VIA ELECTRONIC MAIL

U.S. Department of State
Office of Information Programs and Services
A/GIS/IPS/RL
SA-2, Suite 8100
Washington, DC 20522-0208
FOIArequest@state.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 the implementing regulations of the Department of State (State), 22 C.F.R. Part 171, American Oversight makes the following request for records.

In March 2019, Chairman Cummings of the House Oversight Committee sent a letter to the White House Counsel detailing White House Adviser Jared Kushner’s use of private email and messaging applications—specifically WhatsApp—in conducting official business, including in communications with foreign leaders.¹ In light of Mr. Kushner’s extensive influence² over a wide range of policies across the Trump administration and his involvement in a wide variety of government initiatives—from sensitive diplomacy to veterans affairs to criminal justice reform—American Oversight seeks records with the potential to shed light on Mr. Kushner’s influence on federal policy and high-ranking agency officials. Public reports demonstrate that some of Mr. Kushner’s communications regarding federal government business with these officials are likely sent through the WhatsApp messaging application.

Furthermore, Kushner has taken a leading role in the Trump administration’s diplomatic efforts. For example, in February 2019, White House adviser Jared Kushner visited the Middle East to promote a peace plan, visiting six Middle Eastern countries. He reportedly traveled with Jason Greenblatt, the President’s Middle East Envoy, and Brian Hook, Special Representative for Iran

from the State Department. Press reporting indicates Kushner also has close relationships with the U.S. Ambassadors to Israel and the United Arab Emirates, and the U.S. Ambassador to China wrote Kushner a personal thank-you note for his 2017 trip to Beijing, resolving to “remain in touch on a regular basis.” Kushner has also traveled with the Secretary of State himself in order to promote U.S. interests, including during a delegation to Mexico City last year. To the extent that Mr. Kushner is communicating electronically with these State officials—which seems likely given his relationships and work with the officials described above—public reporting strongly suggests Mr. Kushner is employing WhatsApp messages to do so.

American Oversight seeks records to shed light on whether and to what extent Kushner is participating in State Department policy matters and to what extent he has done so using private messaging platforms.

**Requested Records**

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

All WhatsApp messages sent or received between (1) the State Department officials listed below and (2) White House adviser Jared Kushner. Screenshots or other copies of WhatsApp messages with Mr. Kushner are responsive to this request.

i. Secretary of State Mike Pompeo
ii. Special Representative for Iran, Brian Hook
iii. U.S. Ambassador to Israel, Ron Dermer
iv. U.S. Ambassador to the U.A.E., Yousef Otaiba
v. U.S. Ambassador to China, Terry Branstad

Given the reports establishing both that Mr. Kushner regularly uses WhatsApp messages for communications regarding official government business and Mr. Kushner’s relationship with the relevant agency officials, the agency must conduct an adequate search for

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responsive WhatsApp messages “reasonably calculated to uncover all relevant documents.”

Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 325 (D.C. Cir. 1999) (citations omitted). An adequate search will likely require asking officials with knowledge to aid in identifying responsive records. Although many agencies have policies requiring that official text messages copy an agency employee’s email address, an electronic search of email records would not be a sufficient search for this request because WhatsApp messaging applications do not have the technological capability to permit copying or forwarding to an email address.

Please provide all responsive records from January 20, 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 State 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 are subject to the Federal Records Act and FOIA. 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.

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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
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 State’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. 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 State’s archiving tools would capture that email under Capstone. Accordingly, American Oversight insists that State 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.” 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.” 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.” Further, “the withholding agency must supply ‘a relatively detailed

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)).


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

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.”

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. 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, State 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 State 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 22 C.F.R. § 171.16(a), American Oversight
requests a waiver of fees associated with processing this request for records. First, 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. Second, the request is primarily and fundamentally for non-commercial
purposes.

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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)).
14 Mead Data Central, 566 F.2d at 261.
15 22 C.F.R. § 171.16(a)(1).
16 22 C.F.R. § 171.16(a)(2).
Under the public interest requirement, FOIA requesters must satisfy four factors. American Oversight has met these four factors for the reasons set forth below. The subject matter of the requested records specifically relates to the operations or activities of the government, as it directly concerns the communications practices of senior administration officials and the steps taken to ensure compliance with federal records retention law—a matter that President Trump has suggested is extremely important. The requested records would also shed light on the communications of high-ranking government officials charged with executing the foreign policy of the United States. The subject of this request is a matter of public interest, and the public’s understanding of the government’s activities and use of resources would be enhanced through American Oversight’s analysis and publication of these records.

Increasing the likelihood that disclosure of these records will contribute significantly to public understanding, American Oversight’s objective is to reveal to the public at large any information it receives related to this FOIA request, and little information is currently available regarding the subject matter of this request—specifically the influence White House Adviser Jared Kushner has had, or may have had, on State officials’ foreign policy actions and operations. American Oversight has the capacity to disseminate this information as it posts all records to its public websites and publishes analyses of its records. In the past, the organization has successfully informed the public of specific government activities and operations. As an example, American Oversight obtained Education Secretary DeVos’s calendar entries, which revealed Secretary DeVos’s frequent absences from office and the influence of charter schools and for-profit colleges on the Education Department. The New York Times and CNN relied on American Oversight’s analyses to report on Secretary DeVos’s priorities within the Department of Education.

American Oversight’s request is also primarily and fundamentally for non-commercial purposes. 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

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20 22 C.F.R. § 171.16(a)(2)(i)-(iii).
releases, or other media. American Oversight also makes materials it gathers available on our public website and promotes their availability on social media platforms, such as Facebook and Twitter.\(^1\) 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 website\(^2\) and published an analysis of what the records reflected about DOJ’s process for ethics waivers.\(^3\) As an additional 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.\(^4\)

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 State 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,

Melanie Sloan  
Senior Advisor  
American Oversight

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\(^1\) 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. 30, 2019); American Oversight (@weareoversight), TWITTER, https://twitter.com/weareoversight (last visited Apr. 30, 2019).


\(^3\) *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.

\(^4\) *Audit the Wall, AMERICAN OVERSIGHT*, https://www.americanoversight.org/investigation/audit-the-wall.