



May 1, 2019

**VIA ELECTRONIC MAIL**

FOIA/PA Request  
FOIA and Transparency  
Department of the Treasury  
Washington, DC 20220  
[treasfoia@treasury.gov](mailto:treasfoia@treasury.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 the Treasury (Treasury), 31 C.F.R. Part 1, 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.<sup>1</sup> In light of Mr. Kushner's extensive influence<sup>2</sup> 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, Treasury Secretary Steven Mnuchin and Kushner appear to have a close personal and working relationship. Publicly released calendars indicate repeated meetings and engagements between Secretary Mnuchin and Kushner.<sup>3</sup> Mnuchin and Kushner are both intimately involved in

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<sup>1</sup> Letter from Elijah E. Cummings, Chairman of House of Representatives Committee on Oversight and Reform to Pat Cipollone, White House Counsel, Mar. 21, 2019, <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-03-21.EEC%20to%20Cipollone-WH.pdf>; Nicholas Fandos, *Jared Kushner and Ivanka Trump Use Private Accounts for Official Business, Their Lawyer Says*, N.Y. TIMES, Mar. 21, 2019, <https://www.nytimes.com/2019/03/21/us/politics/jared-kushner-whatsapp.html>.

<sup>2</sup> Jessica Kwong, *Jared Kushner is Growing More Powerful in the White House, Frustrating Trump Aides: Report*, NEWSWEEK (Jan. 17, 2019, 1:00 PM) <https://www.newsweek.com/jared-kushner-growing-more-powerful-white-house-frustrating-trump-aides-1296220>.

<sup>3</sup> *Treasury Secretary Mnuchin's Calendars*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/document/treasury-secretary-mnuchins-calendars>.



handling the U.S.-Saudi Arabia relationship, with both closely managing ties with Crown Prince Mohammed Bin Salman after the killing of U.S. resident and journalist Jamal Khashoggi.<sup>4</sup> The two also appear to have a close personal relationship, as Mnuchin has joined Kushner for a casual weekend dinner at his residence.<sup>5</sup>

American Oversight seeks records to shed light on whether and to what extent Kushner is participating in Treasury Department policy matters and to what extent he and Secretary Mnuchin have communicated using private messaging platforms.

### **Requested Records**

American Oversight requests that Treasury produce the following within twenty days:

All WhatsApp messages sent or received between (1) Treasury Secretary Steven Mnuchin (2) White House adviser Jared Kushner. Screenshots or other copies of WhatsApp messages with Mr. Kushner are responsive to this request.

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 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.

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

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<sup>4</sup> Mark Lander & Maggie Haberman, *On Jamal Khashoggi Killing, Trump Administration Sends Mixed Signals*, N.Y. TIMES, Oct. 22, 2018,

<https://www.nytimes.com/2018/10/22/world/middleeast/kushner-khashoggi-prince-mbs.html>.

<sup>5</sup> Greg Morabito, *Moneybags Mnuchin Brings \$22 Bottle of Wine to Kushner Rendezvous*, EATER (May 7, 2018, 5:25 PM), <https://www.eater.com/2018/5/7/17328366/steve-mnuchin-jared-kushner-red-wine>.

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>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 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>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 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**

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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>.

**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 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, your agency 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 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

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

<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) (emphasis 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.

Oversight, 1030 15<sup>th</sup> 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 31 C.F.R. § 1.7(d)(1), 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. 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 government operations or activities.<sup>14</sup> The disclosure of the information sought under this request will reveal the operations of the federal 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 fiscal 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.

This request is primarily and fundamentally not for commercial purposes, but rather the primary interest is in public disclosure of responsive records.<sup>15</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>16</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

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<sup>14</sup> 31 C.F.R. § 1.7(d)(1).

<sup>15</sup> 31 C.F.R. § 1.7(d)(1).

<sup>16</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. 30, 2019); American Oversight (@weareoversight), TWITTER, <https://twitter.com/weareoversight> (last visited Apr. 30, 2019).

attorney,<sup>17</sup> 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.<sup>18</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>19</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 Dan McGrath at [foia@americanoversight.org](mailto: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

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<sup>17</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>.

<sup>18</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>19</sup> *Audit the Wall*, AMERICAN OVERSIGHT, <https://www.americanoversight.org/investigation/audit-the-wall>.