, it shows that the very officials who made these misrepresentations were directly and personally involved in the provision of formal written guidance: the Chief of Staff to the Attorney General personally emailed a formal, signed

directive from the Attorney General to the U.S. Attorney in question defining the scope of this extraordinary inquiry. Notably, the belatedly produced record was only finally disclosed after both Mr. Whitaker and Mr. Sessions were no longer at the Department.

This clear and contradictory evidence demonstrates that Defendant's declarations in this matter may no longer be relied upon by American Oversight or the Court as the sole source of evidence in this case, and raises grave questions regarding whether the senior DOJ officials who made these misrepresentations were discharging their official duties properly and in good faith. The failure to identify this responsive record during the initial search, whether as the result of gross negligence or a deliberate effort to frustrate FOIA and hide nonexempt government records from public view, highlights the critical importance of independently testing the evidence to evaluate the adequacy of DOJ's search to uncover all relevant records. To develop this evidence regarding the adequacy of Defendant's search and as necessary to oppose Defendant's motion for summary judgment, the briefing schedule currently in place should be stayed and American Oversight must first be afforded limited discovery to obtain factual evidence necessary to effectively litigate the remaining issues in this matter.

BACKGROUND

In July and September 2017, Representative Bob Goodlatte, then-Chairman of the House of Representatives Committee on the Judiciary ("the Committee"), and several other members of the Committee signed a letter to then-Attorney General Jeff Sessions and Deputy Attorney General Rod Rosenstein requesting the appointment of a second special counsel to investigate numerous actions taken by persons who served in the executive branch during the Obama administration, including former Secretary of State Hillary Clinton and numerous DOJ and FBI officials. Decl. of Counsel in Supp. of P.'s Mot. to Stay Summ. J. Briefing and for Leave to Seek

Limited Discovery Pursuant to Rule 56(d) ("Cafasso Decl."), Ex. A ("Goodlatte Letters"). On November 13, 2017, the Assistant Attorney General for Legislative Affairs, Stephen E. Boyd, responded to the Committee's letters and stated that "the Attorney General has directed senior federal prosecutors to evaluate certain issues raised in your letters." Cafasso Decl., Ex. B ("Boyd Response").

Shortly thereafter, Plaintiff American Oversight submitted several Freedom of Information Act (FOIA) requests to Defendant on November 22, 2017, seeking records that would inform the public as to the nature and scope of the new investigation that the agency was undertaking as referenced in the Boyd Response. Cafasso Decl. ¶ 6. One such request sought the following records from the Office of the Attorney General (OAG) and the Office of the Deputy Attorney General (ODAG):

> All guidance or directives provided to the "senior federal prosecutors" who have been "directed" "to evaluate certain issues raised in [Congressman Robert Goodlatte's] letters," as indicated in the Department of Justice's November 13, 2017 response signed by Assistant Attorney General Stephen Boyd, attached for your convenience, regarding their performance of that task.

Cafasso Decl., Ex. D ("Guidance FOIA").[1]

[1] American Oversight also filed a FOIA request seeking "[r]ecords sufficient to identify all of the 'senior federal prosecutors'" referenced in the Boyd Response. *See* Compl. ¶ 10, ECF No. 1; Cafasso Decl., Ex. C ("Prosecutors FOIA"). In July 2018, the Department responded with a record that identified only one such prosecutor—U.S. Attorney John Huber—who had been directed to undertake a review. Cafasso Decl., Ex. E at 2 (DOJ July 2018 FOIA Response). The Department moved for summary judgment as to the adequacy of its searches for both the Prosecutors FOIA and the Guidance FOIA. *See* Def.'s Mot for Summ. J., ECF No. 16. In opposing the Department's motion and cross-moving for summary judgment, American Oversight withdrew its challenge regarding the adequacy of the Department's search for records responsive to the Prosecutors FOIA "in light of the Department's sworn declaration that the representation to Congress that multiple senior prosecutors had been assigned was false." Mem. of Points & Authorities in Supp. of P.'s Cross-Mot. for Summ. J & in Opp'n to Def.'s Mot. for Summ. J. at 4–5 n.1 (citing Brinkmann Decl. ¶ 14).

American Oversight initiated the instant litigation on February 12, 2018, after the Department failed to make a timely determination as required by law. *See* Compl., ECF No. 1. On July 16, 2018, the Department issued its final determination for the Guidance FOIA stating that OAG and ODAG did not identify any responsive records. Cafasso Decl., Ex. E at 2 (DOJ July 2018 FOIA Response).

The Department moved for summary judgment on November 16, 2018. Def.'s Mot for Summ. J., ECF No. 16. In support of its motion, the Department submitted the sworn declaration of Vanessa R. Brinkmann, Senior Counsel in the Office of Information Policy (OIP). Decl. of Vanessa R. Brinkmann, ECF No. 16-3 ("Brinkmann Decl.") (also attached hereto as Cafasso Decl., Ex. F). The Declarant stated that OIP had "determined that a direct inquiry to knowledgeable staff in [OAG] would be the most logical and effective search method." Brinkmann Decl. ¶ 14. The Declarant, therefore, "contacted the Counselor to the Attorney General in OAG who is responsible for assisting OIP with FOIA requests for OAG documents to ascertain . . . what guidance or directives, if any, were issued." *Id.* The Declarant then represented that the Counselor "conferred with other Department officials with direct knowledge of the subject matter, including the then-OAG Chief of Staff and U.S. Attorney Huber." *Id.* Although never named in the declaration, the "then-OAG Chief of Staff" during the relevant time period was Matthew Whitaker. Cafasso Decl. ¶ 17.

The Declarant went on to state that "OAG"—without reference to a specific person in the office—"advised that, when the Attorney General directed Mr. Huber to evaluate these matters, no written guidance or directives were issued to Mr. Huber in connection with this directive, either by the Attorney General, or by other senior leadership office staff." Brinkmann Decl. ¶ 15. The Declarant further stated that "OAG" advised that direction was provided orally "in meetings

and discussions among a small group of Department officials, including the Attorney General, the Deputy Attorney General, the OAG Chief of Staff, the Principal Associate Deputy Attorney General, and U.S. Attorney Huber." *Id.*[2]

However, at approximately 9:04 p.m. on Thursday, February 28, 2019—the same day on which Defendant's reply and response to American Oversight's cross-motion for summary judgment was due—the Department notified American Oversight that "OIP learned this evening of a record responsive to American Oversight's 'Guidance FOIA' request that has not previously been released." Cafasso Decl. ¶ 20. Matthew Whitaker left his position at the Department of Justice two days later, on Saturday, March 2, 2019. *Id.* ¶ 21. At the end of the following week, shortly after close of business on Friday, March 8, 2019, the Department produced the responsive record in full without any claim of exemption; the production consisted of one email and two substantive attachments. *See* Cafasso Decl. ¶¶ 24–27; Cafasso Decl., Ex. G (DOJ March 2019 Supplemental FOIA Response).

The email, dated November 22, 2017, is from Mr. Whitaker to U.S. Attorney Huber with the subject line "Letter from Attorney General" and a body that reads, in full, "As we discussed. MW". Cafasso Decl. ¶ 25; Cafasso Decl., Ex. G at 3 ("the Whitaker Email"). The first substantive attachment is a formal letter dated November 22, 2017, to Mr. Huber signed by Attorney General Sessions. Cafasso Decl. ¶ 26; Cafasso Decl., Ex. G at 4 ("the Attorney General Directive"). In this directive, the Attorney General directs Mr. Huber to review the matters raised

[2] Notably, in the Declaration this list is prefaced by "including," suggesting that it is not a complete account of all of the participants present for any relevant meetings or discussions. The Declaration also identifies these participants only by title; Plaintiff presumes that the identified participants are then-Attorney General Jeff Sessions, Deputy Attorney General Rod Rosenstein, then-OAG Chief of Staff Matthew Whitaker, then-Principal Associate Deputy Attorney General Robert Hur, and U.S. Attorney John Huber. *See* Cafasso Decl. ¶¶ 17, 22, 29–31.

in Assistant Attorney General Boyd's letter, Ex. G at 4—in other words the letter that formed the basis of American Oversight's FOIA request. The letter further specifies the Attorney General's request that Mr. Huber "make recommendations to [the Attorney General] or the Deputy Attorney General, as appropriate*." Id*. The second substantive attachment is a copy of the Boyd Response. *See* Cafasso Decl. ¶ 27; Cafasso Decl., Ex. G at 5–6 ("Boyd Response").

On April 4, 2019, Defendant provided a supplemental response to the Guidance FOIA stating that an additional electronic search did not result in locating additional responsive records. Cafasso Decl. Ex. H (DOJ April 2019 Supplemental FOIA Response). On April 10, 2019, Defendant informed American Oversight that the April response was the result of a supplemental search of: (1) electronic mail of former Attorney General Jeff Sessions, Deputy Attorney General Rod Rosenstein, former OAG Chief of Staff Matthew Whitaker, former Principal Associate Deputy Attorney General Robert Hur, U.S. Attorney John Huber, and two personal assistants to former Attorney General Sessions; and (2) the Executive Secretariat for official communications with Mr. Huber. Cafasso Decl. ¶ 29.

Defendant has yet to fully explain to American Oversight how it came to finally discover the Whitaker Email, including its attachments, or why it concluded that the limited supplemental search was sufficient to uncover all relevant records. Nor has Defendant explained how it failed to identify—even after speaking with officials with direct knowledge—a formal, written directive signed by the Attorney General to a U.S. Attorney requesting an inquiry into numerous politically sensitive allegations related to former presidential candidate Hillary Clinton, the actions of the FBI surrounding the 2016 presidential election, and other sensitive matters. And Defendant has not produced or identified any other copy or draft of the Attorney General's

formal order directing this sensitive and extraordinary evaluation by a U.S. Attorney. Cafasso Decl. ¶ 33.

The parties are currently in the midst of summary judgment briefing regarding the adequacy of the Department's search to uncover all records responsive to the Guidance FOIA. The Department moved for summary judgment on November 16, 2018. *See* ECF Nos. 16, 17. American Oversight opposed and cross-moved for summary judgment briefing on December 13, 2018. *See* ECF Nos. 18, 19. Defendant first sought a stay of briefing in light of a lapse of the Department's appropriations. *See* ECF No. 20, Dec. 26, 2018. The agency then sought an extension on the evening its response-reply was due as a result of the discovery of the Whitaker Email. *See* ECF No. 22, Feb. 28, 2019. Prior to the release of the Whitaker Email, Defendant proposed resuming summary judgment briefing on the following schedule: Defendant's response-reply brief would be due on April 26, 2019, and Plaintiff's cross-reply would be due on May 15, 2019. *See* Joint Status Report ¶ 4, ECF No. 23, Mar. 7, 2019. At that time Plaintiff stated that it was not in a position to evaluate Defendant's proposed schedule absent further information about the then-yet-to-be-produced responsive record and DOJ's planned supplemental search, but proposed notifying Defendant and the Court by April 15, 2019, if it concluded that a different briefing schedule would be appropriate. *See id.* ¶ 5. The Court entered Defendant's proposed scheduled but noted that "Plaintiff may move to modify the above schedule for good cause after reviewing the records." *See* Minute Orders, Mar. 8 & 11, 2019.

ARGUMENT

I. Legal Standards

Summary judgment is typically the proper mechanism by which courts resolve legal disputes in FOIA litigation. *Lantz v. U.S. Dep't of Commerce*, 316 F. Supp. 3d 523, 527

(D.D.C. 2018) (citing *Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011); *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). It is the agency's burden to demonstrate the adequacy of its search for responsive records, which is often met through the submission of detailed and non-conclusory sworn declarations. *See Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) ("*Weisberg II*"). Agency affidavits are typically accorded a presumption of good faith. *SafeCard Servs., Inc. v. Sec. & Exch. Comm'n*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (citing *Ground Saucer Watch, Inc. v. Cent. Intelligence Agency*, 692 F.2d 770, 771 (D.C. Cir. 1981)). However, "if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." *Founding Church of Scientology v. Nat'l Sec. Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979).

Discovery is rare in FOIA litigation, *Pub. Citizen Health Research Group v. Food & Drug Admin.*, 997 F. Supp. 56, 72 (D.D.C. 1998), *rev'd in part on other grounds*, 185 F.3d 898 (D.C. Cir. 1999); however, "[t]he major exception . . . is when the plaintiff raises a sufficient question as to the agency's good faith in processing documents," *Landmark Legal Found. v. Envtl. Prot. Agency*, 959 F. Supp. 2d 175, 184 (D.D.C. 2013) (quoting U.S. Dep't of Justice, Guide to the Freedom of Information Act 812 (2009)). To rebut the presumption of good faith, a plaintiff's "allegations regarding the 'existence and discoverability of other documents' [must not be] 'purely speculative.'" *Id.* at 182 (citing *Negley v. Fed. Bureau of Investigation*, 169 F. Appx. 591, 594 (D.C. Cir. 2006)); *see also SafeCard Servs., Inc.*, 926 F.2d at 1200. A FOIA defendant that has failed to make accurate representations to the Court or otherwise acted in bad faith may not avoid discovery merely by making belated attempts at corrective action through additional searches and productions. *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 185 F. Supp. 3d 26, 28–30 (D.D.C. 2016) (ordering discovery in a FOIA case even after

supplemental searches and productions by defendant agency due to unreliability of agency's representations to the Court); *Landmark Legal Found.*, 959 F. Supp. 2d at 179–80, 184 (ordering discovery in a FOIA case even after additional searches and productions by defendant due to facts and circumstances that undermined the Court's confidence in the truthfulness of the agency's representations).

When discovery is granted, it is often in circumstances where the adequacy of the agency's search has been called into question. U.S. Dep't of Justice, Guide to the Freedom of Information Act, "Litigation Considerations" at 113 & n.319 (Nov. 26, 2013), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/litigation-considerations.pdf; *see also Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980) ("*Weisberg I*"); *Pub. Citizen*, 997 F. Supp. at 72; *Pulliam v. Envtl. Prot. Agency*, 292 F. Supp. 3d 255, 260–61 (D.D.C. 2018). Discovery is also merited "in an even rarer subset of these cases [when] the government's response to a FOIA request smacks of outrageous conduct." *Judicial Watch, Inc. v. U.S. Dep't of State*, 344 F. Supp. 3d 77, 80 (D.D.C. 2018) (citing *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 34 F. Supp. 2d 28, 41 (D.D.C. 1998); *DiBacco v. U.S. Army*, 795 F.3d 178, 192–93 (D.C. Cir. 2015); *Flowers v. Internal Revenue Serv.*, 307 F. Supp. 2d 60, 71 (D.D.C. 2004)).

Rule 56(d) of the Federal Rules of Civil Procedure, formerly Rule 56(f), permits the court to "allow time to obtain affidavits or declarations or to take discovery" when a party opposing summary judgment "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d)(2). The declaration must: (1) "outline the particular facts he intends to discover and describe why those facts are necessary to the litigation"; (2) "explain 'why [he] could not produce [the facts] in opposition to the motion

[for summary judgment]'"; and (3) "show the information is in fact discoverable." *Convertino v. U.S. Dep't of Justice*, 684 F.3d 93, 99–100 (D.C. Cir. 2012) (internal citations omitted); *see also Banks v. Veneman*, 402 F. Supp. 2d 43, 47 (D.D.C. 2005) (The party seeking discovery "bears the burden of identifying the facts to be discovered that would create a triable issue and why the party cannot produce those facts in opposition to the motion.").

II. Summary Judgment Is Premature in This Case.

Summary judgment is inappropriate in FOIA litigation when the sufficiency of the agency's search is genuinely at issue. *Founding Church of Scientology*, 610 F.2d at 836. In support of its motion for summary judgment, the Department provided a statement of material facts as to which, it stated, there was no genuine dispute. *See* Def. Dep't of Justice's Statement of Material Facts as to Which There Is No Genuine Dispute, Nov. 16, 2018, ECF No. 16-2. That statement included assertions that "no written guidance or directives were issued to Mr. Huber in connection with this directive, either by the Attorney General, or by other senior leadership office staff" and that that conclusion was "confirmed over the course of several conversations between OIP and OAG." *Id.* ¶¶ 13–14 (citations omitted). However, hours before its reply and response to Plaintiff's cross-motion for summary judgment was due, the Department informed American Oversight that, in fact, there was a responsive record—with the eventual production over a week later revealing that Attorney General Sessions wrote a letter to Mr. Huber directing him to initiate an evaluation and that the Attorney General's Chief of Staff personally emailed the letter to Mr. Huber. Cafasso Decl., Ex. G. Critically, the document in question was in the possession of two individuals upon whose personal knowledge the DOJ's inaccurate declaration was based: Matthew Whitaker and John Huber.

Having called into question the veracity of material facts mere hours before the agency was prepared to continue defending its search, the Department's limited supplemental search does not restore the presumption of regularity to the Department's representations to American Oversight and to the Court. *See Competitive Enter. Inst.*, 185 F. Supp. 3d at 28; *Landmark Legal Found.*, 959 F. Supp. 2d at 179–80, 184. The incongruity between the representations made by the Declarant—that no records had been created and that all guidance and direction had been provided orally—and the discovery of responsive records undermines the credibility of all of the agency's untested and unsubstantiated assertions in this case, leaving Plaintiff to struggle in the dark with two fundamental questions: (1) what records were actually created reflecting the guidance and direction provided to Mr. Huber; and (2) where do those records exist? Consequently, discovery is necessary for American Oversight to evaluate whether the Department has conducted "a search reasonably calculated to uncover all relevant documents." *Weisberg II*, 705 F.2d at 1351.

The supplemental search conducted by the Department does not resolve the material facts in dispute. First, even if Plaintiff were to accept Defendant's representations regarding the scope and conduct of the supplemental search, it fails to address the questions of material fact introduced by the false representations that shaped the initial search in this case. Defendant submitted a declaration wherein it stated, based on representations made by Mr. Whitaker and Mr. Huber, among others, that there were absolutely no responsive records to the Guidance FOIA, and it affirmatively claimed that all guidance and direction provided to Mr. Huber was communicated orally. Brinkmann Decl. ¶¶ 14–16. Defendant subsequently identified a responsive record that was emailed from Mr. Whitaker to Mr. Huber. Cafasso Decl. ¶¶ 24–27; Cafasso Decl., Ex. G. Even in conducting its supplemental search, Defendant ignored the

fundamental flaw it was attempting to cure: if Mr. Whitaker and Mr. Huber had forgotten about (or deliberately overlooked) an email containing a formal directive from the attorney general, is it not possible that they forgot other categories of responsive records as well? In any event, having already made material misrepresentations to the Court, the fact that Defendant may, in the future, file additional declarations in this matter will not resolve these questions because Defendant's own conduct in this case establishes that limited discovery is necessary to test the reliability of Defendant's representations. *See Competitive Enter. Inst.*, 185 F. Supp. 3d at 28; *Landmark Legal Found.*, 959 F. Supp. 2d at 179–80, 184.

The scope of the investigation delegated to Mr. Huber is a matter of considerable public interest. The belatedly produced Attorney General Directive makes clear that, with limited if any predicate, the Attorney General directed Mr. Huber to undertake a broad, sweeping, and vaguely defined review of allegations regarding the political opponents of the president based on a demand by the president's political allies in Congress. These are troubling facts, and the public is entitled to know the full scope of Mr. Huber's assignment. But accountability for this troubling delegation depends upon a full disclosure of records reflecting the nature of all guidance and direction Mr. Huber received, which in turn depends upon the Department conducting a thorough search reasonably calculated to identify *all* responsive records. The sufficiency of that search for records responsive to the Guidance FOIA is the central question that remains in this matter. The parties have a genuine dispute regarding material facts related to the adequacy of the search that are necessary for summary judgment. Defendant is uniquely in possession of evidence relating to those facts, and Plaintiff cannot obtain that evidence without limited discovery. Therefore, briefing should be suspended so that American Oversight can conduct limited discovery to

establish admissible evidence relevant to the appropriateness of summary judgment in this matter for either party.

III. Limited Discovery Is Necessary and Appropriate.

The reliance on government declarations rather than discovery in the typical FOIA case rests on the presumption of regularity—that is, the assumption that government officials are acting in good faith and properly discharging their official duties. *See Weisberg II*, 705 F.2d at 1351; *see also Chem. Found.*, 272 U.S. at 14–15. Discovery is appropriate here because the plain facts revealed by the government's belated disclosure fully rebut that presumption, as those facts directly contradict the representations made by the Office of the Attorney General and the Office of the Deputy Attorney General, as reported in the sworn declaration filed in support of Defendant's motion for summary judgment, and raise grave concerns regarding whether the Department's initial search was grossly negligent or was not conducted in good faith.

A. The Department defended its initial determination that there were no responsive records with a declaration that relied on representations of senior DOJ officials.

American Oversight has concrete, non-speculative reasons for doubting the reliability of the Department's representations in this action and the Department's good faith. *See Landmark Legal Found.*, 959 F. Supp. 2d at 182; *SafeCard Servs.*, 926 F.2d at 1200. This is not a case where Plaintiff seeks discovery based on the "bare hope of falling upon something that might impugn the affidavits" submitted by the government. *See Founding Church of Scientology*, 610 F.2d at 836–37 n.101 (citing *Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 355 (D.C. Cir. 1978). The reliability of the Department's declaration is already called into question by a simple comparison between the Declarant's description of the alleged search performed by OAG resulting in a determination that there were no responsive records to the Guidance FOIA and the

facts revealed by the responsive record—including a formal directive—that the Department finally produced.[3]

The declaration averred that OAG, after conversations with knowledgeable Department officials, including both then-OAG Chief of Staff Matthew Whitaker and U.S. Attorney John Huber, advised OIP that there was no written guidance or direction provided to Mr. Huber and further represented affirmatively that all guidance or direction provided to Mr. Huber on these issues was provided orally. Brinkmann Decl. ¶¶ 14–16. According to the declaration, at some point between when the Guidance FOIA was filed on November 22, 2017, and when OIP provided a final response on July 16, 2018, OIP contacted "the Counselor in the Attorney General's Office . . . responsible for assisting OIP with FOIA requests for OAG documents to ascertain . . . what guidance or directives, if any, were issued." *Id*. ¶ 14. The declaration went on to state that "[t]he Counselor to the Attorney General then conferred with other Department officials with direct knowledge of the subject matter, including the then-OAG Chief of Staff [Whitaker] and U.S. Attorney Huber." *Id.*

To conclude that there were no responsive records, the Declarant relied on OAG having "advised that, when the Attorney General directed Mr. Huber to evaluate these matters, no written guidance or directives were issued to Mr. Huber in connection with this directive, either by the Attorney General, or by other senior leadership office staff." *Id.* ¶ 15. According to the Declarant, OAG further informed her "that the details of Mr. Huber's direction were addressed

[3] American Oversight has no reason to believe that Declarant, a career attorney in OIP, inaccurately reported the information provided to her by officials in OAG and ODAG. However, in light of the facts revealed by the belatedly produced record, it is now clear that as a result of this reliance on the representations of others, the declaration relayed misrepresentations by officials in OAG (and possibly ODAG) that were at best the result of gross negligence and at worst a manifestation of a deliberate effort to conceal information and frustrate FOIA.

orally, in meetings or discussions among a small group of Department officials, including [then-Attorney General Jeff Sessions, Deputy Attorney General Rod Rosenstein, then-OAG Chief of Staff Matthew Whitaker, then-Principal Associate Deputy Attorney General Robert Hur], and U.S. Attorney Huber." *Id.*; Cafasso Decl. ¶ 22. Finally, the declaration states that "the lack of written guidance or directives was confirmed by OAG, pursuant to internal OAG discussions as well as discussions with Mr. Huber himself." Brinkmann Decl. ¶ 15. OIP concluded that no additional searching was necessary for written guidance or directives "[i]n light of the clear, comprehensive, and conclusive information [it] received directly from OAG." *Id.* ¶ 16.

The Department's March 8, 2019 production directly undermines the credibility of the Department's representations in the declaration and the OAG's representations to the Declarant: the belatedly discovered record is itself an email from Mr. Whitaker to Mr. Huber—the two individuals who, according to the declaration, were consulted regarding the records requested—relaying a formal letter from Attorney General Sessions charging Mr. Huber with undertaking a wide-ranging review of more than fifteen issues proposed for criminal investigation by Republican members of Congress, including the then-chairman of the U.S. House Committee on the Judiciary, involving the conduct of the former Democratic nominee for president, Hillary Clinton, as well as the conduct of the investigation into Russian interference in the 2016 election by DOJ and the FBI. Cafasso Decl. ¶¶ 24–27; Cafasso Decl., Ex. G. The stark contrast between the representations made by OAG reflected in the declaration and the facts revealed by the disclosed record raise serious questions regarding whether OAG participated in this search properly and in good faith.

B. The discovery of a responsive email that directly contradicts representations made by senior DOJ officials gives rise to non-speculative reason to doubt the good-faith presumption typically afforded an agency declaration.

It is difficult to believe that the failure to disclose the existence of the Whitaker Email and the Attorney General Directive to OIP was merely a failure of recollection or an inadvertent omission. A formal delegation of an investigative charge by the attorney general is a rare occurrence—Plaintiff is unaware that DOJ appointed any other special prosecutors during Mr. Sessions's tenure as attorney general. Cafasso Decl. ¶ 12. And the charge contained in the Attorney General Directive—to review criminal investigations of the Clintons and the Clinton Foundation as well as disturbing allegations of abuse of power by the Department itself and the FBI, apparently in response to a request by political allies of the president in the House of Representatives—is high profile and highly controversial. Such a sensitive formal delegation of authority is nothing if not memorable.

Thus, it strains credulity that none of the knowledgeable Department officials consulted—including Mr. Whitaker and Mr. Huber, the sender and recipient of the email relaying the Attorney General Directive—recalled the existence of this letter when, only a few months after the letter was sent, they were directly questioned about the existence of written guidance or direction. It is likewise difficult to credit that all of those knowledgeable officials instead explicitly recalled that all direction was provided to Mr. Huber only orally in meetings and discussions. Nor is it credible that the misrepresentation resulted from confusion about whether this record was responsive to the request—a formal letter defining the scope of Mr. Huber's charge is at the very core of the sort of guidance and direction sought by the request. These facts plainly call the Department's representations in its declaration "into question," and raise questions "as to the agency's good faith" in a manner that courts have found warrants

discovery. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, No. 05-2078, 2006 WL 1518964, at *3 (D.D.C. June 1, 2006) [hereinafter *CREW v. DOJ*] (citing *Judicial Watch Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 25 (D.D.C. 2000); *Pub. Citizen*, 997 F. Supp. at 72–73)).

Additional facts surrounding the letter raise further questions about the reliability of Defendant's search. Indeed, given the nature of Mr. Huber's extraordinary assignment outside his ordinary jurisdiction as U.S. Attorney for the District of Utah, the absence of any responsive records alone should have struck "Department officials with direct knowledge about the subject matter," Brinkmann Decl. ¶ 14, as odd and unlikely.[4] In addition, despite the fact that the Attorney General Directive expressly indicated that the delegation of authority to Mr. Huber was undertaken "[i]n consultation with the Deputy Attorney General," the Declarant indicated that she consulted with an unnamed official in ODAG regarding OAG's representation that Mr. Huber received no written guidance or directives, and ODAG presumably confirmed this (now clearly erroneous) claim. Brinkmann Decl. ¶ 15. Moreover, it is unclear that OAG took its FOIA search obligations seriously at all, given that a simple review of the Attorney General's correspondence file for the relevant time period for any correspondence with Mr. Huber should have uncovered a formal letter like the belatedly discovered document.[5]

[4] Sections III.A, III.B, and III.C of Plaintiff's memorandum in support of its cross-motion for summary judgment and opposition to Defendant's motion discussed a number of categories of documents that one would expect to exist in the instance of such an extraordinary delegation of authority, including one such as the Attorney General Directive. Mem. of Points & Authorities Supp. of P.'s Cross-Mot. for Summ. J & Opp. to Def.'s Mot. for Summ. J. at 14–23, ECF 18-1.

[5] Nor is it credible that the passage of time somehow obscured officials' recollection of this memorable record. The belatedly disclosed record reveals that Mr. Whitaker emailed the Attorney General Directive to Mr. Huber a little after five o'clock on the evening of November 22, 2017, four hours after Plaintiff submitted the FOIA request seeking any guidance or directives provided to Mr. Huber, and the processing of the Guidance FOIA was completed only months later. *Compare* Cafasso Decl., Ex. G *with* Brinkmann Decl. ¶¶ 7, 14–15. Moreover,

C. In light of the non-speculative reason to doubt the presumption of regularity, American Oversight is entitled to discovery.

In these circumstances, Plaintiff is entitled to discovery to test whether the explanation for those evident and indisputable misrepresentations is deliberate concealment, gross negligence, or something in between. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Veterans Affairs*, 828 F. Supp. 2d 325, 334 (D.D.C. 2011) (hereinafter *CREW v. VA*) (approving deposition of two VA employees for the "purpose of determining whether the explanation for the [potential improper destruction of responsive records] is document destruction, incompetence, or something in between"). The facts here raise sufficient questions regarding the good faith of the search on the part of the Department to warrant limited discovery for the purpose of exploring the reasons and motivations behind the false representations regarding both the existence of responsive records and the course of dealing between OAG and Mr. Huber. *See CREW v. DOJ*, No. 05-2078, 2006 WL 1518964, at *3–6 (D.D.C. June 1, 2006) (granting plaintiff's motion for discovery in the form of time-limited depositions because plaintiff raised sufficient question of bad faith on the part of the government to "warrant limited discovery for the purpose of exploring the reasons behind the delays in processing [the plaintiff's] FOIA requests").

One of the primary reasons courts grant discovery in FOIA matters is to resolve material questions that have arisen regarding the adequacy of an agency's search. *See Landmark Legal Found.*, 959 F. Supp. 2d at 184; *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 127 F. Supp. 2d

---

throughout this timeframe, this extraordinary assignment of investigative authority to Mr. Huber was ongoing and remained of considerable interest on both sides of the aisle in Congress. *See* Laura Jarret, *Acting AG Whitaker Reveals Federal Prosecutor Still Investigating GOP Claims of FBI Misconduct*, CNN (Jan. 3, 2019, 11:58 a.m.), https://www.cnn.com/2019/01/03/politics/whitaker-prosecutor-fbi/index.html.

228, 230 (D.D.C. 2000); *Bangoura v. U.S. Dep't of the Army*, No. 05-0311, 2006 WL 3734164, at *6 (D.D.C. Dec. 8, 2006); *Long v. U.S. Dep't of Justice*, 10 F. Supp. 2d 205, 210 (N.D.N.Y. 1998). This is true particularly where, like here, Plaintiff can point to concrete facts that draw the reliability of the agency's declarations into question. *CREW v. VA*, 828 F. Supp. 2d at 334; *Landmark Legal Found.*, 959 F. Supp. 2d at 184; *Weisberg I*, 627 F.2d at 370–71; *Pulliam*, 292 F. Supp. 3d at 260-61.

As courts in this District have recognized, discovery may be granted in FOIA matters where plaintiff has made a sufficient showing that the agency may have acted in bad faith, "has raised a sufficient question as to the agency's good faith," or "when a factual dispute exists and the plaintiff has called the affidavits submitted by the government into question." *CREW v. DOJ*, No. 05-2078, 2006 WL 1518964, at *3 (D.D.C. June 1, 2006) (internal citations omitted).

Unlike a typical FOIA case where discovery is not necessary because the agency "has made a detailed declaration in good faith and there is no factual dispute remaining," *Bangoura*, 2006 WL 3734164, at * 2, here the belatedly produced record, on its face, raises material factual questions about the adequacy of the Department's search, as well as whether OAG participated in the initial search in good faith. The deficiencies in the Department's posture in this litigation are similar to those when the court granted discovery in *Bangoura*: there is no explanation for "why the search procedures were not adequate enough to find the [document] during the initial search," and DOJ has provided no "rationale for the delay in finding the requested [document]." *Id*. at *6. Ultimately, discovery is warranted here because "there are direct contradictions, questions of fact, and questions of good faith" that arise from reviewing and comparing the

belatedly discovered record and the false representations contained in the initial declaration. *See Long*, 10 F. Supp. 2d at 210.[6]

IV. Plaintiff's Proposed Discovery Is Necessary to Establish Material Facts Regarding the Adequacy of the Search

To illustrate why limited discovery is necessary here to establish facts material to the question before the Court, Plaintiff provides the following overview of the discovery it believes is necessary to adduce facts likely to create a genuine issue of material fact regarding the adequacy of the Department's search and any attempts to undermine FOIA.[7] If requested, Plaintiff will provide a detailed discovery plan within seven days of its motion being granted or as otherwise ordered by the Court. To establish the facts necessary to evaluate summary judgment, Plaintiff proposes to begin with a small number of interrogatories and time-limited

[6] The unexplained delay by DOJ in actually producing the responsive record once it was identified is also not encouraging. Defendant first informed Plaintiff that it had identified this record in the evening of Thursday, February 28, 2019, the day Defendant's reply-response was originally due to be filed. Cafasso Decl. ¶ 20. Yet despite Plaintiff's repeated requests that Defendant produce the record in advance of the joint status report scheduled by the Court for March 7, 2019, Defendant only produced the record after close of business on Friday, March 8, 2019. *Id.* ¶ 24. There is no legal basis under FOIA to delay the release of an identified record to a FOIA requester in order to serve the public relations interests of the agency—a requester is entitled to prompt access to responsive records by law. Yet Plaintiff is aware of no other explanation for the delay in production of the record, which OIP eventually produced in full, without any claim of exemption and with no indication that it was a discretionary release. Nor, once the record was identified, did Defendant indicate to Plaintiff at any time that it was evaluating whether the record was releasable; rather, as reflected in Defendant's request for an extension, Plaintiff understood that Defendant had already made a determination that the record was releasable. Def.'s Unopposed Mot. for Extension of Time ¶ 2, Feb. 28, 2019, ECF No. 22 (OIP "learned this evening of a record responsive to Plaintiff's 'Guidance FOIA' request that was not identified by OIP's initial search for records. In light of this discovery, DOJ requests a short extension of time to produce this record to Plaintiff . . . ."); *see also* Joint Status Report ¶ 1, Mar. 7, 2019, ECF No. 23 ("The Department will release the record it identified to Plaintiff this week."). Notably, this unexplained delay also meant that the record was not produced until after March 2, 2019, Mr. Whitaker's last day at the Department. *See* Cafasso Decl. ¶ 21.

[7] The overview provided here may not be exhaustive. Additional facts gathered during discovery may identify additional areas where it is necessary for Plaintiff to conduct further discovery.

depositions. This proposed discovery will seek to elicit the facts necessary to ascertain the adequacy of the Department's search and evaluate whether the failure of the initial search to identify the Whitaker Email resulted from negligence or a deliberate attempt to prevent compliance with FOIA. Plaintiff has, in the first instance, limited its request for depositions to those individuals most likely to possess concrete and first-hand information about the Department's search, the existence and location of responsive records, and any actions that may reflect on whether Department officials discharged their duties in connection with the initial search for records responsive to the Guidance FOIA properly and in good faith.

A. There exist unknown facts necessary to resolve this litigation.

A party seeking discovery must "outline the particular facts he intends to discover and describe why those facts are necessary to the litigation." *Convertino*, 684 F.3d at 99 (citing *Byrd v. Envtl. Prot. Agency*, 174 F.3d 239, 248 (D.C. Cir 1999)). The central question that remains in this litigation is whether Defendant conducted a reasonable search calculated to uncover all responsive records. *See* Cafasso Decl. ¶ 35. To address that question in this litigation, Plaintiff needs, and seeks to discover, the following facts:

a. The number of meetings or conversations Mr. Huber had with the Office of the Attorney General and/or the Office of the Deputy Attorney General regarding the evaluation he was to undertake as described in Assistant Attorney General Boyd's letter;

b. For each of those meetings or conversations, how those meetings or conversations took place (e.g., by phone, by video conference, in person, etc.);

c. For each of those meetings or conversations, who was present during those meetings or conversations;

d. For each of those meetings or conversations, what, if any, records were used, exchanged, made available, or created in connection with those meetings or conversations that reflect guidance or direction provided to Mr. Huber, such as background materials, talking points, memoranda to file, or handwritten notes;

e. Who, if anyone apart from those present for those meetings or discussions, was involved in the drafting or review of the Attorney General Directive;

f. Whether any paper or electronic materials were provided to Mr. Huber other than by electronic mail (e.g., whether he was handed paper materials or a flash drive with files on it);

g. If any paper or electronic materials were provided to Mr. Huber other than by electronic mail, who provided them to him, and how;

h. Whether any officials communicated directly or indirectly to Mr. Huber outside those meetings and discussions to provide any other guidance or direction, and if so, whether that guidance or direction is captured in any records, such as text messages, messages on an electronic messaging system (such as Lync or Slack), voicemails, handwritten notes, or other medium of communication;

i. How the search for records was conducted and how any potentially responsive records were evaluated for responsiveness;

j. How paper and electronic records of former Department employees are handled upon their departure;

k. How paper and electronic records of Department employees who move to a different agency component are handled upon their transfer;

l. How and why it came to be that Defendant submitted a sworn declaration in support of its motion for summary judgment that contained material representations of statements made by "Department officials with direct knowledge of the subject matter," including the former Chief of Staff to the Attorney General and the U.S. Attorney for the District of Utah, that were untrue.

See id. ¶¶ 36–37.

Establishing these facts is necessary to the litigation, because these facts are material to the evaluation of the adequacy of the Department's search. *See id.* ¶¶ 38–39. These facts are necessary to determine what custodians, locations, and systems of records should have been searched to conduct a search reasonably calculated to identify all responsive records. *See id.* ¶ 38. These facts are also material to address the question of whether the misrepresentations contained in the initial declaration resulted from negligence or a lack of good faith in the discharge of the agency's responsibility to conduct a search for responsive records, and will indicate whether any additional discovery is necessary in this case. *See id.* ¶¶ 40–41. Thus these facts are material to American Oversight's and the Court's evaluation of whether the search conducted by the agency was adequate.

B. Defendant and former Department officials are in sole possession of the unknown facts necessary to resolve this litigation.

A party seeking discovery must also explain why it cannot produce the facts sought and show that the information is discoverable. *Convertino*, 684 F.3d at 99–100 (citations omitted). The facts outlined above remain solely in the possession of the Department and former Department officials, and are material to the question of the adequacy of the search currently pending before the Court on summary judgment. *See* Cafasso Decl. ¶¶ 39, 41, 43, 45. Likewise, the facts outlined above can be ascertained through discovery. *See id.* ¶ 44. Plaintiff's proposed

plan for limited discovery is designed to obtain admissible and material evidence necessary for Plaintiff to seek summary judgment and to oppose Defendant's motion for summary judgment in the most efficient manner consistent with obtaining reliable evidence regarding material facts in dispute. The limited interrogatories and depositions proposed by Plaintiff are intended to elicit evidence central to the question of the adequacy of Defendant's search, the primary remaining issue in this case. *See id.* ¶¶ 45–47.

The facts that Plaintiff seeks are outside of its possession and can be produced exclusively by Defendant or by former Department officials. *See id.* ¶ 43. To obtain admissible evidence as to the above-referenced facts as efficiently as possible, Plaintiff intends to use a limited number of interrogatories to identify information like the identities of participants in relevant activities at the Department, such as the participants in meetings and discussions where guidance or direction was provided to Mr. Huber; the participants in the drafting of the Attorney General Directive; and the participants in the initial search for responsive records who communicated with OIP or with officials in OAG or ODAG gathering information to relay to OIP. *See id.* ¶ 46.

In addition, Plaintiff proposes to conduct a small number of time-limited depositions, starting with the witnesses most likely to be able to provide relevant evidence regarding how the search was conducted; possible locations, custodians, or systems of records where responsive records might be located; how the initial search was conducted; how the request was construed by the Department; and how inaccurate representations came to be included in the Department's sworn declaration:

i. Vanessa Brinkmann, Office of Information Policy (the Declarant);

ii. The Counselor to the Attorney General who undertook the search of OAG for responsive records and communicated to OIP regarding the results of that search;

iii. Then-Chief of Staff to the Attorney General Matthew Whitaker; and

iv. U.S. Attorney for the District of Utah Huber. [8]

See id. ¶ 47. Depending on the information obtained from this discovery, it might also be necessary to depose the official (or officials) in ODAG with whom OIP consulted to confirm the (erroneous) results of the OAG search. *See id.* ¶ 41. Any discovery by Plaintiff can be appropriately limited to focus on that which is admissible, such as the process by which any guidance or direction was conveyed and recorded so as to facilitate the identification of potential locations of responsive records, and towards how the search was conducted, in order to evaluate the adequacy of the search, including whether it was reasonably calculated to identify all potentially responsive records.

Plaintiff is hopeful that this limited discovery will be sufficient to identify the evidence necessary to proceed to summary judgment. However, it is possible that during the course of conducting this discovery, Plaintiff may learn additional facts that identify additional areas where it is necessary for Plaintiff to conduct further discovery. Plaintiff would notify the Court before pursuing discovery apart from the proposed discovery outlined above.

[8] To the extent that relevant personnel or officials have left the Department, Plaintiff may have to serve third-party discovery requests on such persons. Indeed, because multiple key witnesses to the relevant events are now former officials, DOJ lacks the authority to compel their cooperation or participation in this matter. Having waited until key witnesses left government service before taking steps to correct the record, DOJ effectively lacks the ability to identify material information to evaluate the adequacy of the search absent discovery through court-backed subpoenas.

V. Plaintiff's Proposed Discovery Plan Is Reasonable and Proportionate to the Needs of This Case.

Plaintiff is not unaware of the gravity of its request to depose the person who served as both chief of staff to the attorney general and later as acting attorney general. Plaintiff is not seeking "to probe the mental processes" of any DOJ officials, *see United States v. Morgan*, 313 U.S. 409, 422 (1941), but rather is seeking a limited amount of time to inquire with the individuals who have first-hand knowledge of relevant facts regarding the records in question, including the locations, custodians, or systems of records where potentially responsive records might be located, and thus are in the best position to answer questions regarding the facts outlined above, so as to ensure that the Department conducts a search reasonably calculated to uncover *all* relevant records, *see Weisberg I*, 627 F.2d at 370–71.

The Guidance FOIA seeks directives and guidance given to a United States Attorney for an investigation that potentially centers on a former political adversary of the president. The Department's initial declaration stated that no such records exist because all such direction and guidance was exclusively provided to U.S. Attorney Huber orally by a small group of the most senior DOJ officials, including the attorney general's chief of staff. The belatedly produced email from Mr. Whitaker to Mr. Huber directly refutes the representations made by OAG officials, reportedly based on consultations directly with both Mr. Whitaker and Mr. Huber, contained in DOJ's declaration. The supplemental search yielded no additional responsive records and did not assuage Plaintiff's concerns regarding the adequacy of DOJ's search.

The agency is no longer entitled to a presumption of regularity in this case, and it is necessary for American Oversight to conduct discovery that will test the facts relating to the issue before the Court—whether there has been an adequate search for records responsive to Plaintiff's FOIA request—and reveal all potential locations where responsive records might be

located. The identified DOJ officials above are proposed as deponents because they have direct knowledge regarding the occasions and mechanisms through which information was relayed to Mr. Huber and consequently regarding where records reflecting any such guidance and direction may exist. *See Fed. Deposit Ins. Corp. v. Galan-Alvarez*, No. 15-mc-752, 2015 WL 5602342, at *3 (D.D.C. Sept. 4, 2015) (quoting *Lederman v. N.Y.C. Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013)) (party seeking to depose high-ranking official must demonstrate, "for example, that the official has unique first-hand knowledge related to the litigated claims or that the necessary information cannot be obtained through other, less burdensome or intrusive means"); *see also Payne v. District of Columbia*, 859 F. Supp. 2d 125, 136 (D.D.C. 2012). The proposed deponents are in the best position to provide admissible evidence regarding the questions of material fact relevant to resolution of this case, particularly where the evidence submitted by the Department to date raises significant questions that can be answered only by those with first-hand knowledge of the facts at issue.

VI. Conclusion

For the foregoing reasons, Plaintiff American Oversight respectfully requests that this Court stay summary judgment briefing and grant American Oversight leave to conduct discovery pursuant Federal Rule of Civil Procedure 56(d) to obtain admissible evidence about what records responsive to the Guidance FOIA were created, where those records may be located, and whether the Department's submission of false statements to the Court in a sworn declaration submitted in support of its motion for summary judgment was the result of gross negligence or a deliberate attempt to frustrate FOIA.

Dated: April 15, 2019

Respectfully submitted,

/s/ Cerissa Cafasso
Cerissa Cafasso
D.C. Bar No. 1011003
Daniel A. McGrath
D.C. Bar No. 1531723
Austin R. Evers
D.C. Bar No. 1006999

AMERICAN OVERSIGHT
1030 15th Street NW, B255
Washington, DC 20005
(202) 869-5244
cerissa.cafasso@americanoversight.org
daniel.mcgrath@americanoversight.org
austin.evers@americanoversight.org

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, *Plaintiff*, v. U.S. DEPARTMENT OF JUSTICE, *Defendant*.	)	Case No. 18-cv-319 (CRC)

DECLARATION OF COUNSEL IN SUPPORT OF PLAINTIFF'S MOTION TO STAY SUMMARY JUDGMENT BRIEFING AND FOR LEAVE TO SEEK LIMITED DISCOVERY PURSUANT TO RULE 56(d)

1. I am an attorney employed by American Oversight and counsel for Plaintiff in the above-captioned matter. I have personal knowledge of the matters set forth below.

2. Pursuant to Federal Rule of Civil Procedure 56(d), I submit this declaration in support of Plaintiff's motion to allow time for limited discovery. This declaration outlines the limited facts Plaintiff seeks to discover regarding custodians, record locations, and systems of records where there may exist records responsive to Plaintiff's Freedom of Information Act (FOIA) request. These facts are necessary to determine what would constitute an adequate search for records required by Defendant under FOIA.

3. There exist disputes as to material facts regarding the agency's search for records. Plaintiff seeks discovery to resolve those facts, all of which are in Defendant's possession and which Plaintiff needs to oppose Defendant's motion for summary judgment.

4. In July and September 2017, Representative Bob Goodlatte, Chairman of the House of Representatives Committee on the Judiciary ("the Committee"), and several other members of the Committee signed letters to then-Attorney General Jeff Sessions and Deputy Attorney General Rod Rosenstein requesting the appointment of a second special counsel to

investigate numerous actions taken by persons who served in the executive branch during the Obama administration, including former Secretary of State Hillary Clinton and numerous DOJ and Federal Bureau of Investigation (FBI) officials ("Goodlatte Letters"). *See also* Def. Dep't of Justice's Statement of Material Facts as to Which There Is No Genuine Dispute ¶¶ 1–2, Nov. 16, 2018, ECF No. 16-2 ("Def.'s Statement of Material Facts"). A true and correct copy of the Goodlatte Letters is attached hereto as Exhibit A.

5. On November 13, 2017, the Assistant Attorney General for Legislative Affairs, Stephen E. Boyd, responded to the Committee's letters and stated that "the Attorney General has directed senior federal prosecutors to evaluate certain issues raised in your letters" ("Boyd Response"). *See also* Def.'s Statement of Material Facts ¶ 3. A true and correct copy of the Boyd Response is attached hereto as Exhibit B.

6. On November 22, 2017, between approximately 1:15 pm and 1:35 pm, I submitted several FOIA requests to the Department of Justice related to the Boyd Response.

7. Two of those FOIA requests were included in the instant litigation and were the subject of the Department's motion for summary judgment.

8. In the Prosecutors FOIA, American Oversight requested records sufficient to identify all of the "senior federal prosecutors" who have been "directed" "to evaluate certain issues raised in [the Goodlatte Letters]" as indicated by the Boyd Response. A true and correct copy of the Prosecutors FOIA is attached hereto as Exhibit C.

9. In the Guidance FOIA, American Oversight requested all guidance or directives provided to the "senior federal prosecutors" who have been "directed" "to evaluate certain issues raised in [the Goodlatte Letters]" as indicated by the Boyd Response. A true and correct copy of the Guidance FOIA is attached hereto as Exhibit D.

10. On or about July 16, 2018, Defendant issued a "final response" to American Oversight in response to both the Prosecutors FOIA and the Guidance FOIA. A true and correct copy of the July 16, 2018 response is attached hereto as Exhibit E.

11. In response to the Prosecutors FOIA, the Department provided a letter dated March 29, 2018, from Attorney General Jeff Sessions to congressional committees that identified U.S. Attorney for the District of Utah John Huber as the special prosecutor leading the Department's evaluation of certain issues raised in the Goodlatte Letters.

12. I am unaware that the Department appointed any other such special prosecutors during Mr. Sessions's tenure as attorney general.

13. In response to the Guidance FOIA, the Department stated that it had identified no responsive records in the Office of the Attorney General or in the Office of the Deputy Attorney General.

14. On November 16, 2018, the Department filed its motion for summary judgment on the adequacy of the searches for both the Prosecutors FOIA and the Guidance FOIA.

15. In support of its motion for summary judgment, Defendant filed the "Declaration of Vanessa R. Brinkmann." *See* Declaration of Vanessa Brinkmann, ECF No. 16-3 ("Brinkmann Decl."). A true and correct copy of the Brinkmann Declaration (without its exhibits) is attached hereto as Exhibit F for ease of the Court's reference.

16. The Declarant stated that she had "determined that a direct inquiry to knowledgeable staff in the Office of the Attorney General (OAG) would be the most logical and effective search method." *Id.* ¶ 14. She, therefore, "contacted the Counselor to the Attorney General in OAG who is responsible for assisting [the Office of Information Policy (OIP)] with FOIA requests for OAG documents to ascertain . . . what guidance or directives, if any, were

issued." *Id.* ¶ 14. The Declarant then represented that the Counselor "conferred with other Department officials with direct knowledge of the subject matter, including the then-OAG Chief of Staff and U.S. Attorney Huber." *Id.* ¶ 14.

17. According to public reporting, from September 2017 to November 2018, Matthew Whitaker served as Chief of Staff to Attorney General Jeff Sessions. *See* Ben Jacobs, *Matt Whitaker: Sessions's Replacement a Longtime Critic of Mueller Inquiry*, The Guardian (Nov. 7, 2018, 4:02 p.m.), https://www.theguardian.com/us-news/2018/nov/07/matt-whitaker-jeff-sessions-acting-attorney-general-mueller. After Mr. Sessions stepped down on November 7, 2018, Mr. Whitaker began serving as Acting Attorney General. *See id.* Therefore, although unnamed, American Oversight understands the Declarant's November 16, 2018 references to "the then-OAG Chief of Staff" regarding the November 2017 FOIA request to be to Mr. Whitaker.

18. The Declarant went on to state that "OAG"—without reference to a specific person in the office—"advised that, when the Attorney General directed Mr. Huber to evaluate these matters, no written guidance or directives were issued to Mr. Huber in connection with this directive, either by the Attorney General, or by other senior leadership office staff." Brinkmann Decl. ¶ 15.

19. The Declarant then stated that "OAG" advised that direction was provided orally "in meetings and discussions among a small group of Department officials, including the Attorney General, the Deputy Attorney General, the OAG Chief of Staff, the Principal Associate Deputy Attorney General, and U.S. Attorney Huber." *Id.* ¶ 15.

20. However, at approximately 9:04 pm on Thursday, February 28, 2019—the same day on which Defendant's response-reply was due in the summary judgment briefing of this

litigation—Defendant's counsel notified me via electronic mail that "OIP learned this evening of a record responsive to American Oversight's 'Guidance FOIA' request that has not previously been released to your client." That evening Defendant moved for an unopposed extension of time to file its brief. *See* Def.'s Unopposed Mot. for Extension of Time, Feb. 28, 2019, ECF No. 22.

21. According to public reports, Mr. Whitaker's last day of employment at the Department was Saturday, March 2, 2019. *See* Anna Hopkins, *Former Acting Attorney General Matthew Whitaker Leaves Justice Department*, Fox News, Mar. 4, 2019, https://www.foxnews.com/politics/former-acting-attorney-general-matthew-whitaker-leaves-justice-department.

22. On March 4, 2019, Defendant's counsel notified me via electronic mail that the Department would release that week the record identified on February 28 and would "conduct an electronic mail search of the following custodians for records responsive to the 'Guidance FOIA': Jeff Sessions, Rod Rosenstein, Matthew Whitaker, Robert Hur, and John Huber."

23. On Thursday, March 7, 2019, the parties filed a joint status report wherein Defendant stated it was going to release the identified record and "conduct an expedited, supplemental electronic mail search of custodians in the Department involved in U.S. Attorney John W. Huber's 'evaluat[ion] of certain issues' raised by members of Congress regarding 'the sale of Uranium One, alleged unlawful dealings related to the Clinton Foundation and other matters,' with the release of any additional responsive, non-exempt records to be made by April 4, 2019." Joint Status Report ¶ 2, Mar. 7, 2019, ECF No. 23.

24. On Friday, March 8, 2019, at approximately 5:06 p.m., Defendant produced the responsive record, consisting of one email and two substantive attachments. A true and correct copy of the Department's response letter and production are attached hereto as Exhibit G.

25. The email, dated November 22, 2017, is from Mr. Whitaker to Mr. Huber with the subject line "Letter from Attorney General" and a body that reads, in full, "As we discussed. MW". Ex. G at 3 ("Whitaker Email").

26. The first substantive attachment is a letter dated November 22, 2017, to Mr. Huber signed by Attorney General Sessions indicating the Attorney General's request that Mr. Huber review the matters raised in the November 13, 2017 letter from Assistant Attorney General Boyd to Chairman Goodlatte—in other words the letter that formed the basis of American Oversight's FOIA request. *See supra* ¶ 4. The letter goes on to reflect the request that Mr. Huber "make recommendations to [the Attorney General] or the Deputy Attorney General, as appropriate." *See* Ex. G at 4 ("the Attorney General Directive").

27. The second substantive attachment is the Boyd Response. *See* Ex. G at 5–6.

28. On April 4, 2019, Defendant issued a supplemental response in which it informed American Oversight that no additional records responsive to the Guidance FOIA were located during the supplemental search. A true and correct copy of the Department's response letter and production are attached hereto as Exhibit H.

29. On April 10, 2019, Defendant's counsel represented to me on a teleconference that Defendant had conducted only two supplemental searches. First, the Department conducted an electronic mail search of the following custodians for records responsive to the "Guidance FOIA": Jeff Sessions, Rod Rosenstein, Matthew Whitaker, Robert Hur, John Huber, and two personal assistants to Jeff Sessions. Second, Defendant also conducted a search of the Executive Secretariat.

30. Robert Hur served as Principal Associate Deputy Attorney General before being sworn in as the U.S. Attorney for the District of Maryland in April 2018. *See* Press Release, U.S.

Dep't of Justice, U.S. Attorney's Office, Dist. of Md., Robert K. Hur Is Sworn in as the 48th United States Attorney for the District of Maryland (Apr. 9, 2018), https://www.justice.gov/usao-md/pr/robert-k-hur-sworn-48th-united-states-attorney-district-maryland; John Fritze, *Marlyand's Federal Prosecutor Nominee Delayed Over Questions About Russia Probe*, Balt. Sun (Mar. 15, 2018, 6:50 p.m.), https://www.baltimoresun.com/news/maryland/politics/bs-md-robert-hur-confirmed-20180315-story.html. Therefore, although he was in the Office of the Deputy Attorney General when American Oversight filed the Guidance FOIA and initiated this litigation, he has since moved to a different component of DOJ.

31. I note that the five named persons in Defendant's supplemental electronic mail search described *supra* in Paragraphs 22 and 29 held the same titles as those persons described in Paragraph 15 of the Brinkmann Declaration: Attorney General Jeff Sessions; Deputy Attorney General Rod Rosenstein; OAG Chief of Staff Matthew Whitaker; Principal Associate Deputy Attorney General Robert Hur; and U.S. Attorney John Huber.

32. Since filing the underlying FOIA requests and initiating this litigation, Attorney General Sessions and Chief of Staff Whitaker have both left the Department of Justice, *see* Anna Hopkins, Former Acting Attorney General Matthew Whitaker Leaves Justice Department, Fox News, Mar. 4, 2019, https://www.foxnews.com/politics/former-acting-attorney-general-matthew-whitaker-leaves-justice-department, and, to the best of my knowledge, are no longer employed by the United States Government.

33. Defendant has yet to fully explain to American Oversight how it came to finally discover the Whitaker Email, including its attachments, or why it concluded that the limited supplemental search was sufficient to uncover all relevant records. Nor has Defendant explained how it failed to identify—even after speaking with officials with direct knowledge—a formal,

written directive signed by the Attorney General to a U.S. Attorney requesting an inquiry into numerous politically sensitive allegations related to former presidential candidate Hillary Clinton, the actions of the FBI surrounding the 2016 presidential election, and other sensitive matters. And Defendant has not produced or identified any other copy or draft of the Attorney General's formal order directing this sensitive and extraordinary evaluation by a U.S. Attorney.

34. When American Oversight opposed the Department's motion and cross-moved for summary judgment, it maintained its challenge only to the adequacy of the search for records responsive to the Guidance FOIA. American Oversight withdrew its challenge to the adequacy of the agency's search for records responsive to the Prosecutors FOIA "in light of the Department's sworn declaration that the representation to Congress that multiple senior prosecutors had been assigned was false" and that it was, in fact, only Mr. Huber who had been so assigned. *See* Mem. of Points & Authorities in Supp. of P.'s Cross-Mot. for Summ. J & in Opp'n to Def.'s Mot. for Summ. J. at 4–5 n.1 (citing Brinkmann Decl. ¶ 14).

35. The adequacy of Defendant's search for records responsive to the Guidance FOIA remains at issue in this litigation—namely whether the agency has conducted a search reasonably calculated to uncover all relevant records.

36. Plaintiff requires discovery to oppose Defendant's motion for summary judgment and to cross-move for summary judgment and ultimately to resolve this FOIA litigation.

37. Specifically, Plaintiff seeks to discover the following facts:

a. The number of meetings or conversations Mr. Huber had with the Office of the Attorney General and/or the Office of the Deputy Attorney General regarding the evaluation he was to undertake as described in Assistant Attorney General Boyd's letter;

b. For each of those meetings or conversations, how those meetings or conversations took place (e.g., by phone, by video conference, in person, etc.);

c. For each of those meetings or conversations, who was present during those meetings or conversations;

d. For each of those meetings or conversations, what, if any, records were used, exchanged, made available, or created in connection with those meetings or conversations that reflect guidance or direction provided to Mr. Huber, such as background materials, talking points, memoranda to file, or handwritten notes;

e. Who, if anyone apart from those present for those meetings or discussions, was involved in the drafting or review of the Attorney General Directive;

f. Whether any paper or electronic materials were provided to Mr. Huber other than by electronic mail (e.g., whether he was handed paper materials or a flash drive with files on it);

g. If any paper or electronic materials were provided to Mr. Huber other than by electronic mail, who provided them to him, and how;

h. Whether any officials communicated directly or indirectly to Mr. Huber outside those meetings and discussions to provide any other guidance or direction, and if so, whether that guidance or direction is captured in any records, such as text messages, messages on an electronic messaging system (such as Lync or Slack), voicemails, handwritten notes, or other medium of communication;

i. How the search for records was conducted and how any potentially responsive records were evaluated for responsiveness;

j. How paper and electronic records of former Department employees are handled upon their departure;

k. How paper and electronic records of Department employees who move to a different agency component are handled upon their transfer; and

l. How and why it came to be that Defendant submitted a sworn declaration in support of its motion for summary judgment that contained material representations of statements made by "Department officials with direct knowledge of the subject matter," including the former Chief of Staff to the Attorney General and the U.S. Attorney for the District of Utah, that were untrue.

38. These facts are material and necessary to determine how "guidance or directives" were provided to Mr. Huber as part of his being directed by the attorney general to evaluate certain matters raised in the Goodlatte Letters and, therefore, where Defendant must search for records responsive to the Guidance FOIA.

39. Without these facts, Plaintiff cannot evaluate the adequacy of Defendant's search and is, therefore, unable to either accept the supplemental search as adequate or to effectively challenge the search in summary judgment.

40. These facts are material to address the question of whether the misrepresentations contained in the initial declaration resulted from negligence or a lack of good faith in the discharge of the agency's responsibility to conduct a search for responsive records.

41. These facts are thus necessary to evaluate how material misrepresentations came to be made in this litigation and will indicate whether any additional discovery is necessary in this case.

42. Based on the material inconsistency between the Brinkmann Delcaration and the subsequent discovery of the Whitaker Email, Plaintiff cannot continue to rely simply on declarations to ascertain necessary facts to resolve this litigation.

43. Admissible evidence is not presently available to American Oversight; Defendant has been unwilling to provide this information to Plaintiff, and only Defendant possesses it.

44. The facts that Plaintiff seeks are discoverable. "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1).

45. The discoverable facts that Plaintiff seeks are necessary to resolve the issue of whether Defendant conducted a search reasonably calculated to uncover all relevant materials.

46. To obtain the factual information necessary to Plaintiff's case, Plaintiff would serve discovery requests, which may include requests for admission, interrogatories, document requests, and depositions. A limited number of interrogatories would be used to identify information like the identities of participants in relevant activities at the Department, such as the participants in meetings and discussions where guidance or direction was provided to Mr. Huber; the participants in the drafting of the Attorney General Directive; and the participants in the initial search for responsive records who communicated with OIP or with officials in OAG or ODAG gathering information to relay to OIP. These discovery requests would be served upon Defendant as well as upon non-parties such as former Department of Justice employees who have personal knowledge of the direction and guidance provided to Mr. Huber and the means by which such direction and guidance were provided.

47. Presently, the persons most likely to have information American Oversight needs regarding the Department's search for records, the location of records, and the representations

contained in the Brinkmann Declaration, and, therefore, the most likely to be noticed for a deposition are: Vanessa Brinkmann, the unnamed "Counselor in the Office of the Attorney General," Matthew Whitaker, and John Huber.

48. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 15, 2019

Cerissa Cafasso

EXHIBIT A

ONE HUNDRED FIFTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

July 27, 2017

The Honorable Jeff Sessions
Attorney General
U.S. Department of Justice
Washington, D.C.

The Honorable Rod J. Rosenstein
Deputy Attorney General
U.S. Department of Justice
Washington, D.C.

Dear Attorney General Sessions and Deputy Attorney General Rosenstein:

We are writing to you to request assistance in restoring public confidence in our nation's justice system and its investigators, specifically the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI). We need to enable these agencies to perform their necessary and important law enforcement and intelligence functions fully unhindered by politics. While we presume that the FBI's investigation into Russian influence has been subsumed into Special Counsel Robert Mueller's investigation, we are not confident that other matters related to the 2016 election and aftermath are similarly under investigation by Special Counsel Mueller. The unbalanced, uncertain, and seemingly unlimited focus of the special counsel's investigation has led many of our constituents to see a dual standard of justice that benefits only the powerful and politically well-connected. For this reason, we call on you to appoint a second special counsel[1] to investigate a plethora of matters connected to the 2016 election and its aftermath, including actions taken by previously public figures like Attorney General Loretta Lynch, FBI Director James Comey, and former Secretary of State Hillary Clinton.

Many Democrats and members of the Washington media previously called for a "special prosecutor" to investigate Russian influence on the election and connections with the Trump campaign. Not surprisingly, once you actually made the decision to appoint a special counsel, the calls for further investigations by congressional committees continued, focused on allegations that have heretofore produced no evidence of criminality, despite the fact that over a year has passed since the opening of the original FBI investigation. Political gamesmanship continues to

[1] *See* 28 CFR Part 600 – General Powers of Special Counsel.

saturate anything and everything associated with reactions to President Trump's executive decisions, and reveals the hypocrisy of those who refuse to allow the Special Counsel's investigation to proceed without undue political influence. It is an unfortunate state of affairs.

Your stated rationale for recommending Director Comey's termination as FBI Director was his mishandling of former Secretary Clinton's email investigation and associated public disclosures concerning the investigation's findings. We believe this was the correct decision. It is clear that Director Comey contributed to the politicization of the FBI's investigations by issuing his public statement, nominating himself as judge and jury, rather than permitting career DOJ prosecutors to make the final decision. But many other questions remain unanswered, due to Mr. Comey's premature and inappropriate decision, as well as the Obama Justice Department's refusal to respond to legitimate Congressional oversight. Last week, the Republican Members of this Committee sent a letter to the Justice Department, asking for responses to those unanswered inquiries.[2] These questions cannot, for history's sake and for the preservation of an impartial system of justice, be allowed to die on the vine.

It is therefore incumbent on this Committee, in our oversight capacity, to ensure that the agencies we oversee are above reproach and that the Justice Department, in particular, remains immune to accusations of politicization. Many Congressional entities have been engaged in oversight of Russian influence on the election, but a comprehensive investigation into the 2016 Presidential campaign and its aftermath must, similarly, be free of even the suggestion of political interference. The very core of our justice system demands as much. A second, newly-appointed special counsel will not be encumbered by these considerations, and will provide real value to the American people in offering an independent perspective on these extremely sensitive matters.

Our call for a special counsel is not made lightly. We have no interest in engendering more bad feelings and less confidence in the process or governmental institutions by the American people. Rather, our call is made on their behalf. It is meant to determine whether the criminal prosecution of any individual is warranted based on the solemn obligation to follow the facts wherever they lead and applying the law to those facts.

As we referenced above, Democrats and the mainstream media called for a special counsel to be appointed to investigate any Russian influence on President Trump's campaign. Their pleas were answered, but there are many questions that may be outside the scope of Special Counsel Mueller's investigation. This was clear following Mr. Comey's recent testimony to the Senate Intelligence Committee on June 8, 2017, which ignited renewed scrutiny of former

---

[2] *See* House Judiciary Committee letter of July 21, 2017 to Attorney General Sessions, requesting answers to multiple questions which remain unanswered or inadequately answered from the Obama Administration, *available at* https://judiciary.house.gov/wp-content/uploads/2017/07/072117_Letter-to-AG-Sessions.pdf?utm_source=House+Judiciary+Committee+Press+Releases&utm_campaign=fcab593157-EMAIL_CAMPAIGN_2017_07_21&utm_medium=email&utm_term=0_df41eba8fd-fcab593157-101865997.

Attorney General Loretta Lynch, and the actions she took to mislead the public concerning the investigation into the Clinton email investigation. Last year, this Committee inquired repeatedly about the circumstances surrounding that and other matters, but our inquiries were largely ignored.[3]

During his testimony, Mr. Comey referenced a meeting on the Phoenix airport tarmac between Ms. Lynch and former President Bill Clinton. Mr. Comey raised concerns about Ms. Lynch's conduct, and questioned her independence, stating:

> At one point, the attorney general had directed me not to call it an investigation, but instead to call it a matter, which confused me and concerned me. That was one of the bricks in the load that led me to conclude, 'I have to step away from the department if we're to close this case credibly.'[4]

In addition, in preparing to testify in front of Congress for a September 2015 hearing, Mr. Comey asked Ms. Lynch at the time whether she was prepared to refer to the Clinton investigation as just that, an "investigation." Mr. Comey testified that Ms. Lynch said, "Yes, but don't call it that, call it a matter." Mr. Comey retorted, "Why would I do that?" Ms. Lynch answered, "Just call it a matter."[5] Mr. Comey stated that he acquiesced, but it gave him "a queasy feeling," since it gave him the "impression that the attorney general was trying to align how we describe our work" with how the Clinton campaign was talking about it.[6]

Notwithstanding the fact that the FBI is the Federal Bureau of Investigation, and not the Federal Bureau of Matters, one is hard-pressed to understand why Ms. Lynch directed then-Director Comey to call the Clinton investigation a "matter" unless she intended to use such deceptive language to help wrongly persuade the American people that former Secretary Clinton was not, in fact, the subject of a full-scale FBI investigation, or to otherwise undermine the integrity of the investigation.

Following Director Comey's Senate Intelligence Committee testimony, Senator Dianne Feinstein was asked about the testimony while appearing on CNN's "State of the Union." Senator Feinstein stated, "I would have a queasy feeling too, though, to be candid with you, I think we need to know more about that, and there's only one way to know about it, and that's to have the Judiciary Committee take a look at that."[7]

---

[3] *Id.*

[4] Peter Baker, *The New York Times*, June 8, 2017, *available at* https://www.nytimes.com/2017/06/08/us/politics/comey-testimony-loretta-lynch.html.

[5] *Id.*

[6] Ed O'Keefe, *The Washington Post*, June 8, 2017, *available at* https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/james-comey-testimony-what-we-learn/comey-repeats-that-lynch-asked-him-to-describe-clinton-investigations-as-a-matter/?utm_term=.ccb1c193f596.

[7] Eli Watkins, "Feinstein: Judiciary Committee must 'step up and carry its weight'," *CNN.com*, June 11, 2017, *available at* http://www.cnn.com/2017/06/11/politics/dianne-feinstein-james-comey/index.html.

We share Senator Feinstein's and Mr. Comey's concerns – specifically, that during the midst of a contentious Presidential election, which was already rife with scandal arising from Secretary Clinton's mishandling of classified information, that our nation's chief law enforcement officer would instruct the FBI Director, her subordinate, to mislead the American public about the nature of the investigation. Following Ms. Lynch's directive to downplay the Clinton investigation as a "matter," Director Comey infamously terminated the Clinton investigation, stating, "[a]lthough there is evidence of potential violations of the statutes regarding the handling of classified information, our judgment is that no reasonable prosecutor would bring such a case."[8]

Mr. Comey's testimony has provided new evidence that Ms. Lynch may have used her position of authority to undermine the Clinton investigation. At any other point in history this accusation would entail a shock to the conscience of law abiding Americans who expect a DOJ free of political influence. We only have, however, an investigation into Russian influence on the 2016 election, including any ties to the Trump campaign. To limit our nation's insight into just this this single component of the 2016 election will only cause the special counsel's work to be derided as one-sided and incomplete. The special counsel's work must begin and end unimpeded by political motivations on either side of the aisle. For these reasons, the following points must also be fully investigated – ideally, via a second special counsel. This is imperative to regain the cherished trust and confidence in our undoubtedly distressed law enforcement and political institutions.

We call on a newly appointed special counsel to investigate, consistent with appropriate regulations, the following questions, many of which were previously posed by this Committee and remain unanswered:

1) Then-Attorney General Loretta Lynch directing Mr. Comey to mislead the American people on the nature of the Clinton investigation;
2) The shadow cast over our system of justice concerning Secretary Clinton and her involvement in mishandling classified information;
3) FBI and DOJ's investigative decisions related to former Secretary Clinton's email investigation, including the propriety and consequence of immunity deals given to potential Clinton co-conspirators Cheryl Mills, Heather Samuelson, John Bentel and possibly others;
4) The apparent failure of DOJ to empanel a grand jury to investigate allegations of mishandling of classified information by Hillary Clinton and her associates;
5) The Department of State and its employees' involvement in determining which communications of Secretary Clinton's and her associates to turn over for public scrutiny;

[8] Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System, July 5, 2016, *available at* https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system.

6) WikiLeaks disclosures concerning the Clinton Foundation and its potentially unlawful international dealings;
7) Connections between the Clinton campaign, or the Clinton Foundation, and foreign entities, including those from Russia and Ukraine;
8) Mr. Comey's knowledge of the purchase of Uranium One by the company Rosatom, whether the approval of the sale was connected to any donations made to the Clinton Foundation, and what role Secretary Clinton played in the approval of that sale that had national security ramifications;
9) Disclosures arising from unlawful access to the Democratic National Committee's (DNC) computer systems, including inappropriate collusion between the DNC and the Clinton campaign to undermine Senator Bernie Sanders' presidential campaign;
10) Post-election accusations by the President that he was wiretapped by the previous Administration, and whether Mr. Comey and Ms. Lynch had any knowledge of efforts made by any federal agency to unlawfully monitor communications of then-candidate Trump or his associates;
11) Selected leaks of classified information related to the unmasking of U.S. person identities incidentally collected upon by the intelligence community, including an assessment of whether anyone in the Obama Administration, including Mr. Comey, Ms. Lynch, Ms. Susan Rice, Ms. Samantha Power, or others, had any knowledge about the "unmasking" of individuals on then candidate-Trump's campaign team, transition team, or both;
12) Admitted leaks by Mr. Comey to Columbia University law professor, Daniel Richman, regarding conversations between Mr. Comey and President Trump, how the leaked information was purposefully released to lead to the appointment of a special counsel, and whether any classified information was included in the now infamous "Comey memos";
13) Mr. Comey's and the FBI's apparent reliance on "Fusion GPS" in its investigation of the Trump campaign, including the company's creation of a "dossier" of information about Mr. Trump, that dossier's commission and dissemination in the months before and after the 2016 election, whether the FBI paid anyone connected to the dossier, and the intelligence sources of Fusion GPS or any person or company working for Fusion GPS and its affiliates; and
14) Any and all potential leaks originated by Mr. Comey and provide to author Michael Schmidt dating back to 1993.

You have the ability now to right the ship for the American people so these investigations may proceed independently and impartially. The American public has a right to know the facts – all of them – surrounding the election and its aftermath. We urge you to appoint a second special counsel to ensure these troubling, unanswered questions are not relegated to the dustbin of history.

Sincerely,

Bob Goodlatte

Jim Jordan

Lamar Smith

Matt Gaetz

Tom Marino

Steve Chabot

Blake Farenthold

Steve King

Louie Gohmert

Trent Franks

Raúl R. Labrador

Andy Biggs

MIKE JOHNSON

John Rutherford

Martha Roby

John Ratcliffe

Brett Guthrie

Karen C. Handel

ONE HUNDRED FIFTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

September 26, 2017

Dear Attorney General Sessions and Deputy Attorney General Rosenstein:

We write to renew this Committee's recent call for a second special counsel, to investigate matters which may be outside the scope of Special Counsel Robert Mueller's investigation.[1] Such a step is even more critical given the recent revelation that former FBI Director James Comey had prepared a statement ending the investigation into former Secretary of State Hillary Clinton, before interviewing at least 17 key witnesses, including the former Secretary herself.[2] At least one former career FBI supervisor has characterized this action as "so far out of bounds it's not even in the stadium," and "clearly communicating to [FBI executive staff] where the investigation was going to go."[3]

Among those witnesses the FBI failed to interview prior to the Director's preparation of his statement were Cheryl Mills and Heather Samuelson, both of whom were close Clinton aides with extensive knowledge of the facts surrounding the establishment of a private email server. Last year, this Committee inquired repeatedly of the Justice Department about the facts surrounding Ms. Mills' and Ms. Samuelson's involvement.[4] Our inquiries were largely ignored. Recently, we wrote to you to request responses to those and other unanswered questions

---

[1] "Goodlatte & Judiciary Republicans Call for Second Special Counsel to Address Issues Outside the Scope of Special Counsel Mueller's Investigation," July 27, 2017, *available at* https://judiciary.house.gov/press-release/goodlatte-judiciary-republicans-call-second-special-counsel-address-issues-outside-scope-special-counsel-muellers-investigation/.

[2] Letter from Senators Grassley and Graham to FBI Director Christopher Wray, August 30, 2017, *available at* https://www.judiciary.senate.gov/imo/media/doc/2017-08-30%20CEG%20+%20LG%20to%20FBI%20(Comey%20Statement).pdf.

[3] "Did James Comey Break Rules by Drafting Hillary Clinton Statement? FBI Experts Are Divided," Newsweek, September 1, 2017, *available at* http://www.newsweek.com/comey-clinton-investigation-draft-statement-trump-658620.

[4] See, e.g., "Goodlatte Presses Justice Department on Secret Agreements with Top Clinton Advisors," October 3, 2016, *available at* https://judiciary.house.gov/press-release/goodlatte-presses-justice-department-secret-agreements-top-clinton-advisors/.

pertaining to the Clinton investigation.[5] We have not received a response. However, as the most recent Comey revelations make clear, ignoring this problem will not make it go away.

As we pointed out at the time, both Ms. Mills and Ms. Samuelson received immunity for their cooperation in the Clinton investigation, but were nevertheless permitted to sit in on the interview of Secretary Clinton. That, coupled with the revelation that the Director had already drafted an exoneration statement, strongly suggests that the interview was a mere formality, and that the Director had already decided the case would be closed.

During our FBI Oversight hearing last year, Congressman John Ratcliffe questioned the Director about this very issue. In part, that exchange was as follows:

> Mr. RATCLIFFE. Director, did you make the decision not to recommend criminal charges relating to classified information before or after Hillary Clinton was interviewed by the FBI on July the 2nd?
>
> Mr. COMEY. After.
>
> Mr. RATCLIFFE. Okay. Then I am going to need your help in trying to understand how that is possible. I think there are a lot of prosecutors or former prosecutors that are shaking our heads at how that could be the case. Because if there was ever any real possibility that Hillary Clinton might be charged for something that she admitted to on July the 2nd, why would two of the central witnesses in a potential prosecution against her be allowed to sit in the same room to hear the testimony?[6]

Why, indeed. Perhaps it was because, just as the Comey revelation suggests, the decision had already been made – prior to the interview of Secretary Clinton, Ms. Mills, Ms. Samuelson, or any of the other 14 potential witnesses – that Secretary Clinton would not be charged with any crimes for her conduct. President Obama had indicated as much, by stating publicly at the time that although Secretary Clinton showed "carelessness" in conducting government business on a private server, she had no intent to endanger national security. Of course, Secretary Clinton's supposed lack of "intent to harm national security" is a red herring, since the law merely requires the government to show "gross negligence."[7]

---

[5] "Goodlatte & Judiciary Republicans Request Responses to Unanswered Oversight Letters Sent During Obama Administration," July 21, 2017, *available at* https://judiciary.house.gov/press-release/goodlatte-judiciary-republicans-request-responses-unanswered-oversight-letters-sent-obama-administration/.

[6] "Oversight of the Federal Bureau of Investigation," Hearing before the H. Comm. on Judiciary, September 28, 2016, p. 87, *available at* https://judiciary.house.gov/wp-content/uploads/2016/09/114-91_22125.pdf.

[7] 18 U.S.C. § 793(f). For a thorough account of this, see Andrew C. McCarthy, "It Wasn't Comey's Decision to Exonerate Hillary – It Was Obama's," *available at* http://www.nationalreview.com/corner/451053/not-comeys-decision-exonerate-hillary-obamas-decision.

Moreover, we note that not only did the former Director end the investigation prematurely -- and potentially at the direction, tacit or otherwise, of President Obama -- but he did so while declining to record the interviews of former Secretary Clinton or any of her close associates, as provided for by DOJ policy. The policy states:

> This policy establishes a presumption that the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the United States Marshals Service (USMS) will electronically record statements made by individuals in their custody.
>
> This policy also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances where the presumption does not apply. The policy encourages agents and prosecutors to consult with each other in such circumstances.[8]

Despite this, the DOJ and FBI declined to exercise their discretion to record the interview of former Secretary Clinton. This is truly inexplicable, given that the case was of keen national interest and importance, and involved a former Secretary of State and candidate for President of the United States who was accused of violating the Espionage Act. It only reinforces the sense that our nation's top law enforcement officials conspired to sweep the Clinton "matter" under the rug, and that there is, truly, one system for the powerful and politically well-connected, and another for everyone else.

In this case, it appears that Director Comey and other senior Justice Department and government officials may have pre-judged the "matter" before all the facts were known, thereby ensuring former Secretary Clinton would not be charged for her criminal activity. We implore you to name a second special counsel, to investigate this and other matters related to the 2016 election, including the conduct of the Justice Department regarding the investigation into Secretary Clinton's private email server.

Sincerely,

[8] "Attorney General Holder Announces Significant Policy Shift Concerning Electronic Recording of Statements," *available at* https://www.justice.gov/opa/pr/attorney-general-holder-announces-significant-policy-shift-concerning-electronic-recording (emphasis added).

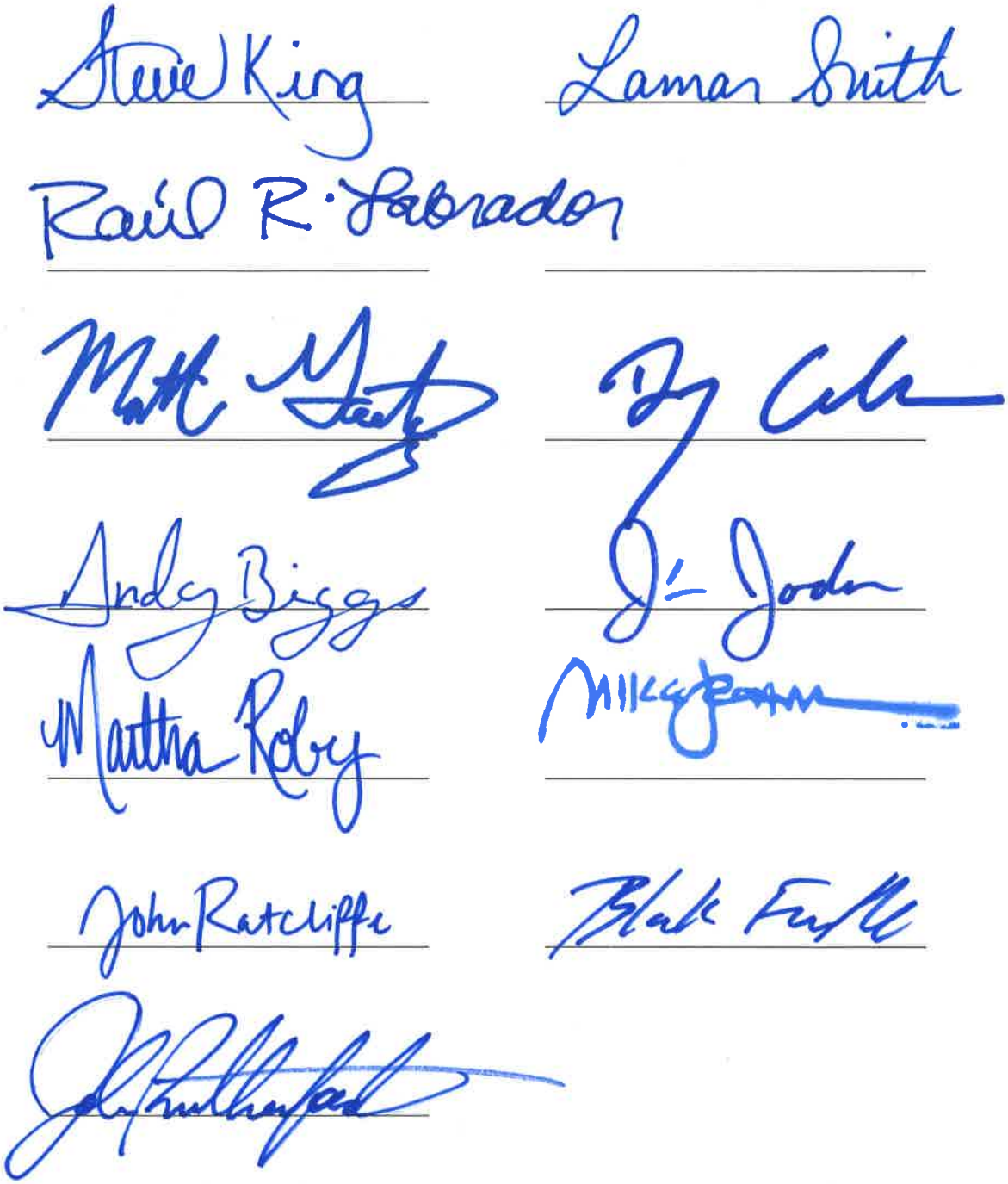

EXHIBIT B

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Robert W. Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

NOV 13 2017

Dear Chairman Goodlatte:

This responds to your letters dated July 27, 2017, and September 26, 2017, in which you and other Members request the appointment of a Special Counsel to investigate various matters, including the sale of Uranium One, alleged unlawful dealings related to the Clinton Foundation and other matters. We are sending identical responses to the other Members who joined your letter.

As noted during our prior meeting in response to your letters, the Department of Justice (Department) takes seriously its responsibility to provide timely and accurate information to Congress on issues of public interest, and seeks to do so in a non-political manner that is consistent with the Department's litigation, law enforcement, and national security responsibilities. Additionally, the Department's leadership has a duty to carefully evaluate the status of ongoing matters to ensure that justice is served and that the Department's communications with Congress are accurate and complete.

To further that goal, the Attorney General has directed senior federal prosecutors to evaluate certain issues raised in your letters. These senior prosecutors will report directly to the Attorney General and the Deputy Attorney General, as appropriate, and will make recommendations as to whether any matters not currently under investigation should be opened, whether any matters currently under investigation require further resources, or whether any matters merit the appointment of a Special Counsel. This will better enable the Attorney General and the Deputy Attorney General to more effectively evaluate and manage the caseload. In conducting this review, all allegations will be reviewed in light of the Principles of Federal Prosecution. (USAM 9-27.000)

As you know, consistent with longstanding policy, the Department does not ordinarily confirm or deny investigations, and this letter should not be construed to do so. While this policy can be frustrating, especially on matters of great public concern, it is necessary to ensure that the Department acts with fairness and thoughtfulness, and always in a manner consistent with the law and rules of the Department.

In addition, you must know the Department will never evaluate any matter except on the facts and the law. Professionalism, integrity, and public confidence in the Department's work is critical for us, and no priority is higher.

Your letter referenced various allegations related to the Federal Bureau of Investigation's (FBI) handling of the investigation into former Secretary of State Hillary Clinton's use of a personal email server. On January 12, 2017, the Department's Inspector General (IG) sent a letter to you and other Members advising that the IG's office was initiating a review of, among other things:

- Allegations that Department or FBI policies or procedures were not followed in connection with, or in actions leading up to or related to, the FBI Director's public announcement on July 5, 2016, and the Director's letters to Congress on October 28 and November 6, 2016, and that certain underlying investigative decisions were based on improper considerations;

- Allegations that the FBI Deputy Director should have been recused from participating in certain investigative matters;

- Allegations that Department and FBI employees improperly disclosed non-public information; and

- Allegations that decisions regarding the timing of the FBI's release of certain Freedom of Information Act documents on October 30 and November 1, 2016, and the use of a Twitter account to publicize the same, were influenced by improper considerations.

These investigations include issues raised in your letters. In addition, the Department has forwarded a copy of your letters to the IG so he can determine whether he should expand the scope of his investigation based on the information contained in those letters.

Once the IG's review is complete, the Department will assess what, if any, additional steps are necessary to address any issues identified by that review.

We will conduct this evaluation according to the highest standards of justice. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Very truly yours,

Stephen E. Boyd
Assistant Attorney General

EXHIBIT C

AMERICAN OVERSIGHT

November 22, 2017

VIA ONLINE PORTAL

Laurie Day
Chief, Initial Request Staff
Office of Information Policy
U.S. Department of Justice
1425 New York Avenue NW, Suite 11050
Washington, DC 20530-0001
Via FOIAOnline

Re: Freedom of Information Act Request

Dear Ms. Day:

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.

Since taking office in January, President Trump has regularly attacked Hillary Clinton and called on DOJ to investigate various allegations against Ms. Clinton.[1] One such allegation has included inappropriate influence in the 2010 acquisition of Uranium One by Rosatom, the Russian nuclear energy agency.[2] Responding both to the president and letters from House Judiciary Committee Chairman Bob Goodlatte, DOJ is now considering the appointment of a second special counsel to investigate Ms. Clinton.[3] In the meantime, Attorney General Jeff Sessions is under regular scrutiny from the president and even the Senate Majority leader is suggesting that Mr. Sessions replace the

---

[1] *See* Matthew Nussbaum & Tara Palmeri, *Trump Can't Stop Obsessing About the Clintons*, POLITICO (Mar. 28, 2017, 5:01 PM), https://www.politico.com/story/2017/03/trump-hillary-bill-clinton-236602; Abigail Abrams, *President Trump Attacked Hillary Clinton over Her Emails. Again.*, TIME, June 15, 2017, http://time.com/4820708/donald-trump-russia-investigation-hillary-clinton-obstruction/; Associated Press, *Trump Tweets Fresh Attacks on Democrats and Hillary Clinton Amid Reports of Looming Charges in Russia Probe*, L.A. TIMES, Oct. 29, 2017, http://www.latimes.com/politics/la-pol-updates-trump-tweets-russia-republican-anger-htmlstory.html.

[2] Lauren Carroll, *Fact-Checking Donald Trump's Tweets About Hillary Clinton and Russia*, POLITIFACT (Mar. 28, 2017, 4:00 PM), http://www.politifact.com/truth-o-meter/article/2017/mar/28/fact-checking-donald-trumps-tweets-about-hillary-c/.

[3] Mat Zapotosky, *Sessions Considering Second Special Counsel to Investigate Republican Concerns, Letter Shows*, WASH. POST, Nov. 13, 2017, https://www.washingtonpost.com/world/national-security/sessions-considering-second-special-counsel-to-investigate-republican-concerns-letter-shows/2017/11/13/bc92ef3c-c8d2-11e7-b0cf-7689a9f2d84e_story.html?utm_term=.fa50162b4a3d.

embattled Republican nominee in the race to fill his former seat in the Senate.[4] American Oversight submits this request to shed light on whether and to what extent political considerations are influencing or outweighing legal principles as DOJ sets its investigative priorities.

Requested Records

American Oversight requests that the Office of the Attorney General, the Office of the Deputy Attorney General, and the Office of Legislative Affairs produce the following within twenty business days:

> Records sufficient to identify all of the "senior federal prosecutors" who have been "directed" "to evaluate certain issues raised in [Congressman Robert Goodlatte's] letters," as indicated in the Department of Justice's November 13, 2017 response signed by Assistant Attorney General Stephen Boyd, attached for your convenience.
>
> Please provide all responsive records from July 27, 2017, through 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 DOJ 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 is 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**

[4] Brian Naylor et al., *McConnell Talks Up Sessions As Write-In Candidate to Replace Roy Moore*, NPR (Nov. 14, 2017, 12:08 PM), https://www.npr.org/2017/11/14/564071391/ryan-sessions-add-to-gop-voices-saying-moore-accusers-are-credible.

[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).

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.[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 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.**[7] **Furthermore, agencies that have adopted the National Archives and Records Agency (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."[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 actually exempt under FOIA."[9] Moreover, the *Vaughn* index "must describe *each* document or

---

[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).

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

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, 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.[13] Moreover, the request is primarily and fundamentally for non-commercial purposes.[14]

---

[10] *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis 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.
[13] 28 C.F.R. § 16.10(k)(2).
[14] *Id.*

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 operations or activities of the government."[15] The requested records are directly related to the work of the highest levels of leadership at DOJ. There is significant interest in the subject of these records, both from the American people at large as well as the U.S. Congress.[16] The requested records will help American Oversight and the general public understand whether and to what extent political considerations are influencing or outweighing legal principles as DOJ sets its investigative priorities. American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available. 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.[17] 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.[18] 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

---

[15] 28 C.F.R. § 16.10(k)(2)(i), (ii)(A)–(B).

[16] *See* Abrams, *supra* note 1; Associated Press, *supra* note 1; Carroll, *supra* note 2; *Uranium One Probe: Order to Lift 'Gag' on Russia Informant Came from Trump, Source Says*, FOX NEWS, Oct. 26, 2017, http://www.foxnews.com/politics/2017/10/26/uranium-one-probe-order-to-lift-gag-on-russia-informant-came-from-trump-source-says.html; Naylor et al., *supra* note 4; Nussbaum & Palmeri, *supra* note 1; Michael S. Schmidt & Maggie Haberman, *Justice Dept. to Weigh Inquiry Into Clinton Foundation*, N.Y. TIMES, Nov. 13, 2017, https://www.nytimes.com/2017/11/13/us/politics/justice-department-uranium-one-special-counsel.html; Eileen Sullivan, *What Is the Uranium One Deal and Why Does the Trump Administration Care So Much?*, N.Y. TIMES, Nov. 14, 2017, https://www.nytimes.com/2017/11/14/us/politics/uranium-one-hillary-clinton.html; The Washington Post, *Sessions Replacing Moore Could Solve Trump's Mueller Problem*, AL.COM (Nov. 14, 2017, 11:10 AM), http://www.al.com/opinion/index.ssf/2017/11/sessions_replacing_moore_could.html; Katie Bo Williams, *Judiciary Chairman Hints at Dissatisfaction with Sessions*, THE HILL (Nov. 14, 2017, 10:31 AM), http://thehill.com/homenews/administration/360265-judiciary-chairman-hints-at-dissatisfaction-with-sessions; Zapotosky, *supra* note 3.

[17] 28 C.F.R. § 16.10(k)(iii)(A)–(B).

[18] American Oversight currently has approximately 11,700 page likes on Facebook, and 37,400 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited Nov. 20, 2017); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited Nov. 20, 2017).

senior DOJ attorney,[19] 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.[20] 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.[21]

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 Cerissa Cafasso at foia@americanoversight.org or 202.869.5246. 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

[19] *DOJ Civil Division Response Noel Francisco Compliance,* AMERICAN OVERSIGHT, https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance.
[20] *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.
[21] *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Robert W. Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

NOV 13 2017

Dear Chairman Goodlatte:

This responds to your letters dated July 27, 2017, and September 26, 2017, in which you and other Members request the appointment of a Special Counsel to investigate various matters, including the sale of Uranium One, alleged unlawful dealings related to the Clinton Foundation and other matters. We are sending identical responses to the other Members who joined your letter.

As noted during our prior meeting in response to your letters, the Department of Justice (Department) takes seriously its responsibility to provide timely and accurate information to Congress on issues of public interest, and seeks to do so in a non-political manner that is consistent with the Department's litigation, law enforcement, and national security responsibilities. Additionally, the Department's leadership has a duty to carefully evaluate the status of ongoing matters to ensure that justice is served and that the Department's communications with Congress are accurate and complete.

To further that goal, the Attorney General has directed senior federal prosecutors to evaluate certain issues raised in your letters. These senior prosecutors will report directly to the Attorney General and the Deputy Attorney General, as appropriate, and will make recommendations as to whether any matters not currently under investigation should be opened, whether any matters currently under investigation require further resources, or whether any matters merit the appointment of a Special Counsel. This will better enable the Attorney General and the Deputy Attorney General to more effectively evaluate and manage the caseload. In conducting this review, all allegations will be reviewed in light of the Principles of Federal Prosecution. (USAM 9-27.000)

As you know, consistent with longstanding policy, the Department does not ordinarily confirm or deny investigations, and this letter should not be construed to do so. While this policy can be frustrating, especially on matters of great public concern, it is necessary to ensure that the Department acts with fairness and thoughtfulness, and always in a manner consistent with the law and rules of the Department.

In addition, you must know the Department will never evaluate any matter except on the facts and the law. Professionalism, integrity, and public confidence in the Department's work is critical for us, and no priority is higher.

Your letter referenced various allegations related to the Federal Bureau of Investigation's (FBI) handling of the investigation into former Secretary of State Hillary Clinton's use of a personal email server. On January 12, 2017, the Department's Inspector General (IG) sent a letter to you and other Members advising that the IG's office was initiating a review of, among other things:

- Allegations that Department or FBI policies or procedures were not followed in connection with, or in actions leading up to or related to, the FBI Director's public announcement on July 5, 2016, and the Director's letters to Congress on October 28 and November 6, 2016, and that certain underlying investigative decisions were based on improper considerations;

- Allegations that the FBI Deputy Director should have been recused from participating in certain investigative matters;

- Allegations that Department and FBI employees improperly disclosed non-public information; and

- Allegations that decisions regarding the timing of the FBI's release of certain Freedom of Information Act documents on October 30 and November 1, 2016, and the use of a Twitter account to publicize the same, were influenced by improper considerations.

These investigations include issues raised in your letters. In addition, the Department has forwarded a copy of your letters to the IG so he can determine whether he should expand the scope of his investigation based on the information contained in those letters.

Once the IG's review is complete, the Department will assess what, if any, additional steps are necessary to address any issues identified by that review.

We will conduct this evaluation according to the highest standards of justice. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Very truly yours,

Stephen E. Boyd
Assistant Attorney General

EXHIBIT D

AMERICAN OVERSIGHT

November 22, 2017

VIA ONLINE PORTAL

Laurie Day
Chief, Initial Request Staff
Office of Information Policy
U.S. Department of Justice
1425 New York Avenue NW, Suite 11050
Washington, DC 20530-0001
Via FOIAOnline

Re: Freedom of Information Act Request

Dear Ms. Day:

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.

Since taking office in January, President Trump has regularly attacked Hillary Clinton and called on DOJ to investigate various allegations against Ms. Clinton.[1] One such allegation has included inappropriate influence in the 2010 acquisition of Uranium One by Rosatom, the Russian nuclear energy agency.[2] Responding both to the president and letters from House Judiciary Committee Chairman Bob Goodlatte, DOJ is now considering the appointment of a second special counsel to investigate Ms. Clinton.[3] In the meantime, Attorney General Jeff Sessions is under regular scrutiny from the president and even the Senate Majority leader is suggesting that Mr. Sessions replace the

---

[1] *See* Matthew Nussbaum & Tara Palmeri, *Trump Can't Stop Obsessing About the Clintons*, POLITICO (Mar. 28, 2017, 5:01 PM), https://www.politico.com/story/2017/03/trump-hillary-bill-clinton-236602; Abigail Abrams, *President Trump Attacked Hillary Clinton over Her Emails. Again.*, TIME, June 15, 2017, http://time.com/4820708/donald-trump-russia-investigation-hillary-clinton-obstruction/; Associated Press, *Trump Tweets Fresh Attacks on Democrats and Hillary Clinton Amid Reports of Looming Charges in Russia Probe*, L.A. TIMES, Oct. 29, 2017, http://www.latimes.com/politics/la-pol-updates-trump-tweets-russia-republican-anger-htmlstory.html.

[2] Lauren Carroll, *Fact-Checking Donald Trump's Tweets About Hillary Clinton and Russia*, POLITIFACT (Mar. 28, 2017, 4:00 PM), http://www.politifact.com/truth-o-meter/article/2017/mar/28/fact-checking-donald-trumps-tweets-about-hillary-c/.

[3] Mat Zapotosky, *Sessions Considering Second Special Counsel to Investigate Republican Concerns, Letter Shows*, WASH. POST, Nov. 13, 2017, https://www.washingtonpost.com/world/national-security/sessions-considering-second-special-counsel-to-investigate-republican-concerns-letter-shows/2017/11/13/bc92ef3c-c8d2-11e7-b0cf-7689a9f2d84e_story.html?utm_term=.fa50162b4a3d.

embattled Republican nominee in the race to fill his former seat in the Senate.[4] American Oversight submits this request to shed light on whether and to what extent political considerations are influencing or outweighing legal principles as DOJ sets its investigative priorities.

Requested Records

American Oversight requests that the Office of the Attorney General and the Office of the Deputy Attorney General produce the following within twenty business days:

> All guidance or directives provided to the "senior federal prosecutors" who have been "directed" "to evaluate certain issues raised in [Congressman Robert Goodlatte's] letters," as indicated in the Department of Justice's November 13, 2017 response signed by Assistant Attorney General Stephen Boyd, attached for your convenience, regarding their performance of that task.
>
> Please provide all responsive records from July 27, 2017, through 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 DOJ 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 is 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**

[4] Brian Naylor et al., *McConnell Talks Up Sessions As Write-In Candidate to Replace Roy Moore*, NPR (Nov. 14, 2017, 12:08 PM), https://www.npr.org/2017/11/14/564071391/ryan-sessions-add-to-gop-voices-saying-moore-accusers-are-credible.

[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).

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.[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 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.**[7] **Furthermore, agencies that have adopted the National Archives and Records Agency (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."[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 actually exempt under FOIA."[9] Moreover, the *Vaughn* index "must describe *each* document or

---

[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).

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

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, 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.[13] Moreover, the request is primarily and fundamentally for non-commercial purposes.[14]

---

[10] *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis 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.
[13] 28 C.F.R. § 16.10(k)(2).
[14] *Id.*

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 operations or activities of the government."[15] The requested records are directly related to the work of the highest levels of leadership at DOJ. There is significant interest in the subject of these records, both from the American people at large as well as the U.S. Congress.[16] The requested records will help American Oversight and the general public understand whether and to what extent political considerations are influencing or outweighing legal principles as DOJ sets its investigative priorities. American Oversight is committed to transparency and makes the responses agencies provide to FOIA requests publicly available. 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.[17] 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.[18] 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

---

[15] 28 C.F.R. § 16.10(k)(2)(i), (ii)(A)–(B).

[16] *See* Abrams, *supra* note 1; Associated Press, *supra* note 1; Carroll, *supra* note 2; *Uranium One Probe: Order to Lift 'Gag' on Russia Informant Came from Trump, Source Says*, FOX NEWS, Oct. 26, 2017, http://www.foxnews.com/politics/2017/10/26/uranium-one-probe-order-to-lift-gag-on-russia-informant-came-from-trump-source-says.html; Naylor et al., *supra* note 4; Nussbaum & Palmeri, *supra* note 1; Michael S. Schmidt & Maggie Haberman, *Justice Dept. to Weigh Inquiry Into Clinton Foundation*, N.Y. TIMES, Nov. 13, 2017, https://www.nytimes.com/2017/11/13/us/politics/justice-department-uranium-one-special-counsel.html; Eileen Sullivan, *What Is the Uranium One Deal and Why Does the Trump Administration Care So Much?*, N.Y. TIMES, Nov. 14, 2017, https://www.nytimes.com/2017/11/14/us/politics/uranium-one-hillary-clinton.html; The Washington Post, *Sessions Replacing Moore Could Solve Trump's Mueller Problem*, AL.COM (Nov. 14, 2017, 11:10 AM), http://www.al.com/opinion/index.ssf/2017/11/sessions_replacing_moore_could.html; Katie Bo Williams, *Judiciary Chairman Hints at Dissatisfaction with Sessions*, THE HILL (Nov. 14, 2017, 10:31 AM), http://thehill.com/homenews/administration/360265-judiciary-chairman-hints-at-dissatisfaction-with-sessions; Zapotosky, *supra* note 3.

[17] 28 C.F.R. § 16.10(k)(iii)(A)–(B).

[18] American Oversight currently has approximately 11,700 page likes on Facebook, and 37,400 followers on Twitter. American Oversight, FACEBOOK, https://www.facebook.com/weareoversight/ (last visited Nov. 20, 2017); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited Nov. 20, 2017).

senior DOJ attorney,[19] 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.[20] 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.[21]

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 Cerissa Cafasso at foia@americanoversight.org or 202.869.5246. 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

[19] *DOJ Civil Division Response Noel Francisco Compliance,* AMERICAN OVERSIGHT, https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance.
[20] *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.
[21] *Audit the Wall*, AMERICAN OVERSIGHT, www.auditthewall.org.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Robert W. Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

NOV 13 2017

Dear Chairman Goodlatte:

This responds to your letters dated July 27, 2017, and September 26, 2017, in which you and other Members request the appointment of a Special Counsel to investigate various matters, including the sale of Uranium One, alleged unlawful dealings related to the Clinton Foundation and other matters. We are sending identical responses to the other Members who joined your letter.

As noted during our prior meeting in response to your letters, the Department of Justice (Department) takes seriously its responsibility to provide timely and accurate information to Congress on issues of public interest, and seeks to do so in a non-political manner that is consistent with the Department's litigation, law enforcement, and national security responsibilities. Additionally, the Department's leadership has a duty to carefully evaluate the status of ongoing matters to ensure that justice is served and that the Department's communications with Congress are accurate and complete.

To further that goal, the Attorney General has directed senior federal prosecutors to evaluate certain issues raised in your letters. These senior prosecutors will report directly to the Attorney General and the Deputy Attorney General, as appropriate, and will make recommendations as to whether any matters not currently under investigation should be opened, whether any matters currently under investigation require further resources, or whether any matters merit the appointment of a Special Counsel. This will better enable the Attorney General and the Deputy Attorney General to more effectively evaluate and manage the caseload. In conducting this review, all allegations will be reviewed in light of the Principles of Federal Prosecution. (USAM 9-27.000)

As you know, consistent with longstanding policy, the Department does not ordinarily confirm or deny investigations, and this letter should not be construed to do so. While this policy can be frustrating, especially on matters of great public concern, it is necessary to ensure that the Department acts with fairness and thoughtfulness, and always in a manner consistent with the law and rules of the Department.

In addition, you must know the Department will never evaluate any matter except on the facts and the law. Professionalism, integrity, and public confidence in the Department's work is critical for us, and no priority is higher.

Your letter referenced various allegations related to the Federal Bureau of Investigation's (FBI) handling of the investigation into former Secretary of State Hillary Clinton's use of a personal email server. On January 12, 2017, the Department's Inspector General (IG) sent a letter to you and other Members advising that the IG's office was initiating a review of, among other things:

- Allegations that Department or FBI policies or procedures were not followed in connection with, or in actions leading up to or related to, the FBI Director's public announcement on July 5, 2016, and the Director's letters to Congress on October 28 and November 6, 2016, and that certain underlying investigative decisions were based on improper considerations;

- Allegations that the FBI Deputy Director should have been recused from participating in certain investigative matters;

- Allegations that Department and FBI employees improperly disclosed non-public information; and

- Allegations that decisions regarding the timing of the FBI's release of certain Freedom of Information Act documents on October 30 and November 1, 2016, and the use of a Twitter account to publicize the same, were influenced by improper considerations.

These investigations include issues raised in your letters. In addition, the Department has forwarded a copy of your letters to the IG so he can determine whether he should expand the scope of his investigation based on the information contained in those letters.

Once the IG's review is complete, the Department will assess what, if any, additional steps are necessary to address any issues identified by that review.

We will conduct this evaluation according to the highest standards of justice. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Very truly yours,

Stephen E. Boyd
Assistant Attorney General

EXHIBIT E

U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

July 16, 2018

Re: DOJ-2018-001094 (AG)
DOJ-2018-001097 (AG)
DOJ-2018-001096 (AG)
DOJ-2018-001144 (OLA)
DOJ-2018-001145 (DAG)
DOJ-2018-001146 (OLA)
DOJ-2018-001098 (AG)
DOJ-2018-001147 (DAG)
VRB:TAZ:JRS

Mr. Austin R. Evers
American Oversight
1350 15th Street NW, Suite B255
Washington, DC 20005
foia@americanoversight.org

Dear Mr. Evers:

This is our final response to your four Freedom of Information Act (FOIA) requests dated November 22, 2017, in which you requested various records pertaining to Rep. Robert Goodlatte's July 27, 2017 and September 26, 2017 letters and the Department's November 13, 2017 response, including (1) records relating to the drafting of the November 13, 2017 letter signed by Assistant Attorney General Stephen Boyd, (2) records reflecting ethics issues or recusal obligations of the Attorney General, (3) guidance to prosecutors who have been directed to evaluate certain issues, and (4) records identifying "senior federal prosecutors who have been directed to evaluated certain issues. This response is made on behalf of the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), and Legislative Affairs (OLA).

Please be advised that searches have been completed on behalf of the above-referenced offices.

With respect to request (1), relating to the drafting of the November 13, 2017 letter signed by Assistant Attorney General Stephen Boyd, thirty-one pages containing records responsive to your request were located. I have determined that nineteen of these pages are appropriate for release with certain excisions made pursuant to Exemptions 5, 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(5), (b)(6) and (b)(7)(C), and copies are enclosed. I have also determined that twelve additional pages containing records responsive to your request should be withheld in full pursuant to Exemption 5 of the FOIA. Exemption 5 pertains to certain inter- and intra-agency communications protected by the deliberative process privilege. Exemption 6 pertains to information the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties. Exemption 7(C) pertains to records or information compiled for law enforcement purposes, the release of which could

reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties.

With respect to requests (2) and (3), relating to records reflecting ethical issues or recusal obligations of the Attorney General[1] and guidance issued to prosecutors, aside from the Department's November 13, 2017 response to Rep. Goodlatte, no additional records responsive to your request were identified in the above-referenced offices. A copy of JMD's letter relating to request (2) is enclosed.

Lastly, with respect to request (4), relating to "[r]ecords sufficient to identify all of the 'senior federal prosecutors' who have been 'directed' 'to evaluate certain issues raised in [Congressman Robert Goodlatte's] letters," I note that in a March 29, 2018 letter to congressional committees, the Attorney General identified United States Attorney John W. Huber as leading the Department's evaluation of certain issues raised by House Judiciary Committee Chairman Goodlatte. A copy of this letter is enclosed. No additional records responsive to your request have been identified. To the extent that Mr. Huber engaged other staff to assist his efforts, records identifying such individuals, if requested, would likely be withheld in full pursuant to Exemptions 6, 7(A), and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6), (b)(7)(A) and (b)(7)(C). Exemption 7(A) pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2012 & Supp. IV 2016). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Michael Gerardi of the Department's Civil Division, Federal Programs Branch, at (202)-514-0680.

Sincerely,

Timothy Ziese
Senior Reviewing Attorney
For
Vanessa R. Brinkmann
Senior Counsel

Enclosures

[1] I understand that the Department's Justice Management Division (JMD) also responded to your request submitted to separately to that component for ethics-related records, and advised you on February 15, 2018 that no records were located.

U.S. Department of Justice

Justice Management Division

Office of General Counsel

Washington, D.C. 20530

FEB 15 2018

Austin R. Evers
Executive Director
American Oversight
1030 15th Street, NW, Suite B255
Washington, DC 20005
Email: foia@americanoversight.org

RE: Your FOIA Request JMD #110380

Dear Mr. Evers:

I am responding on behalf of the Justice Management Division (JMD) to your Freedom of Information Act (FOIA) request dated November 22, 2017, addressed to both the Office of Information Policy (OIP) and JMD, for records relating to analysis of legal-ethics issues or relating to recusal issues in connection with any issues raised by letters dated July 27, 2017, and September 26, 2017, from Congressman Goodlatte. We have conducted a search within the Departmental Ethics Office and have found no records responsive to your request.

You may contact our FOIA Public Liaison at (202) 514-3101 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202 741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with my response to your request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, N.W., Washington, DC 20530-0001, or you may submit an appeal through OIP's eFOIA portal at: http://www.justice.gov/oip/efoia-portal.html. Your appeal must be postmarked or transmitted electronically within 90 days from the date of this letter. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Arthur E. Gary
General Counsel

Office of the Attorney General
Washington, D. C. 20530

March 29, 2018

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Robert W. Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Trey Gowdy
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Chairmen Grassley, Goodlatte, and Gowdy:

I write in response to recent letters requesting the appointment of a Special Counsel to review certain prosecutorial and investigative determinations made by the Department of Justice in 2016 and 2017. I take the concerns you raise seriously.

Since I took this office, it has been my goal to establish the highest standards for our work and to maintain integrity and discipline throughout the Department of Justice. I know this Department, I respect it and its mission, and I love it and its people. I am deeply proud of the important work that the hardworking men and women of the Department do every day to fight violent crime, reduce opioid addictions and deaths, keep Americans safe from threats both foreign and domestic, and uphold the rule of law. We are determined to be worthy of the responsibility we have been given and to earn the trust of Congress and the American people. I appreciate your support for the Department and our law enforcement community.

It is important that Congress and the American people have confidence in the Department of Justice. No institution is perfect. That is why I and my senior leadership team, including FBI Director Wray, are working every day to ensure the

highest levels of performance and integrity as we carry out our fundamental mission. We view Congress as partners in this effort. However, the law requires that much of the work we are doing to accomplish these goals remain confidential to ensure full and fair process and just outcomes. In that regard, as you know, the Department of Justice cannot provide continuous updates on ongoing investigations, or confirm or deny the existence thereof. This is integral to our duty to adhere to the highest ethical standards, and to ensure that prosecutorial and investigative decisions are made without political bias or favoritism—in either direction.

As you are aware, I have asked the Department's Inspector General, Michael E. Horowitz, to review certain matters that you and some members of your committees have raised in recent and previous letters. In addition to his ongoing investigation, the Inspector General has now confirmed that he has opened a review into the Department's compliance with certain legal requirements and Department and FBI policies and procedures with respect to certain applications filed with the U.S. Foreign Intelligence Surveillance Court.

Congress created the Department's Office of the Inspector General explicitly for the purpose of, among other things, investigating alleged violations of criminal and civil laws by Department employees, including actions taken by former employees after they have left government service. The Inspector General's jurisdiction extends not only to allegations of legal violations, but also to allegations that Department employees violated established policies as well.

To carry out these duties, Title 5 of the United States Code provides the Inspector General with broad discretion and significant investigative powers. The office currently employs approximately 470 staff, a significant number of whom are lawyers, auditors, and investigators who may exercise wide discretion on matters under their jurisdiction. If the Inspector General finds evidence of criminal wrongdoing, he may refer it to a United States Attorney who can then convene a grand jury or take other appropriate actions. To be clear, the Inspector General has the authority to investigate allegations of wrongdoing, collect evidence through subpoena, and develop cases for presentation to the Attorney General and the Deputy Attorney General for prosecution or other action. The Inspector General also may, under appropriate circumstances, make information available to the public even if no criminal or disciplinary action is recommended. In contrast, this type of information would not normally be publicly available after the conclusion of a traditional criminal investigation.

Pursuant to Department of Justice regulations, the appointment of a Special Counsel, by design, is reserved for use in only the most "extraordinary circumstances." 28 C.F.R. § 600.1(a). Under the regulations, any Special Counsel must be "selected from outside the United States Government." *Id.* § 600.3(a). To justify such an appointment, the Attorney General would need to conclude that "the public interest would be served by removing a large degree of responsibility for the matter from the Department of Justice." 64 Fed. Reg. 37038, 37038 (July 9, 1999). The Department has successfully investigated and prosecuted many high-profile, resource-intensive matters since the regulations were promulgated in 1999, but the regulations' standard has been found to be satisfied on only two occasions.

The regulations recognize that, when presented with a matter "that might warrant consideration of the appointment of a Special Counsel," the Attorney General may conclude that the circumstances do not justify such a departure "from the normal processes of the Department," and that he may instead determine that other "appropriate steps" can be taken to mitigate any conflicts of interest. 28 C.F.R. § 600.2(c). Thus, in high-profile circumstances involving other politically sensitive matters, it has been more common to make special arrangements within the Department to ensure that actual or apparent conflicts can be avoided, while experienced and accountable prosecutors conduct an efficient and appropriate investigation that comports with the interests of justice and with the public interest.

As noted in Assistant Attorney General Stephen E. Boyd's November 13, 2017, letter to the House Committee on the Judiciary, I already have directed senior federal prosecutors to evaluate certain issues previously raised by the Committee. In that letter, Mr. Boyd stated:

> "These senior prosecutors will report directly to the Attorney General and the Deputy Attorney General, as appropriate, and will make recommendations as to whether any matters not currently under investigation should be opened, whether any matters currently under investigation require further resources, or whether any matters merit the appointment of a Special Counsel."

Specifically, I asked United States Attorney John W. Huber to lead this effort. Mr. Huber is an experienced federal prosecutor who was twice confirmed unanimously by the Senate as United States Attorney for the District of Utah in 2015 and 2017. Mr. Huber previously served in leadership roles within the U.S. Attorney's Office as the National Security Section Chief and the Executive Assistant U.S. Attorney. He has personally prosecuted a number of high-profile cases and coordinated task forces focused against violent crime and terrorism. This work

garnered commendations from the highest levels of the Department over the course of two administrations.

Mr. Huber is conducting his work from outside the Washington, D.C. area and in cooperation with the Inspector General. The additional matters raised in your March 6, 2018, letter fall within the scope of his existing mandate, and I am confident that Mr. Huber's review will include a full, complete, and objective evaluation of these matters in a manner that is consistent with the law and the facts. I receive regular updates from Mr. Huber and upon the conclusion of his review, will receive his recommendations as to whether any matters not currently under investigation should be opened, whether any matters currently under investigation require further resources, or whether any matters merit the appointment of a Special Counsel.

We understand that the Department is not above criticism and it can never be that the Department conceals errors when they occur. I expect every person in this Department to adhere to the highest level of integrity, ethics, and professionalism. If anyone falls short of these high standards, I will fulfill my responsibility to take necessary action to protect the integrity of our work.

Thank you for your leadership on these and other matters. I am making your letters on this and related issues available to the Department's leadership, Inspector General Horowitz, and Mr. Huber for such action as is appropriate. Please contact me personally if you have additional questions or concerns.

Sincerely,

Jefferson B. Sessions III
Attorney General

cc: The Honorable Dianne Feinstein
Ranking Member, Senate Committee on the Judiciary

The Honorable Jerry Nadler
Ranking Member, House Committee on the Judiciary

The Honorable Elijah Cummings
Ranking Member, House Committee on Oversight and Government Reform

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE Defendant.	Civil Action No. 1:18-cv-00319

DECLARATION OF VANESSA R. BRINKMANN

I, Vanessa R. Brinkmann, declare the following to be true and correct:

1. I am Senior Counsel in the Office of Information Policy (OIP), United States Department of Justice (DOJ). In this capacity, I am responsible for, among other things, reviewing records and coordinating the handling of Freedom of Information Act (FOIA) requests processed by the Initial Request Staff (IR Staff) of OIP that are subject to litigation. The IR Staff of OIP is responsible for processing FOIA requests seeking records from within OIP and from six senior leadership offices of DOJ, specifically the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), Associate Attorney General (OASG), Legal Policy (OLP), Legislative Affairs (OLA), and Public Affairs (PAO). The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in the senior leadership offices and, when appropriate, with other components within DOJ, as well as with other Executive Branch agencies.

2. I make the statements herein on the basis of personal knowledge, and on information acquired by me in the course of performing my official duties, including information provided to me by other knowledgeable personnel within the Department.

Plaintiff's FOIA Requests and OIP's Response

3. On July 27, 2017 and September 26, 2017 House Judiciary Chairman Robert Goodlatte wrote to former Attorney General Sessions, raising various issues. On November 13, 2017 the Department responded to Chairman Goodlatte's letters, stating, in part, that "the Attorney General has directed senior federal prosecutors to evaluate certain issues raised in your letters." Later, on March 29, 2018 Attorney General Sessions provided an additional response to Chairman Goodlatte's letters, in which he identified United States John W. Huber as leading the Department's evaluation of certain issues raised by Chairman Goodlatte. (Copies of Chairman Goodlatte's July 27, 2017 and September 26, 2017 letters as well as the Department's November 13, 2017 and March 29, 2018 responses are attached hereto as Exhibit A.)
4. On November 22, 2017, Plaintiff American Oversight submitted four separate FOIA requests to OIP related to the Department's November 13, 2017 response to Chairman Goodlatte. Specifically, these four FOIA requests sought:
    a. "All records relating to the drafting of the November 13, 2017 letter signed by Assistant Attorney General Stephen Boyd . . . responding to the two letters from Congressman Robert Goodlatte." The timeframe specified in this request was from July 27, 2017, through the date the search was conducted. [Hereinafter the "Drafting Request."]
    b. "All records reflecting any analysis of government or legal-ethics issues or

evaluating any recusal obligations . . . related to the Attorney General's participation in connection with any decision relating to any investigation or prosecution . . . of any issues" raised in Chairman Goodlatte's letters. The timeframe specified in this request was from July 27, 2017, through the date the search was conducted. [Hereinafter the "Recusal Request."]

c. "All guidance or directives provided to 'the senior federal prosecutors'" who were directed to evaluate certain issues raised in Chairman Goodlatte's letters, as indicated in the Department's November 13, 2017 response thereto. The timeframe specified in this request was from July 27, 2017, through the date the search was conducted. [Hereinafter the "Guidance Request."]

d. "Records sufficient to identify all of the 'senior federal prosecutors' who had been 'directed' to evaluate certain issues raised in [Congressman Robert Goodlatte's] letters" as indicated in the Department's November 13, 2017 response thereto. The timeframe specified in this request was from July 27, 2017, through the date the search was conducted. [Hereinafter the "Prosecutors Request."]

Copies of Plaintiff's FOIA requests are attached hereto as Exhibit B.

5. By letters dated December 19, 2017 and December 21, 2017, OIP acknowledged Plaintiff's FOIA requests. OIP's letters informed Plaintiff that its requests were being processed on behalf of OAG, ODAG, and OLA, that searches and/or consultation were required with other offices, and that OIP would not be able to respond within the twenty-working-day time limit, or within the ten additional days provided by the statute due to "unusual circumstances." Copies of OIP's acknowledgment letters are attached hereto as Exhibit C.

6. On February 12, 2018, Plaintiff filed suit in connection with the aforementioned FOIA requests. *See* Compl., ECF No. 1.

7. On July 16, 2018, OIP issued its final response to Plaintiff's FOIA requests. Pursuant to this response, OIP informed Plaintiff that searches had been completed for each of the four requests. With respect to the Drafting Request, OIP informed Plaintiff that thirty-one pages responsive to its request were located, twelve of which were withheld in full, and nineteen of which were released with excisions made pursuant to Exemptions 5, 6, and 7(C) of the FOIA, 5 U.S.C. § 552(b)(5), (b)(6), and (b)(7)(C).[1] With respect to the Recusal and Guidance Requests, OIP informed Plaintiff that aside from the Department's November 13, 2017 response to Chairman Goodlatte, no additional responsive records were identified. Lastly, with respect to the Prosecutors Request, OIP informed Plaintiff that, in a March 29, 2018 letter to congressional committees, Attorney General Sessions identified United States Attorney John W. Huber as leading the Department's evaluation of issues raised in Chairman Goodlatte's letters. OIP provided a copy of the Attorney General's March 29, 2018 letter, and informed Plaintiff that no additional responsive records were identified.[2] A copy of OIP's final response to Plaintiff is attached hereto as

[1] Exemption 5 pertains to certain inter- and intra-agency communications protected by the deliberative process privilege. Exemption 6 pertains to information the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties. Exemption 7(C) pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties.

[2] To be of assistance, OIP further informed Plaintiff that to the extent that Mr. Huber engaged other staff to assist his efforts, records identifying such individuals, if requested, would likely be withheld in full pursuant to Exemptions 6, 7(A), and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6), (b)(7)(A) and (b)(7)(C). Exemption 7(A) pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings. However, staff later engaged by Mr. Huber are outside the scope of Plaintiff's instant request.

Exhibit D.

8. During the course of negotiations between the parties, and as presented to the Court in the parties' October 2, 2018 Joint Status Report, Plaintiff advised DOJ that it would only be challenging the adequacy of OIP's searches conducted in response to the Prosecutors and Guidance Requests. *See* ECF No. 14. This declaration will therefore address the searches conducted in response to the Prosecutors and Guidance Requests, and the basis for my conclusion that these searches were reasonably calculated to identify records responsive to these requests.

Description of OIP's Standard Search Methods

9. As noted in paragraph 1 above, OIP processes FOIA requests on behalf of itself and six senior leadership offices of the Department of Justice. OIP makes determinations upon receipt of a FOIA request, both as to the appropriate senior leadership office or offices in which to conduct initial records searches, as well as the records repositories and/or records custodians to search, and search methods to use in conducting records searches on behalf of the designated senior leadership offices.
10. Assessments of where responsive records are likely maintained are based on a review of the content of the request itself and the nature of the records sought therein, as well as OIP's familiarity with the types and location of records that each senior leadership office maintains, discussions with knowledgeable personnel in the senior leadership offices, and any research that OIP staff may conduct on the topic of the request.
11. Potentially responsive records may be located in email systems, computer hard drives (electronic documents), and/or hard copy (paper files). Depending on the nature of the request, OIP employs one or more of a variety of search methods to identify potentially

responsive records in the relevant leadership office(s). OIP staff may conduct keyword-based email/electronic document searches of designated records custodians; keyword searches of records custodians' file lists (and, if necessary, subsequent hand-searches of paper files identified through searches of the file lists); and/or direct inquiries of senior leadership office staff regarding the existence and location of potentially responsive records.

12. Direct inquiry of leadership office staff is the search method typically employed in response to FOIA requests which seek specific, clearly-defined records on topics with which current leadership office staff are personally familiar, and are able to provide informed input on the existence and location of potentially responsive records. Although not always practical, direct inquiry searches are both highly efficient and accurate, bypassing the "guesswork" that may be associated with search parameters selected solely by FOIA staff by engaging directly with the leadership office staff most familiar with the information subject to a given FOIA request.

13. OIP's initial determination regarding relevant leadership offices, search methods, and/or records custodians is not always final. In order to ensure that reasonably thorough records searches are conducted, during the course of processing a given FOIA request, OIP continually assesses whether other (both current and former) staff members' records should be searched, or whether alternative search methods should be used, and will initiate such searches as appropriate. This assessment is based on OIP's review of records that are located in initial records searches, discussions with Department personnel, or other pertinent factors. In sum, OIP records searches are conducted in an efficient, comprehensive, and agile manner. The various search steps undertaken by OIP

staff in response to a given request work in tandem to achieve a complete records search.

OIP's Records Searches Conducted in Response to Plaintiff's Request

14. In the Prosecutors and Guidance Requests, Plaintiff sought to identify whom former Attorney General Sessions directed to evaluate certain issues raised in Chairman Goodlatte's July 27, 2017 and September, 26, 2017 letters, and related guidance or directives regarding that directive. Accordingly, OIP determined that a direct inquiry to knowledgeable staff in the Office of the Attorney General (OAG) would be the most logical and effective search method. Accordingly, I contacted the Counselor to the Attorney General in OAG who is responsible for assisting OIP with FOIA requests for OAG documents to ascertain (1) whom the Attorney General directed to evaluate these matters and (2) what guidance or directives, if any, were issued. The Counselor to the Attorney General then conferred with other Department officials with direct knowledge of the subject matter, including the then-OAG Chief of Staff and U.S. Attorney Huber, and informed me that Mr. Huber was the only senior federal prosecutor whom the Attorney General directed to look into matters raised by Chairman Goodlatte, as well as the only prosecutor referenced in the Department's November 13, 2017 and March 29, 2018 responses to Chairman Goodlatte. Notwithstanding the use of the plural "prosecutors" in the Department's November 13, 2017 letter to Chairman Goodlatte, OAG confirmed that there was only one federal prosecutor directed to evaluate and report to the Attorney General and Deputy Attorney General on these matters: U.S. Attorney Huber.[3]

[3] As stated above, the Attorney General disclosed Mr. Huber's assignment to various congressional committees in a letter dated March 29, 2018 (subsequent to the filing of Plaintiff's requests). *See* Ex. A.

15. OAG also advised that, when the Attorney General directed Mr. Huber to evaluate these matters, no written guidance or directives were issued to Mr. Huber in connection with this directive, either by the Attorney General, or by other senior leadership office staff. OAG also advised that details of Mr. Huber's direction were addressed orally, in meetings and discussions among a small group of Department officials, including the Attorney General, the Deputy Attorney General, the OAG Chief of Staff, the Principal Associate Deputy Attorney General, and U.S. Attorney Huber.[4] In addition and as stated above, the lack of written guidance or directives was confirmed by OAG, pursuant to internal OAG discussions as well as discussions with Mr. Huber himself. Nonetheless, as a supplementary measure, I took the additional step of conferring with the Office of the Deputy Attorney General (ODAG) regarding the information provided to me by OAG. As a result of this discussion, I concluded that the OAG information regarding the lack of written guidance or directives to Mr. Huber was adequate and that further searches would be unlikely to identify records relevant to Plaintiff's request.

16. This information —i.e., OAG's confirmation that the only prosecutor directed by the Attorney General to lead the effort in evaluating the issues raised by the Goodlatte letters was U.S. Attorney John W. Huber, and that no written guidance or directives were issued to Mr. Huber – was confirmed over the course of several discussions between OIP and OAG. Moreover, the information provided directly by OAG was consistent with OIP's independent review of records retrieved in response to Plaintiff's Drafting Request, which did not disclose the number or identity of any federal prosecutors directed by

[4] As a United States Attorney, Mr. Huber is generally guided by the United States Attorneys' Manual (recently renamed the Justice Manual), available at https://www.justice.gov/jm/justice-manual.

Attorney General Sessions to look into these matters, other than Mr. Huber.[5] Likewise, nothing in the records reviewed by OIP indicated the existence of written guidance or directives issued to Mr. Huber. In light of the clear, comprehensive, and conclusive information I received directly from OAG, and the lack of any indication that other records responsive to Plaintiff's Prosecutors or Guidance Requests exist in leadership office files, I determined that no additional searching was necessary in this instance.

Conclusion

17. Based on my experience with the Department, my familiarity with the records maintained by the leadership offices, discussions with OAG and ODAG staff, and my understanding of the scope of Plaintiff's requests, I aver that OIP's searches were reasonably calculated to uncover all potentially responsive records and that all files likely to contain relevant documents were searched.

I declare under penalty of perjury that the foregoing is true and correct.

Vanessa R. Brinkman
Senior Counsel
Office of Information Policy
U.S. Department of Justice

Executed this 16th day of November 2018.

[5] For Plaintiff's Drafting Request, OIP conducted an electronic records search of the Office of Legislative Affairs, using the search term "Goodlatte" and a date range of July 27, 2017 to November 15, 2017.

EXHIBIT G

U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

March 8, 2019

Mr. Austin R. Evers
American Oversight
1350 15th Street NW, Suite B255
Washington, DC 20005
foia@americanoversight.org

Re: DOJ-2018-001098 (AG)
DOJ-2018-001147 (DAG)
18-cv-00319
VRB:TAZ:SJD

Dear Mr. Evers:

This is a supplemental response to your Freedom of Information Act (FOIA) request dated November 22, 2017, in which you requested various records pertaining to the Department's November 13, 2017 response to Rep. Robert Goodlatte's July 27, 2017 and September 26, 2017 letters, specifically, records reflecting guidance to prosecutors who have been directed to evaluate certain issues raised in Congressman Goodlatte's letters. This response is made on behalf of the Offices of the Attorney General (OAG) and Deputy Attorney General (ODAG).

We issued a response to you in this request (the "Guidance" request) and three related requests on July 16, 2018. Subsequently, we issued a supplemental response for these four requests on October 31, 2018, providing you with additional records located after re-running searches necessitated by the need to remedy a technical issue. Recently, we became aware of additional material responsive to the "Guidance" request that was not located in our previous searches, consisting of six pages.

I have determined that these six pages are appropriate for release in full, and copies are enclosed.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2012 & Supp. IV 2016). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Michael Gerardi of the Department's Civil Division, Federal Programs Branch, at (202)-514-0680.

Sincerely,

Vanessa R. Brinkmann
Senior Counsel

Enclosures

Whitaker, Matthew (OAG)

From:	Whitaker, Matthew (OAG)
Sent:	Wednesday, November 22, 2017 5:21 PM
To:	Huber, John (USAUT)
Subject:	Letter from Attorney General
Attachments:	11.22 Letter to Huber.pdf; ATT00001.htm; 2017-11-13 Special Counsel - Goodlatte #3912087.pdf; ATT00002.htm

As we discussed. MW

Office of the Attorney General
Washington, D. C. 20530

November 22, 2017

Hon. John W. Huber
United States Attorney for
The District of Utah
111 South Main Street
Suite 1800
Salt Lake City, UT 84111

Dear Mr. Huber:

In consultation with the Deputy Attorney General, I have requested that you review the matters referenced in the enclosed November 13, 2017, letter from Assistant Attorney General Stephen Boyd to House Judiciary Committee Chairman Robert Goodlatte and make recommendations to me or the Deputy Attorney General, as appropriate. Your review need not include matters that you determine are within the scope of the investigation being conducted by Special Counsel Robert Mueller.

Your recommendations should include whether any matters not currently under investigation warrants the opening of an investigation, whether any matters currently under investigation require further resources or further investigation, and whether any matters would merit the appointment of a Special Counsel.

Sincerely,

Jefferson B. Sessions III
Attorney General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Robert W. Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

NOV 13 2017

Dear Chairman Goodlatte:

This responds to your letters dated July 27, 2017, and September 26, 2017, in which you and other Members request the appointment of a Special Counsel to investigate various matters, including the sale of Uranium One, alleged unlawful dealings related to the Clinton Foundation and other matters. We are sending identical responses to the other Members who joined your letter.

As noted during our prior meeting in response to your letters, the Department of Justice (Department) takes seriously its responsibility to provide timely and accurate information to Congress on issues of public interest, and seeks to do so in a non-political manner that is consistent with the Department's litigation, law enforcement, and national security responsibilities. Additionally, the Department's leadership has a duty to carefully evaluate the status of ongoing matters to ensure that justice is served and that the Department's communications with Congress are accurate and complete.

To further that goal, the Attorney General has directed senior federal prosecutors to evaluate certain issues raised in your letters. These senior prosecutors will report directly to the Attorney General and the Deputy Attorney General, as appropriate, and will make recommendations as to whether any matters not currently under investigation should be opened, whether any matters currently under investigation require further resources, or whether any matters merit the appointment of a Special Counsel. This will better enable the Attorney General and the Deputy Attorney General to more effectively evaluate and manage the caseload. In conducting this review, all allegations will be reviewed in light of the Principles of Federal Prosecution. (USAM 9-27.000)

As you know, consistent with longstanding policy, the Department does not ordinarily confirm or deny investigations, and this letter should not be construed to do so. While this policy can be frustrating, especially on matters of great public concern, it is necessary to ensure that the Department acts with fairness and thoughtfulness, and always in a manner consistent with the law and rules of the Department.

In addition, you must know the Department will never evaluate any matter except on the facts and the law. Professionalism, integrity, and public confidence in the Department's work is critical for us, and no priority is higher.

Your letter referenced various allegations related to the Federal Bureau of Investigation's (FBI) handling of the investigation into former Secretary of State Hillary Clinton's use of a personal email server. On January 12, 2017, the Department's Inspector General (IG) sent a letter to you and other Members advising that the IG's office was initiating a review of, among other things:

- Allegations that Department or FBI policies or procedures were not followed in connection with, or in actions leading up to or related to, the FBI Director's public announcement on July 5, 2016, and the Director's letters to Congress on October 28 and November 6, 2016, and that certain underlying investigative decisions were based on improper considerations;

- Allegations that the FBI Deputy Director should have been recused from participating in certain investigative matters;

- Allegations that Department and FBI employees improperly disclosed non-public information; and

- Allegations that decisions regarding the timing of the FBI's release of certain Freedom of Information Act documents on October 30 and November 1, 2016, and the use of a Twitter account to publicize the same, were influenced by improper considerations.

These investigations include issues raised in your letters. In addition, the Department has forwarded a copy of your letters to the IG so he can determine whether he should expand the scope of his investigation based on the information contained in those letters.

Once the IG's review is complete, the Department will assess what, if any, additional steps are necessary to address any issues identified by that review.

We will conduct this evaluation according to the highest standards of justice. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Very truly yours,

Stephen E. Boyd
Assistant Attorney General

EXHIBIT H

U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

April 4, 2019

Austin R. Evers
American Oversight
1350 15th Street NW, Suite B255
Washington, DC 20005
foia@americanoversight.org

Re: DOJ-2018-001098 (AG)
DOJ-2018-001147 (DAG)
18-cv-00319
VRB:TAZ:SJD

Dear Austin Evers:

This is a supplemental response to your Freedom of Information Act (FOIA) request dated November 22, 2017, in which you requested various records pertaining to Rep. Robert Goodlatte's July 27, 2017 and September 26, 2017 letters and the Department's November 13, 2017 response, specifically, records reflecting guidance to prosecutors who have been directed to evaluate certain issues raised in Congressman Goodlatte's letters. This response is made on behalf of the Offices of the Attorney General (OAG) and Deputy Attorney General (ODAG).

In an email dated March 4, 2019 from Department counsel, you were advised that the Department would conduct electronic searches of specified custodians for records responsive to the "Guidance FOIA." This search is now complete, and no additional records responsive to your request were located other than the records released to you in our response of March 8, 2019.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2012 & Supp. V 2017). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Michael Gerardi of the Department's Civil Division, Federal Programs Branch, at (202)-514-0680.

Sincerely,

Vanessa R. Brinkmann
Senior Counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, *Plaintiff*, v. U.S. DEPARTMENT OF JUSTICE, *Defendant*.	)	Case No. 18-cv-319 (CRC)

PROPOSED ORDER

Upon consideration of Plaintiff's Motion to Stay Summary Judgment Briefing and for Leave to Seek Limited Discovery Pursuant to Rule 56(d), as well as the entire record, and for good cause shown, it is hereby

ORDERED that Plaintiff's Motion is **GRANTED**.

SO ORDERED.

Date: _____

_____
CHRISTOPHER R. COOPER
United States District Judge