



May 23, 2019

VIA ELECTRONIC MAIL

Stephanie Carr
OSD/JS FOIA Requester Service Center
Office of Freedom of Information
U.S. Department of Defense
1155 Defense Pentagon
Washington, DC 20301-1155
whs.mc-alex.esd.mbx.osd-js-foia-requester-service-center@mail.mil

Re: Freedom of Information Act Request

Dear Ms. Carr:

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.

When current VA Secretary Robert Wilkie served as Under Secretary of Defense for Personnel and Readiness at the Department of Defense (DOD), he had senior policy-making authority affecting thousands of DOD officers—managing human resources, human capital development, health affairs, and personnel requirements, including equal opportunity and quality of life matters. During the period of Mr. Wilkie's tenure, DOD was developing a new policy for transgender service members following President Trump's tweet banning transgender military members in summer 2017.¹ This policy change reportedly surprised the Pentagon—specifically the then-Acting Under Secretary of Defense for Personnel and Readiness, Mr. Wilkie's predecessor²—and the Office of Personnel and Readiness would likely have been the a DOD office responsible for developing and implementing new policy on the matter. Furthermore, Wilkie's office almost certainly would have been in charge of managing health issues of female service members—an issue that has been seriously overlooked historically according to recent press reporting.³

American Oversight seeks records with the potential to shed light on former Under Secretary of Defense for Personnel and Readiness Mr. Wilkie's communications regarding the treatment of

¹ Vera Bergengruen, *New Emails Show Confusion at the Pentagon After Trump's Transgender Ban Tweets*, BUZZFEED NEWS (Sept. 21, 2018, 8:01 AM), <https://www.buzzfeednews.com/article/verabergengruen/new-emails-show-confusion-at-the-pentagon-after-trumps>.

² *Id.*

³ Ema O'Connor & Vera Bergengruen, *Military Doctors Told Them It Was Just "Female Problems." Weeks Later, They Were in the Hospital*, BUZZFEED NEWS (March 8, 2019, 5:19 PM), <https://www.buzzfeednews.com/article/emaconnor/woman-military-doctors-female-problems-health-care>.



female and LGBTQ military service members.

Requested Records

American Oversight requests that the Department of Defense (DOD) produce the following within twenty business days:

All sent email communications (including emails, email attachments, complete email chains, and calendar invitations) of former Under Secretary of Defense for Personnel and Readiness Wilkie containing any of the following terms:

- | | | | |
|--------|----------------|---------|------------------------|
| i. | LGBT | xix. | “gender nonconforming” |
| ii. | GLBT | xx. | “chelsea manning” |
| iii. | LGBTQ | xxi. | cross-sex |
| iv. | LGBTQ+ | xxii. | sex-based |
| v. | LGBTQA | xxiii. | “unit cohesion” |
| vi. | gay | xxiv. | “sex discrimination” |
| vii. | lesbian | xxv. | dysphoria |
| viii. | queer | xxvi. | “biological sex” |
| ix. | homosexual | xxvii. | “sex reassignment” |
| x. | intersex | xxviii. | “gender reassignment” |
| xi. | transgender | xxix. | “hormone therapy” |
| xii. | trans-gender | xxx. | “hormone replacement” |
| xiii. | TG | xxxi. | “gender transition” |
| xiv. | transban | xxxii. | “gender identity” |
| xv. | trans-ban | xxxiii. | “gender ideology” |
| xvi. | “trans ban” | xxxiv. | fertility |
| xvii. | transsexualism | xxxv. | infertility |
| xviii. | transsex | xxxvi. | IVF |

Please provide all responsive records from November 30, 2017, through July 30, 2018.

Although American Oversight has limited its request to emails sent by Mr. Wilkie in an effort to streamline the search and limit the volume of potentially responsive records to be reviewed, this request seeks all complete email chains identified in the search. For example, any email sent by Mr. Wilkie that either contains one of the key terms identified above, or responds to a message containing one of these key terms, should be considered responsive, and the complete email chain should be produced.

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.⁴ **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.**⁵

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.**⁶ **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

⁴ 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).

⁵ 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)).

⁶ 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>.

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.”⁷ 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.”⁸ 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.”⁹ 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.’”¹⁰

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.¹¹ 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.

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.

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

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

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

¹⁰ *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)).

¹¹ *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 of the government. The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how Mr. Wilkie handled matters related to transgender military service and the health of female service members—both areas that fell within the purview of his office and affect thousands of military servicemembers. Given Mr. Wilkie's responsibility for implementing a policy that affects the eligibility of transgender Americans to serve in our nation's armed forces, the requested records concern operations and activities of significant public interest.¹² The records responsive to this request will contribute significantly to the public's understanding of the government's activities.

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.¹³ 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,¹⁴ 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.¹⁵ As another example, American Oversight has a

¹² Bergengruen, *supra* note 1.

¹³ 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 May 16, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited May 16, 2019).

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

¹⁵ *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>.

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.¹⁶ 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 Dan McGrath at foia@americanoversight.org or 202.897.4213. 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

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