



May 20, 2019

VIA ELECTRONIC MAIL

Dionne Hardy
FOIA Officer
Office of Management and Budget
725 17th Street NW, Suite 9204
Washington, DC 20503
OMBFOIA@omb.eop.gov

Re: Freedom of Information Act Request

Dear Ms. Hardy:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and implementing regulations for the Office of Management and Budget (OMB), 5 C.F.R. Part 1303, American Oversight makes the following request for records.

Republican pollster and strategist Frank Luntz, despite early criticism of President Trump, has reportedly come to have some amount of influence on the Trump administration's public messaging thanks to his friendship with Office of Management and Budget (OMB) director and acting White House chief of staff Mick Mulvaney.¹ In addition to his relationship with Mulvaney, to whom he reportedly donated a two-day media training in Los Angeles in 2018,² publicly released agency calendars and other documents show that Mr. Luntz has met with Labor Secretary Alex Acosta,³ Transportation Secretary Elaine Chao,⁴ and Education Secretary Betsy DeVos.⁵

¹ Nancy Cook, *How Frank Luntz Went from Trump Enemy to White House Insider*, POLITICO, Mar. 27, 2019, <https://www.politico.com/story/2019/03/27/frank-luntz-trump-white-house-1238283>.

² Nicholas Confessore, *Mick Mulvaney's Master Class in Destroying a Bureaucracy from Within*, N.Y. TIMES, April 16, 2019, <https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html>.

³ *DOL Secretary Acosta's Calendars*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/dol-calendars-of-secretary-acosta>

⁴ *DOT Senior Political Calendars*, AMERICAN OVERSIGHT, <https://www.documentcloud.org/documents/5317015-DOT-Senior-Political-Appointee-Calendars.html#search/p93/luntz>

⁵ *Education Documents Regarding Frank Luntz Slide Presentation*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/education-documents-regarding-frank-luntz-slide-presentation>



American Oversight seeks to shed light on the extent of Mr. Luntz's influence in the Trump administration, any messaging advice he is giving to government agencies, and any taxpayer funds that have been spent on his services.

Requested Records

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

1. All records reflecting communications (including emails, email attachments, text messages, calendar invitations, calendar entries, meeting notices, meeting agendas, and any handwritten or electronic notes taken during any oral communications) between Director Mick Mulvaney or any person communicating on his behalf, such as schedulers or assistants, and Frank Luntz or any person communicating on his behalf, including any person using an email address ending in @luntzglobal.com.

Please produce all responsive records from November 25, 2017 through the date of your search.

2. All records reflecting the content of a media training given to Director Mick Mulvaney by Frank Luntz in Los Angeles in April 2018. Responsive records would include any written communications about the media training, agendas, briefing materials, handwritten notes, or materials exchanged during the training.

American Oversight believes that OMB is in the best position to identify the custodians of responsive records. However, we request that OMB search, at a minimum, records maintained by Director Mick Mulvaney and any person communicating on his behalf, such as schedulers and assistants.

Please provide all responsive records from January 1, 2018 through June 1, 2018.

3. All records reflecting actual or projected costs of Director Mick Mulvaney's trip to Los Angeles beginning on or around April 12, 2018, including air travel, lodging, and security expenses.
4. All calendar entries showing Director Mick Mulvaney's schedule during a trip to Los Angeles beginning on or around April 12, 2018, including the dates and times of Mr. Mulvaney's travel to and from Los Angeles and any appointments during the trip.
5. All records reflecting the content of the following meetings between Director Mick Mulvaney and Frank Luntz that appear on OMB's publicly released visitor logs,⁶ including

⁶ See Derek Kravitz et al., *Here Are the White House Visitor Records the Trump Administration Didn't Want You to See*, PROPUBLICA, Nov. 21, 2017, <https://projects.propublica.org/graphics/wh-complex>.

any calendar entries, written communications about the meeting, agendas, lists of meeting attendees, minutes, summaries, handwritten notes, talking points, or materials displayed or exchanged during or after the meeting.

- a. The April 26, 2017 meeting between Director Mulvaney, Frank Luntz and Ron Kramer.
- b. The May 16, 2017 meeting between Director Mulvaney and Frank Luntz.
- c. The July 24, 2017 lunch with Director Mulvaney and Frank Luntz.

American Oversight believes that OMB is in the best position to identify the custodians of responsive records. However, we request that OMB search, at a minimum, records maintained by Director Mick Mulvaney and any person communicating on his behalf, such as schedulers and assistants.

Please produce all responsive records from April 1, 2017, through August 1, 2017.

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.⁷ **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.**⁸

⁷ 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).

⁸ 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

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 OMB’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.**⁹ 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 OMB’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that OMB 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.”¹⁰ 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.”¹¹ 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.”¹² 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.’”¹³

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)).

⁹ 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>.

¹⁰ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114-185).

¹¹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹² *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphases in original).

¹³ *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)).

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.¹⁴ 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, OMB 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 OMB 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 5 C.F.R. § 1303.70, 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.¹⁵ Moreover, the request is primarily and fundamentally for non-commercial purposes.¹⁶

American Oversight requests a waiver of fees as 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. The requested records will help the public understand the extent to which individuals and organizations outside the government are shaping OMB's priorities and messaging. Specifically, little is known about the advice that pollster Frank Luntz is providing to the heads of federal agencies and how that is impacting what those agencies say to the public. This is despite news reports indicating that Mr. Luntz is in frequent contact with OMB Director Mick

¹⁴ *Mead Data Central*, 566 F.2d at 261.

¹⁵ 5 C.F.R. § 1303.70.

¹⁶ *Id.*

Mulvaney, now also the White House chief of staff, and has advised administration officials on messaging around policy.¹⁷ In addition, Department of Education documents indicate that Mr. Luntz provided substantive guidance on how to communicate on certain agency policies.¹⁸ 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 not for commercial purposes.¹⁹ 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 promote their availability on social media platforms, such as Facebook and Twitter.²⁰ 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, American Oversight promptly posted the records to its website²¹ and published an analysis of what the records reflected about DOJ's process for ethics waivers.²² 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.²³

Accordingly, American Oversight qualifies for a fee waiver.

¹⁷ See Cook, *supra* note 1; Confessore, *supra* note 2.

¹⁸ *Education Documents Regarding Frank Luntz Slide Presentation*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/education-documents-regarding-frank-luntz-slide-presentation>

¹⁹ *Id.*

²⁰ American Oversight currently has over 12,600 followers on Facebook, and over 54,200 followers on Twitter. American Oversight, FACEBOOK, <https://www.facebook.com/weareoversight/> (last visited May 20, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited May 20, 2019).

²¹ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>.

²² *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>.

²³ *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with OMB 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 Hart Wood at foia@americanoversight.org or 202.873.1743. 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, appearing to read "Austin R. Evers", with a long horizontal flourish extending to the left.

Austin R. Evers
Executive Director
American Oversight