



April 18, 2019

**VIA ELECTRONIC MAIL**

Kathy Ray  
U.S. Department of Transportation  
1200 New Jersey Avenue SE  
W94-122  
Washington, DC 20590  
[ost.foia@dot.gov](mailto:ost.foia@dot.gov)

**Re: Freedom of Information Act Request**

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and your agency's implementing regulations, American Oversight makes the following request for records.

Following two crashes of the Boeing 737 Max 8 in a five-month period,<sup>1</sup> questions remain as to the safety and certification of the aircraft and its flight control system.<sup>2</sup> Another Boeing model, the 747-8 was announced last year as the next craft to be used as Air Force One.<sup>3</sup>

American Oversight seeks records with the potential to shed light on the activities and decisions of the government concerning the Boeing 747-8, including ensuring its compliance, and whether there have been any concerns that the 747-8 may suffer from similar safety concerns as the 737 Max 8 planes.

**Requested Records**

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

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<sup>1</sup> Karl West, *After Two Deadly Disasters in Five Months, Can Boeing Survive?*, THE GUARDIAN (Mar. 16, 2019, 12:00 PM), <https://www.theguardian.com/business/2019/mar/16/boeing-how-big-is-crisis-two-disasters-five-months>.

<sup>2</sup> Dominic Gates, *Flawed Analysis, Failed Oversight: How Boeing, FAA Certified the Suspect 737 MAX Flight Control System*, THE SEATTLE TIMES (Mar. 18, 2019, 2:32 PM), <https://www.seattletimes.com/business/boeing-aerospace/failed-certification-faa-missed-safety-issues-in-the-737-max-system-implicated-in-the-lion-air-crash/>.

<sup>3</sup> Eric Walsh et al., *Boeing Gets \$3.9 Billion Contract for New Air Force One Jets*, REUTERS (July 17, 2018, 7:30 PM), <https://www.reuters.com/article/us-usa-boeing-af1/boeing-gets-3-9-billion-contract-for-new-air-force-one-jets-idUSKBN1K72SH>.



- 1) All records reflecting communications (including emails, email attachments, text messages, voicemails, voicemail transcripts, messages on messaging platforms—such as Slack, GChat or Google Hangouts, Lync, Skype, WhatsApp, Facebook messaging, Twitter Direct Messages, or Signal—telephone call logs, calendar invitations, calendar entries, meeting notices, meeting agendas, informational material, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between (1) the DOT employees and officials listed below and (2) any individual, employee, or official at the White House (including anyone with an email address ending in eop.gov) regarding the Boeing 747-8.

For this portion of the request, please provide all responsive records from January 1, 2018, through the date the search is conducted.

- 2) All email communications (including emails and attachments) sent or received by any of the DOT employees and officials identified below containing the following key term: “747-8”

For this portion of the request, please provide all responsive records from March 10, 2019, through the date the search is conducted.

- 3) All complaints received about the Boeing 747-8, including complaints regarding the craft’s flight control features, and any safety complaint or reports regarding that plane model.

For this portion of the request, please provide all responsive records from January 20, 2017, through the date the search is conducted.

- 4) All email communications (including emails and attachments) of the DOT employees and officials listed below regarding complaints about the Boeing 747-8, including complaints about the craft’s flight control features.

For this portion of the request, please provide all responsive records from January 20, 2017 through the date the search is conducted.

Below are the DOT employees and officials that are the subject of items 2, 3, and 5 above.

- i. Office of the Secretary:
  - a. Secretary Elaine Chao
  - b. Deputy Secretary Jeffrey Rosen
  - c. Under Secretary for Policy Derek Kan
  - d. Chief of Staff Todd Inman
  - e. Deputy Chief of Staff Matt Sturges
  - f. Deputy Chief of Staff Sean McMaster
- ii. Office of the Assistant Secretary for Governmental Affairs:
  - a. Assistant Secretary for Governmental Affairs Adam Sullivan

- iii. Office of Intelligence, Security and Emergency Response:
  - a. Director Richard Chávez
- iv. Office of the General Counsel:
  - a. General Counsel Steven Bradbury
  - b. Deputy General Counsel Judith Kaleta
  - c. Deputy General Counsel James Owens
  - d. Associate General Counsel Gregory Cote
- v. Office of the Assistant Secretary for Aviation and International Affairs:
  - a. Anyone acting in the capacity of Assistant Secretary for Aviation and International Affairs
  - b. Deputy Assistant Secretary for Aviation and International Affairs Joel Szabat
  - c. Deputy Assistant Secretary for Aviation and International Affairs David Short
  - d. Director of Office of International Aviation Brian Hedberg
  - e. Director Office of Aviation Analysis Todd Homan
- vi. Office of the Assistant Secretary for Research and Technology:
  - a. Anyone acting in the capacity of Assistant Secretary for Research and Technology
  - b. Anyone acting in the capacity of Deputy Assistant Secretary for Research and Technology
  - c. Senior Advisor to the Secretary, Keith Nelson
  - d. Center Director for Operations Susan Connors
  - e. Center Director for Safety Management and Human Factors Maura Lohrenz
  - f. Center Director for Air Traffic Systems and Operations Gregory Joyner
- vii. Office of Public Affairs:
  - a. Assistant to the Secretary and Director of Public Affairs Marianne McInerney

American Oversight seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files are subject to

the Federal Records Act and FOIA.<sup>4</sup> **It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; American Oversight has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.**<sup>5</sup>

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered your agency’s prior FOIA practices unreasonable. **In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.**<sup>6</sup> Furthermore, agencies that have adopted the National Archives and Records Administration (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that your agency use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”<sup>7</sup> If it is your position that any portion of the requested records

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<sup>4</sup> See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016).

<sup>5</sup> See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

<sup>6</sup> Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

<sup>7</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

is exempt from disclosure, American Oversight requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”<sup>8</sup> Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”<sup>9</sup> Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”<sup>10</sup>

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.<sup>11</sup> Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

**You should institute a preservation hold on information responsive to this request.** American Oversight intends to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, you are on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight hopes to decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

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<sup>8</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>9</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

<sup>10</sup> *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

<sup>11</sup> *Mead Data Central*, 566 F.2d at 261.

## **Fee Waiver Request**

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and your agency's implementing regulations, American Oversight requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to public understanding of those operations. Moreover, the request is primarily and fundamentally for non-commercial purposes.

American Oversight requests a waiver of fees because disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of activities and operations of the government. The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how officials carry out regulatory responsibilities that affect the public's safety. The public has a direct and important interest in understanding how government officials in an agency with control and influence over transportation safety have engaged in regulation of an aircraft model slated to be the next Air Force One, which is similar to one shown to have significant potential safety problems. This request also has the potential to shed light on the influence of White House officials and outside industry interests on regulatory decisions that affect public safety. The requested records have the potential to shed significant light on these matters of public concern.<sup>12</sup> And, as described below, American Oversight has the intention and ability to disseminate the records it receives to a broad audience.

This request is primarily and fundamentally not for commercial purposes, but rather the primary interest is in public disclosure of responsive records. As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight's financial interest. American Oversight's mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.<sup>13</sup> American Oversight has demonstrated its commitment to the public disclosure of documents and creation of editorial content. For example, after receiving records regarding an ethics waiver received by a senior DOJ attorney,<sup>14</sup> American Oversight promptly posted the records to its website and published an analysis of what the records

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<sup>12</sup> See, e.g., West *supra* note 1; Gates *supra* note 2; Walsh et al., *supra* note 3.

<sup>13</sup> American Oversight currently has approximately 12,200 page likes on Facebook and 54,100 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Apr. 18, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Apr. 18, 2019).

<sup>14</sup> *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

reflected about DOJ's process for ethics waivers.<sup>15</sup> As another example, American Oversight has a project called "Audit the Wall," where the organization is gathering and analyzing information and commenting on public releases of information related to the administration's proposed construction of a barrier along the U.S.-Mexico border.<sup>16</sup>

Accordingly, American Oversight qualifies for a fee waiver.

### Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Katherine Anthony at [foia@americanoversight.org](mailto:foia@americanoversight.org) or (202) 897-3918. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

A handwritten signature in blue ink that reads "Austin R. Evers". The signature is fluid and cursive, with a long horizontal line extending to the left.

Austin R. Evers  
Executive Director  
American Oversight

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<sup>15</sup> *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

<sup>16</sup> *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.