



April 2, 2019

**VIA CERTIFIED MAIL**

U.S. Office of Personnel Management  
FOIA Requester Service Center  
1900 E Street NW, Room 4458  
Washington, D.C. 20415-7900

**Re: Freedom of Information Act Request**

Dear Freedom of Information Act Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of the Office of Personnel Management (OPM), 5 C.F.R. Part 294, American Oversight makes the following request for records.

In September 2018, an investigation by the Inspector General for the Department of Homeland Security (DHS) concluded that then Federal Emergency Management Agency (FEMA) Administrator Brock Long used U.S. government vehicles and FEMA employees for unauthorized home-to-work transportation.<sup>1</sup> OIG estimated that Long's unauthorized use of agency resources cost the U.S. government \$151,000.<sup>2</sup> Following this report, Long and DHS Secretary Kirstjen Nielsen issued a joint statement that Long would reimburse the federal government.<sup>3</sup> Long said, "As the leader of this agency, I accept full responsibility for any mistakes that were made by me or the agency."<sup>4</sup>

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<sup>1</sup> Dep't of Homeland Security, Office of Inspector General, *Report of Investigation* (Sept. 2018), available at <https://www.oig.dhs.gov/sites/default/files/assets/FOIA/ROI-I18-FEMA-SID-06980%20%28Long%29%20%28FINAL%20FOIA%29.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> Nick Miroff & Josh Dawsey, *FEMA Administrator Will Reimburse Government, Won't Face Charges from Internal Probe*, WASH. POST, Sept. 21, 2018, [https://www.washingtonpost.com/world/national-security/fema-administrator-will-reimburse-government-wont-face-charges-from-internal-probe/2018/09/21/79a669e2-be04-11e8-97f6-0cbdd4d9270e\\_story.html](https://www.washingtonpost.com/world/national-security/fema-administrator-will-reimburse-government-wont-face-charges-from-internal-probe/2018/09/21/79a669e2-be04-11e8-97f6-0cbdd4d9270e_story.html).

<sup>4</sup> Sarah Mervosh, *FEMA Chief Brock Long Must Reimburse U.S. for Misuse of Agency Vehicles*, N.Y. TIMES, Sept. 22, 2018, <https://www.nytimes.com/2018/09/22/us/politics/brock-long-fema-repay-government-vehicles.html>.



American Oversight seeks records with the potential to shed light on whether Mr. Long has fulfilled his commitment.<sup>5</sup>

### Requested Records

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

1. Records sufficient to show any payments made by former FEMA Administrator Brock Long to the federal government.
2. Any bills, invoices, or other accounting reflecting any amounts owed by former FEMA Administrator Brock Long to DHS, FEMA, or any other federal agency or component.
3. All records related to former FEMA Administrator Brock Long's commitment to repay the federal government for unauthorized use of FEMA resources, including records reflecting repayment plans, repayment schedules, or acknowledgement of debt, whether formal or informal.

Please provide all responsive records from September 1, 2017, through the date of the search.

American Oversight does not object to the redaction of personal information properly covered by the Privacy Act and FOIA exemptions; however, American Oversight does expect that the existence of personnel records would be confirmed or denied and, if they do exist, that they would be provided to American Oversight with appropriate and proper redactions. In particular, American Oversight does not believe that the date, salary, or signature on the documents can properly be withheld.

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

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

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<sup>5</sup> American Oversight has submitted separate requests to DHS and FEMA; we make this separate request for records from OPM to determine whether additional relevant records reside with the chief human resources agency and personnel policy manager for the federal government.

the Federal Records Act and FOIA.<sup>6</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>7</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 OPM’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>8</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 OPM’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that OPM 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>9</sup> 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

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<sup>6</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>7</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>8</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>9</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”<sup>10</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>11</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>12</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>13</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, OPM 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 OPM 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 rolling basis.

### **Fee Waiver Request**

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 5 C.F.R. § 294.109(f), 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

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<sup>10</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>11</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

<sup>12</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>13</sup> *Mead Data Central*, 566 F.2d at 261.

significant way.<sup>14</sup> Moreover, the request is primarily and fundamentally for non-commercial purposes.<sup>15</sup>

American Oversight requests a waiver of fees because disclosure of the requested information is “in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the Government.”<sup>16</sup> The requested records bear directly on the operations of the government—namely, whether and how FEMA has accounted for taxpayer funds diverted for improper use. The public entrusted former FEMA Administrator Brock Long to lead an agency appropriated with billions of taxpayer dollars per year meant to support people when they are at their most vulnerable. Long violated the public’s trust by using public resources for personal benefit, and it is in the public interest for taxpayers to know whether those funds have been repaid, or if not, when they will be. This is a matter of significant concern,<sup>17</sup> and as described in more detail below, American Oversight has the intention and ability to disseminate any records received in response to this request to a broad audience.

This request is primarily and fundamentally for non-commercial purposes.<sup>18</sup> As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the information requested is not in American Oversight’s financial interest. American Oversight’s mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.<sup>19</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>20</sup> American Oversight promptly posted the records to its website and

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<sup>14</sup> 5 C.F.R. § 294.109(f).

<sup>15</sup> *Id.*

<sup>16</sup> 5 C.F.R. § 294.109(f), (f)(1)(i)-(iv).

<sup>17</sup> *See, e.g.,* Mervosh, *supra* note 3; Lisa Rein, *Brock Long’s Improper Use of FEMA Staff, SUVs Included Hawaii Pineapple Plant Tour, Investigation Says*, WASH. POST, Sept. 26, 2018, [https://www.washingtonpost.com/politics/brock-longs-improper-use-of-fema-staff-suvs-included-hawaii-pineapple-plant-tour-investigation-says/2018/09/26/8f90f2d0-c1ac-11e8-b338-a3289f6cb742\\_story.html?utm\\_term=.2bf1152305e6](https://www.washingtonpost.com/politics/brock-longs-improper-use-of-fema-staff-suvs-included-hawaii-pineapple-plant-tour-investigation-says/2018/09/26/8f90f2d0-c1ac-11e8-b338-a3289f6cb742_story.html?utm_term=.2bf1152305e6); Colleen Long, *FEMA Head Denies Intentionally Misusing Federal Vehicles*, FOX NEWS, Sept. 13, 2018, <https://www.foxnews.com/us/fema-head-denies-intentionally-misusing-federal-vehicles>.

<sup>18</sup> 5 C.F.R. § 294.109(f)(2)(i)-(ii).

<sup>19</sup> American Oversight currently has approximately 12,200 page likes on Facebook and 54,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited Mar. 29, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Mar. 29, 2019).

<sup>20</sup> *DOJ Records Related to Solicitor General Noel Francisco’s Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

published an analysis of what the records reflected about DOJ's process for ethics waivers.<sup>21</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>22</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 OPM 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,



Austin R. Evers  
Executive Director  
American Oversight

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<sup>21</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>22</sup> *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.